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Title 3—

The President

Proclamation 10127 of December 16, 2020

Wright Brothers Day, 2020

By the President of the United States of America

A Proclamation

On this day 117 years ago, for a few short seconds over 120 feet of windswept beach in North Carolina, Orville Wright became the first person to achieve sustained, controlled, powered, and manned flight, forever altering the course of human history. The flying machine Orville piloted, which he and his brother Wilbur designed and constructed following years of research and testing, propelled mankind off the ground and into the skies. Today, we honor these tenacious and intrepid pioneers who paved the way for American leadership in aviation.

The story of the Wright Brothers reflects the quintessential American values of perseverance, courage, and sheer grit. Neither Wilbur nor Orville graduated high school. Both brothers, however, possessed a fascination with new technology and mechanics. They taught themselves engineering through their work in their bicycle shop in Dayton, Ohio. Using a homemade wind tunnel, they collected data and developed new designs for propellers and wings, oversaw the creation of a new, specially made engine, and invented an innovative system for steering manned aircraft, solving problems that had plagued previous attempts at powered flight. Through trial and error and hundreds of test flights in gliders and prototypes, the Wright Brothers, in true American fashion, pushed beyond the boundaries of human discovery and exploration. Their tireless dedication and unyielding determination testify to the power of human ingenuity and produced a revolution in transportation, national defense, and global economic development.

The Wright Brothers' pursuits also established America's role as the world's foremost aviation leader and set the stage for future generations of American flight heroes. Just 24 years after the Wright Brothers' first flight, Charles Lindbergh became the first person to fly solo nonstop across the Atlantic Ocean, and 5 years later Amelia Earhart became the first woman to accomplish that same feat. Just a few weeks ago, our Nation mourned the loss of another aviation legend, Brigadier General Chuck Yeager. In a rocket plane named ''Glamorous Glennis'' after his beloved wife, Yeager flew at speeds in excess of 700 miles per hour, breaking the sound barrier for the first time in human history. This incredible feat occurred a mere 44 years after the Wright Brothers' first flight achieved a top airspeed of just 34 miles per hour. In 1969, 22 years after Yeager's flight, Neil Armstrong, an Ohioan like the Wright Brothers, became the first person to ever set foot on the lunar surface, thrusting American leadership in flight beyond the Earth's atmosphere. And, earlier this year, the National Aeronautics and Space Administration (NASA) launched a commercially built and operated spacecraft to the International Space Station from American soil for the first time. With the same spirit that took the Wright Brothers into the sky, our brave astronauts are once again redefining the limits of human knowledge and discovery.

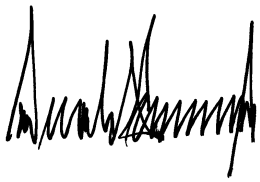
December 17th is forever enshrined as the day the Wright Brothers launched a new era of American greatness. Today, as we reflect on the immeasurable influence the Wright Brothers had upon our society and the world, we resolve to continue breaking barriers, setting new horizons, and building

a better and brighter future for all. In the years to come, Americans must continue to press further on the boundaries of sky and space and forge new frontiers for American success, just as Orville and Wilbur Wright courageously did more than a century ago.

The Congress, by a joint resolution approved December 17, 1963, as amended (77 Stat. 402; 36 U.S.C. 143), has designated December 17 of each year as ''Wright Brothers Day'' and has authorized and requested the President to issue annually a proclamation inviting the people of the United States to observe that day with appropriate ceremonies and activities.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, do hereby proclaim December 17, 2020, as Wright Brothers Day.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth 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.



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Space Policy Directive–6 of December 16, 2020

National Strategy for Space Nuclear Power and Propulsion

Memorandum for the Vice President[,] the Secretary of State[,] the Secretary of Defense[,] the Secretary of Commerce[,] the Secretary of Transportation[,] the Secretary of Energy[,] the Director of the Office of Management and Budget[,] the Assistant to the President for National Security Affairs[,] the Administrator of the National Aeronautics and Space Administration[,] the Chairman of the Nuclear Regulatory Commission[, and] the Director of the Office of Science and Technology Policy

Section 1. *Policy*. The ability to use space nuclear power and propulsion (SNPP) systems safely, securely, and sustainably is vital to maintaining and advancing United States dominance and strategic leadership in space. SNPP systems include radioisotope power systems (RPSs) and fission reactors used for power or propulsion in spacecraft, rovers, and other surface elements. SNPP systems can allow operation of such elements in environments in which solar and chemical power are inadequate. They can produce more power at lower mass and volume compared to other energy sources, thereby enabling persistent presence and operations. SNPP systems also can shorten transit times for crewed and robotic spacecraft, thereby reducing radiation exposure in harsh space environments.

National Security Presidential Memorandum–20 (NSPM–20) of August 20, 2019 (Launch of Spacecraft Containing Space Nuclear Systems), updated the process for launches of spacecraft containing space nuclear systems. It established it as the policy of the United States to ''develop and use space nuclear systems when such systems safely enable or enhance space exploration or operational capabilities.''

Cooperation with commercial and international partners is critical to achieving America's objectives for space exploration. Presidential Policy Directive 4 of June 28, 2010 (National Space Policy), as amended by the Presidential Memorandum of December 11, 2017 (Reinvigorating America's Human Space Exploration Program), established it as the policy of the United States to ''[l]ead an innovative and sustainable program of exploration with commercial and international partners to enable human expansion across the solar system and to bring back to Earth new knowledge and opportunities.''

This memorandum establishes a national strategy to ensure the development and use of SNPP systems when appropriate to enable and achieve the scientific, exploration, national security, and commercial objectives of the United States. In the context of this strategy only, the term ''development'' includes the full development process from design through testing and production, and the term ''use'' includes launch, operation, and disposition. This memorandum outlines high-level policy goals and a supporting roadmap that will advance the ability of the United States to use SNPP systems safely, securely, and sustainably. The execution of this strategy will be subject to relevant budgetary and regulatory processes and to the availability of appropriations.

Sec. 2. *Goals*. The United States will pursue goals for SNPP development and use that are both mission-enabling and ambitious in their substance and their timeline. These goals will enable a range of existing and future space missions, with the aim of accelerating achievement of key milestones,

including in-space demonstration and use of new SNPP capabilities. This memorandum establishes the following such goals for the Nation:

(a) Develop uranium fuel processing capabilities that enable production of fuel that is suitable to lunar and planetary surface and in-space power, nuclear electric propulsion (NEP), and nuclear thermal propulsion (NTP) applications, as needed. These capabilities should support the ability to produce different uranium fuel forms to meet the nearest-term mission needs and, to the extent feasible, should maximize commonality—meaning use of the same or similar materials, processes, designs, or infrastructure—across these fuel forms. To maximize private-sector engagement and cost savings, these capabilities should be developed to enable a range of terrestrial as well as space applications, including future commercial applications;

(b) Demonstrate a fission power system on the surface of the Moon that is scalable to a power range of 40 kilowatt-electric (kWe) and higher to support a sustained lunar presence and exploration of Mars. To the extent feasible, this power system should align with mission needs for, and potential future government and commercial applications of, in-space power, NEP, and terrestrial nuclear power;

(c) Establish the technical foundations and capabilities—including through identification and resolution of the key technical challenges—that will enable options for NTP to meet future Department of Defense (DoD) and National Aeronautics and Space Administration (NASA) mission requirements; and

(d) Develop advanced RPS capabilities that provide higher fuel efficiency, higher specific energy, and longer operational lifetime than existing RPS capabilities, thus enabling survivable surface elements to support robotic and human exploration of the Moon and Mars and extending robotic exploration of the solar system.

Sec. 3. *Principles*. The United States will adhere to principles of safety, security, and sustainability in its development and use of SNPP systems, in accordance with all applicable Federal laws and consistent with international obligations and commitments.

(a) *Safety*. All executive departments and agencies (agencies) involved in the development and use of SNPP systems shall take appropriate measures to ensure, within their respective roles and responsibilities, the safe development, testing, launch, operation, and disposition of SNPP systems. For United States Government SNPP programs, the sponsoring agency holds primary responsibility for safety. For programs involving multiple agencies, the terms of cooperation shall designate a lead agency with primary responsibility for safety in each stage of development and use.

(i) Ground development. Activities associated with ground development, including ground testing, of SNPP systems shall be conducted in accordance with applicable Federal, State, and local laws and existing authorities of regulatory agencies.

(ii) Launch. NSPM–20 established safety guidelines and safety analysis and review processes for Federal Government launches of spacecraft containing space nuclear systems, including SNPP systems, and for launches for which the Department of Transportation has statutory authority to license as commercial space launch activities (commercial launches). These guidelines and processes address launch and any subsequent stages during which accidents may result in radiological effects on the public or the environment—for instance, in an unplanned reentry from Earth orbit or during an Earth flyby. Launch activities shall be conducted in accordance with these guidelines and processes.

(iii) Operation and disposition. The operation and disposition of SNPP systems shall be planned and conducted in a manner that protect human and environmental safety and national security assets. Fission reactor SNPP systems may be operated on interplanetary missions, in sufficiently high orbits, and in low-Earth orbits if they are stored in sufficiently high orbits after the operational part of their mission. In this context, a sufficiently high orbit is one in which the orbital lifetime of the spacecraft

is long enough for the fission products to decay to a level of radioactivity comparable to that of uranium–235 by the time it reenters the Earth's atmosphere, and the risks to existing and future space missions and of collision with objects in space are minimized. Spacecraft operating fission reactors in low-Earth orbits shall incorporate a highly reliable operational system to ensure effective and controlled disposition of the reactor.

(b) *Security*. All agencies involved in the development and use of SNPP systems shall take appropriate measures to protect nuclear and radiological materials and sensitive information, consistent with sound nuclear non-proliferation principles. For United States Government SNPP programs, the sponsoring agency holds primary responsibility for security. For programs involving multiple agencies, the terms of cooperation shall designate a lead agency with primary responsibility for security in each stage of development and use. The use of highly enriched uranium (HEU) in SNPP systems should be limited to applications for which the mission would not be viable with other nuclear fuels or non-nuclear power sources. Before selecting HEU or, for fission reactor systems, any nuclear fuel other than low-enriched uranium (LEU), for any given SNPP design or mission, the sponsoring agency shall conduct a thorough technical review to assess the viability of alternative nuclear fuels. The sponsoring agency shall provide to the respective staffs of the National Security Council, the National Space Council, the Office of Science and Technology Policy, and the Office of Management and Budget a briefing that provides justification for why the use of HEU or other non-LEU fuel is required, and any steps the agency has taken to address nuclear safety, security, and proliferation-related risks. The Director of the Office of Science and Technology Policy shall ensure, through the National Science and Technology Council, that other relevant agencies are invited to participate in these briefings.

(c) *Sustainability*. All agencies involved in the development and use of SNPP systems shall take appropriate measures to conduct these activities in a manner that is suitable for the long-term sustainment of United States space capabilities and leadership in SNPP.

(i) Coordination and Collaboration. To maximize efficiency and return on taxpayer investment, the heads of relevant agencies shall seek and pursue opportunities to coordinate among existing and future SNPP development and use programs. Connecting current efforts with likely future applications will help ensure that such programs can contribute to long-term United States SNPP capabilities and leadership. Agencies also shall seek opportunities to partner with the private sector, including academic institutions, in order to facilitate contributions to United States SNPP capabilities and leadership. To help identify opportunities for collaboration, the heads of relevant agencies should conduct regular technical exchanges among SNPP programs, to the extent that such exchanges are consistent with the principle of security and comply with applicable Federal, State, and local laws. Agencies shall coordinate with the Department of State when seeking opportunities for international partnerships.

(ii) Commonality. The heads of relevant agencies shall seek to identify and use opportunities for commonality among SNPP systems, and between SNPP and terrestrial nuclear systems, whenever doing so could advance program and policy objectives without unduly inhibiting innovation or market development, or hampering system suitability to specific mission applications. For example, opportunities for commonality may exist in goals (*e.g.*, demonstration timeline), reactor design, nuclear fuels (*e.g.*, fuel type and form, and enrichment level), supplementary systems (*e.g.*, power conversion, moderator, reflector, shielding, and system vessel), methods (*e.g.*, additive manufacturing of fuel or reactor elements), and infrastructure (*e.g.*, fuel supply, testing facilities, launch facilities, and workforce).

(iii) Cost-effectiveness. The heads of relevant agencies should pursue SNPP development and use solutions that are cost-effective while also consistent with the principles of safety and security. For any program or system,

the heads of such agencies should seek to identify the combination of in-space and ground-based testing and certification that will best qualify the system for a given mission while ensuring public safety.

Sec. 4. *Roles and Responsibilities*. (a) The Vice President, on behalf of the President and acting through the National Space Council, shall coordinate United States policy related to use of SNPP systems.

(b) The Secretary of State shall, under the direction of the President, coordinate United States activities related to international obligations and commitments and international cooperation involving SNPP.

(c) The Secretary of Defense shall conduct and support activities associated with development and use of SNPP systems to enable and achieve United States national security objectives. When appropriate, the Secretary of Defense shall facilitate private-sector engagement in DoD SNPP activities.

(d) The Secretary of Commerce shall promote responsible United States commercial SNPP investment, innovation, and use, and shall, when consistent with the authorities of the Secretary, ensure the publication of clear, flexible, performance-based rules that are applicable to use of SNPP and are easily navigated. Under the direction of the Secretary of Commerce, the Department of Commerce (DOC) shall ascertain and communicate the views of private-sector partners and potential private-sector partners to relevant agency partners in order to facilitate public-private collaboration in SNPP development and use.

(e) The Secretary of Transportation's statutory authority includes licensing commercial launches and reentries, including vehicles containing SNPP systems. Within this capacity, the Secretary of Transportation shall, when appropriate, facilitate private-sector engagement in the launch or reentry aspect of SNPP development and use activities, in support of United States science, exploration, national security, and commercial objectives. To help ensure the launch safety of an SNPP payload, and consistent with 51 U.S.C. 50904, a payload review may be conducted as part of a license application review or may be requested by a payload owner or operator in advance of or apart from a license application.

(f) The Secretary of Energy shall, in coordination with sponsoring agencies and other agencies, as appropriate, support development and use of SNPP systems to enable and achieve United States scientific, exploration, and national security objectives. When appropriate, the Secretary of Energy shall work with sponsoring agencies and DOC to facilitate United States private-sector engagement in Department of Energy (DOE) SNPP activities. Under the direction of the Secretary of Energy and consistent with the authorities granted to DOE, including authorities under the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. 2011, *et seq.*, DOE may authorize ground-based SNPP development activities, including DOE activities conducted in coordination with sponsoring agencies and private-sector entities. As directed in NSPM–20, the Secretary of Energy shall maintain, on a full-cost recovery basis, the capability and infrastructure to develop, furnish, and conduct safety analyses for space nuclear systems for use in United States Government space systems.

(g) The Administrator of NASA shall conduct and support activities associated with development and use of SNPP systems to enable and achieve United States space science and exploration objectives. The Administrator of NASA shall establish the performance requirements for SNPP capabilities necessary to achieve those objectives. When appropriate, the Administrator of NASA shall facilitate private-sector engagement in NASA SNPP activities, and shall coordinate with the Secretary of Commerce and, as appropriate, the Secretary of State and the Secretary of Energy, to help facilitate private-sector SNPP activities.

(h) The Nuclear Regulatory Commission (NRC) has statutory authority under the AEA for licensing and regulatory safety and security oversight of commercial nuclear activities taking place within the United States. The

NRC should, as appropriate and particularly in circumstances within NRC authority where DOE regulatory authorities cannot be applied, enable private-sector engagement in SNPP development and use activities in support of United States science, exploration, national security, and commercial objectives.

(i) The Director of the Office and Science and Technology Policy shall coordinate United States policy related to research and development of SNPP systems.

Sec. 5. *Roadmap*. The United States will pursue a coordinated roadmap for federally-supported SNPP activities to achieve the goals and uphold the principles established in this memorandum. This roadmap comprises the following elements, which the relevant agencies should pursue consistent with the following objective timeline, subject to relevant budgetary and regulatory processes and to the availability of appropriations:

(a) By the mid-2020s, develop uranium fuel processing capabilities that enable production of fuel that is suitable for lunar and planetary surface and in-space power, NEP, and NTP applications, as needed.

(i) Identify relevant mission needs. DoD and NASA should provide to DOE any mission needs (*e.g.*, power density, environment, and timelines) relevant to the identification of fuels suitable for planetary surface and in-space power, NEP, and NTP applications.

(ii) Identify candidate fuel or fuels. DoD and NASA, in cooperation with DOE and private-sector partners, as appropriate, should identify candidate fuel or fuels to meet the identified mission requirements. This review and assessment should account for current and expected United States capabilities to produce and qualify for use candidate fuels, and for potential commonality of fuels or fuel variants across multiple planetary surface and in-space power, in-space propulsion, and terrestrial applications.

(iii) Qualify at least one candidate fuel. DoD and NASA, in cooperation with DOE and private-sector partners, as appropriate, should qualify a fuel or fuels for demonstrations of a planetary surface power reactor and an in-space propulsion system. While seeking opportunities to use private-sector-partner capabilities, agencies should ensure that the Federal Government retains an ability for screening and qualification of candidate fuels.

(iv) Supply fuel for demonstrations. DOE, in cooperation with NASA and DoD, and with private-sector partners, as appropriate, should identify feedstock and uranium that can be made available for planetary surface power and in-space propulsion demonstrations. DOE shall ensure that any provision of nuclear material for SNPP will not disrupt enriched uranium supplies for the United States nuclear weapons program and the naval propulsion program, and that SNPP needs are included among broader considerations of nuclear fuel supply provisioning and management.

(b) By the mid- to late-2020s, demonstrate a fission power system on the surface of the Moon that is scalable to a power range of 40 kWe and higher to support sustained lunar presence and exploration of Mars.

(i) Initiate a surface power project. NASA should initiate a fission surface power project for lunar surface demonstration by 2027, with scalability to Mars exploration. NASA should consult with DoD and other agencies, and with the private sector, as appropriate, when developing project requirements.

(ii) Conduct technology and requirements assessment. NASA, in coordination with DoD and other agencies, and with private-sector partners, as appropriate, should evaluate technology options for a surface power system including reactor designs, power conversion, shielding, and thermal management. NASA should work with other agencies, and private-sector partners, as appropriate, to evaluate opportunities for commonality among other SNPP needs, including in-space power and terrestrial power needs,

possible NEP technology needs, and reactor demonstrations planned by NASA, other agencies, or the private sector.

(iii) Engage the private sector. DOE and NASA should determine a mechanism or mechanisms for engaging with the private sector to meet NASA's SNPP surface power needs in an effective manner consistent with the guiding principles set forth in this memorandum. In evaluating mechanisms, DOE and NASA should consider the possibility of NASA issuing a request for proposal for the development and construction of the surface power reactor system or demonstration.

(iv) System development. NASA should work with DOE, and with other agencies and private-sector partners, as appropriate, to develop the lunar surface power demonstration project.

(v) Conduct demonstration mission. NASA, in coordination with other agencies and with private-sector partners, as appropriate, should launch and conduct the lunar surface power demonstration project.

(c) By the late-2020s, establish the technical foundations and capabilities—including through identification and resolution of the key technical challenges—that will enable NTP options to meet future DoD and NASA mission needs.

(i) Conduct requirements assessment. DoD and NASA, in cooperation with DOE, and with other agencies and private-sector partners, as appropriate, should assess the ability of NTP capabilities to enable and advance existing and potential future DoD and NASA mission requirements.

(ii) Conduct technology assessment. DoD and NASA, in cooperation with DOE, and with other agencies and private-sector partners, as appropriate, should evaluate technology options and associated key technical challenges for an NTP system, including reactor designs, power conversion, and thermal management. DoD and NASA should work with their partners to evaluate and use opportunities for commonality with other SNPP needs, terrestrial power needs, and reactor demonstration projects planned by agencies and the private sector.

(iii) Technology development. DoD, in coordination with DOE and other agencies, and with private-sector partners, as appropriate, should develop reactor and propulsion system technologies that will resolve the key technical challenges in areas such as reactor design and production, propulsion system and spacecraft design, and SNPP system integration.

(d) By 2030, develop advanced RPS capabilities that provide higher fuel efficiency, higher specific energy, and longer operational lifetime than existing RPS capabilities, thus enabling survivable surface elements to support robotic and human exploration of the Moon and Mars and extending robotic exploration of the solar system.

(i) Maintain RPS capability. Mission sponsoring agencies should assess their needs for radioisotope heat source material to meet emerging mission requirements, and should work with DOE to jointly identify the means to produce or acquire the necessary material on a timeline that meets mission requirements.

(ii) Engage the private sector. NASA, in coordination with DOE and DOC, should conduct an assessment of opportunities for engaging the private sector to meet RPS needs in an effective manner consistent with the guiding principles established in this memorandum.

(iii) Conduct technology and requirements assessment. NASA, in coordination with DOE and DoD, and with other agencies and private-sector partners, as appropriate, should assess requirements for next-generation RPS systems and evaluate technology options for meeting those requirements.

(iv) System development. DOE, in coordination with NASA and DoD, and with other agencies and private-sector partners, as appropriate, should develop one or more next-generation RPS system or systems to meet

the goals of higher fuel efficiency, higher specific energy, and longer operational lifetime for the required range of power.

Sec. 6. *Implementation*. The Vice President, through the National Space Council, shall coordinate implementation of this memorandum.

Sec. 7. *General Provisions*. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

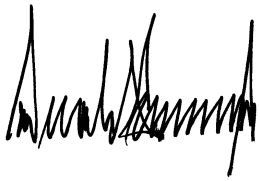
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Energy is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, December 16, 2020

[FR Doc. 2020–28272
Filed 12–18–20; 8:45 am]
Billing code 6450–01–P

Rules and Regulations

Federal Register
Vol. 85, No. 245
Monday, December 21, 2020

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

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

FARM CREDIT ADMINISTRATION

12 CFR Part 614

RIN 3052–AC92

Amortization Limits

AGENCY: Farm Credit Administration.

ACTION: Notification of effective date.

SUMMARY: The Farm Credit Administration (FCA or we) is repealing the regulatory requirement that production credit associations (PCAs) amortize their loans in 15 years or less, while requiring Farm Credit System (FCS or System) associations to address amortization through their credit underwriting standards and internal controls. In accordance with the law, the effective date of the rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session.

DATES: The regulation amending 12 CFR part 614 published on September 28, 2020 (85 FR 60691) is effective on November 19, 2020.

FOR FURTHER INFORMATION CONTACT:

Technical information: Lori Markowitz, Senior Policy Analyst, Office of Regulatory Policy, (703) 883–4487, TTY (703) 883–4056, *markowitzl@fca.gov.*

Legal information: Richard A. Katz, Senior Counsel, Office of General Counsel, (703) 883–4020, TTY (703) 883–4056, *katzr@fca.gov.*

SUPPLEMENTARY INFORMATION: On September 28, 2020, FCA issued a final rule to repeal regulatory provisions that impose amortization limits on PCA loans; and require associations that amortize loans over a period of time that is longer than the term to maturity to address loan amortization in their credit underwriting standards and internal controls.

In accordance with 12 U.S.C. 2252(c)(1), the effective date of the rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is November 19, 2020.

Dated: November 30, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–26619 Filed 12–18–20; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590–AB04

2021 Enterprise Housing Goals

AGENCY: Federal Housing Finance Agency.

ACTION: Final rule.

SUMMARY: The Federal Housing Finance Agency (FHFA) is issuing a final rule on the 2021 housing goals for Fannie Mae and Freddie Mac (the Enterprises). The Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (the Safety and Soundness Act) requires FHFA to establish annual housing goals for mortgages purchased by the Enterprises. The housing goals include separate categories for single-family and multifamily mortgages on housing that is affordable to low-income and very low-income families, among other categories. The final rule establishes benchmark levels for each of the housing goals for 2021.

DATES: The final rule is effective on February 19, 2021.

FOR FURTHER INFORMATION CONTACT: Ted Wartell, Associate Director, Office of Housing & Community Investment, Division of Housing Mission and Goals, at (202) 649–3157, *Ted.Wartell@fhfa.gov;* Padmasini Raman, Supervisory Policy Analyst, Office of Housing & Community Investment, Division of Housing Mission and Goals, at (202) 649–3633, *Padmasini.Raman@fhfa.gov;* or Kevin Sheehan, Associate General Counsel, Office of General Counsel, (202) 649–3086, *Kevin.Sheehan@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Uncertainty over public health and over the economic impacts of the COVID–19 pandemic has caused significant disruption in both the single-family and multifamily housing markets since March 2020. Due to the severe nature of the COVID–19 pandemic and associated economic uncertainty, FHFA is establishing benchmark levels for the Enterprise single-family and multifamily housing goals for calendar year 2021 only. FHFA expects to conduct a new round of notice and comment rulemaking in 2021 to establish benchmark levels for 2022 and beyond. FHFA expects that more data will become available on the economic impacts of the COVID–19 pandemic and that the additional data will allow FHFA to update the economic model that has been a significant factor in setting the single-family benchmark levels. As in past housing goals rulemakings, FHFA expects to publish a paper describing the economic model as part of the rulemaking process in 2021.

A. Statutory and Regulatory Background for the Existing Housing Goals

The Safety and Soundness Act requires FHFA to establish several annual housing goals for both single-family and multifamily mortgages purchased by Fannie Mae and Freddie Mac.[1] The annual housing goals are one measure of the extent to which the Enterprises are meeting their public purposes, which include ''an affirmative obligation to facilitate the financing of affordable housing for low- and moderate-income families in a manner consistent with their overall public purposes, while maintaining a strong financial condition and a reasonable economic return.''[2]

FHFA has established annual housing goals for Enterprise purchases of single-family and multifamily mortgages consistent with the requirements of the Safety and Soundness Act. The structure of the housing goals and the rules for determining how mortgage purchases are counted or not counted are set forth in the housing goals

[1] *See* 12 U.S.C. 4561(a).

[2] *See* 12 U.S.C. 4501(7).

regulation.[3] The current benchmark levels for the housing goals were established by a final rule covering 2018–2020.[4] This final rule establishes benchmark levels for 2021 but does not make any other changes to the housing goals regulation.

Single-family goals. The single-family goals defined under the Safety and Soundness Act include separate categories for home purchase mortgages for low-income families, very low-income families, and families that reside in low-income areas.[5] FHFA has also established a subgoal within the low-income areas goal that is limited to families in low-income census tracts and moderate-income families in minority census tracts. Performance on the single-family home purchase goals is measured as the percentage of the total home purchase mortgages purchased by an Enterprise each year that qualify for each goal or subgoal. There is also a separate goal for refinancing mortgages for low-income families, and performance on the refinancing goal is determined in a similar way.

Under the Safety and Soundness Act, the single-family housing goals are limited to mortgages on owner-occupied housing with one to four units total. The single-family goals cover conventional, conforming mortgages, defined as mortgages that are not insured or guaranteed by the Federal Housing Administration or another government agency and with principal balances that do not exceed the conforming loan limits for Enterprise mortgages.

Two-part performance evaluation approach. The performance of the Enterprises on the single-family housing goals is evaluated using a two-part approach, comparing the goal-qualifying share of each Enterprise's mortgage purchases to two separate measures: A benchmark level and a market level. In order to meet a single-family housing goal, the percentage of mortgage purchases by an Enterprise that meet each goal must equal or exceed either the benchmark level or the market level for that year. The benchmark level is set prospectively by rulemaking based on various factors set forth in the Safety and Soundness Act.[6] The market level is determined retrospectively for each year, based on the actual goal-qualifying share of the overall market as measured by the Home Mortgage Disclosure Act (HMDA) data for that year. The overall market that FHFA uses for setting the prospective benchmark level and for determining the retrospective market level consists of all single-family owner-occupied conventional conforming mortgages that would be eligible for purchase by either Enterprise. It includes loans purchased by the Enterprises, as well as comparable loans held in a lender's portfolio. It also includes any loans that are part of a private label security (PLS), although very few such securities have been issued for conventional conforming mortgages since 2008.

While both the benchmark level and the retrospective market level are designed to measure the current year's mortgage originations, the performance of the Enterprises on the housing goals includes all Enterprise purchases in that year, regardless of the year in which the loan was originated. This includes providing for housing goals credit when the Enterprises acquire qualified seasoned loans.[7]

Multifamily goals. The multifamily goals defined under the Safety and Soundness Act include categories for mortgages on multifamily properties (properties with five or more units) with rental units affordable to low-income families and mortgages on multifamily properties with rental units affordable to very low-income families. FHFA has also established a small multifamily low-income subgoal for properties with 5–50 units. The multifamily housing goals include all Enterprise multifamily mortgage purchases, regardless of the purpose of the loan. The multifamily goals evaluate the performance of the Enterprises based on numeric targets, not percentages, for the number of affordable units in properties backed by mortgages purchased by an Enterprise. FHFA has not established a retrospective market level measure for the multifamily goals, due in part to a lack of comprehensive data about the multifamily market. As a result, FHFA currently measures Enterprise multifamily goals performance against the benchmark levels only.

The Safety and Soundness Act requires that affordability for rental units under the multifamily goals be determined based on rents that ''[do] not exceed 30 percent of the maximum income level of such income category, with appropriate adjustments for unit size as measured by the number of bedrooms.''[8] The housing goals regulation considers the net rent paid by the renter and, therefore, nets out any subsidy payments that the renter may receive, including housing assistance payments.

B. Adjusting the Housing Goals

If, after publication of a final rule establishing the housing goals for 2021, FHFA determines that any of the single-family or multifamily housing goals should be adjusted in light of market conditions, to ensure the safety and soundness of the Enterprises, or for any other reason, FHFA will take any steps that are necessary and appropriate to adjust that goal consistent with the statute and regulation. FHFA recognizes that 2021 may be a year of disrupted economic activity. While FHFA is taking this uncertainty into consideration in setting the benchmark levels for 2021, FHFA may take other actions consistent with the Safety and Soundness Act and the Enterprise housing goals regulation based on new information or developments that occur after publication of this final rule.

For example, under the Safety and Soundness Act and the Enterprise housing goals regulation, FHFA may reduce the benchmark levels in response to an Enterprise petition for reduction for any of the single-family or multifamily housing goals in a particular year based on a determination by FHFA that: (1) Market and economic conditions or the financial condition of the Enterprise require a reduction; or (2) efforts to meet the goal or subgoal would result in the constraint of liquidity, over-investment in certain market segments, or other consequences contrary to the intent of the Safety and Soundness Act or the purposes of the Enterprises' charter acts.[9]

The Safety and Soundness Act and the Enterprise housing goals regulation also take into account the possibility that achievement of a particular housing goal may not have been feasible for an Enterprise. If FHFA determines that a

[3] *See* 12 CFR part 1282.

[4] *See* 83 FR 5878 (Feb. 12, 2018).

[5] The low-income areas housing goal includes: (1) Families in ''low-income census tracts,'' defined as census tracts with median income less than or equal to 80 percent of area median income; (2) families with incomes less than or equal to area median income who reside in minority census tracts (defined as census tracts with a minority population of at least 30 percent and a tract median income of less than 100 percent of area median income); and (3) families with incomes less than or equal to 100 percent of area median income who reside in designated disaster areas.

[6] *See* 12 U.S.C. 4562(e).

[7] Seasoned mortgage means a mortgage on which the date of the mortgage note is more than one year before the Enterprise purchased the mortgage. *See* 12 CFR 1282.1(b).

[8] *See* 12 U.S.C. 4563(c). This affordability definition is sometimes referred to as the ''Brooke Amendment,'' which states that to be affordable at the 80 percent of area median income level, the rents must not exceed 30 percent of the renter's income which must not exceed 80 percent of the area median income. *See https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html* for a description of the Brooke Amendment and background on the notion of affordability embedded in the housing goals.

[9] 12 CFR 1282.14(d).

housing goal was not feasible for an Enterprise to achieve, then the statute and regulation provide for no further enforcement of that housing goal for that year.[10]

If FHFA determines that an Enterprise failed to meet a housing goal and that achievement of the housing goal was feasible, then the statute and regulation provide FHFA with discretion in determining whether to require the Enterprise to submit a housing plan describing the specific actions the Enterprise will take to improve its performance.

C. Housing Goals Under Conservatorship

On September 6, 2008, FHFA placed each Enterprise into conservatorship. Although the Enterprises remain in conservatorships at this time, they continue to have the mission of supporting a stable and liquid national market for residential mortgage financing. FHFA has continued to establish annual housing goals for the Enterprises and to assess their performance under the housing goals each year during the conservatorships.

II. Proposed Rule and Comments

FHFA published a proposed rule in the **Federal Register** on August 13, 2020 that proposed benchmark levels for each of the single-family and multifamily housing goals for 2021.[11] The comment period ended on October 13, 2020.

FHFA received 15 comment letters on the proposed rule, including four letters [12] from policy advocacy organizations, six letters from trade associations representing lenders, home builders, credit unions, and other housing market participants, three letters from individuals, one letter from Fannie Mae, and one letter from Freddie Mac. FHFA has reviewed and considered all of the comments. Specific provisions of the proposed rule, and the comments received on those provisions, are discussed in the relevant sections of this final rule. Some topics raised were applicable to both the single-family and multifamily goals and are discussed briefly below. Some comment letters raised issues that are beyond the limited scope of this rulemaking, which is focused solely on establishing new benchmark levels for 2021. FHFA recognizes that the issues raised in the comment letters are important, and FHFA has provided more information and explanation in this final rule whenever it is possible to do so. FHFA is committed to addressing these issues more thoroughly in the proposed rule that is planned for next year on establishing housing goals for 2022 and beyond, which may include proposed changes to the Enterprise housing goals that go beyond setting new benchmark levels.

Research and data. Three comment letters from policy advocacy organizations urged FHFA to conduct additional analysis on the goal-affected markets and to make more data available to the public, including data on Enterprise mortgage acquisitions and activities for low-income and minority borrowers, with real-time data throughout 2021. Through oversight of the regulated entities, FHFA collects and analyzes a significant amount of data on trends in the housing and mortgage markets, enabling FHFA to respond appropriately to market developments and disseminate information to improve the public's understanding of housing finance markets. FHFA's existing data collection, research, and analysis capabilities for the housing goals are supported by the new Division of Research and Statistics (DRS) within FHFA. DRS provides economic and market research, data development, and statistical analysis to support FHFA's oversight, supervision, rulemaking, and policy development. The division examines trends and risks in housing and housing finance markets, advances modeling capabilities, develops and maintains data, evaluates policy impacts, and engages with research communities outside of FHFA. FHFA reviews and monitors proprietary data from the Enterprises throughout the year, but much of this type of data cannot be shared publicly until the following year, in order to avoid influencing the market or giving a competitive advantage or disadvantage to an Enterprise. However, FHFA produces and releases numerous reports every year, detailing FHFA's activities as regulator and conservator of Fannie Mae and Freddie Mac. For example, the Annual Housing Report, released each October, includes data on loans made to low-income and minority borrowers in the previous year.[13] It is valuable to understand what types of information the public finds useful, and FHFA will continue to reflect on what data the agency can share publicly and when.

Forbearance. In the proposed rule, FHFA requested comments on whether there were any kinds of activities, including forbearance, that should receive housing goals credit. Numerous comment letters encouraged FHFA and the Enterprises to take actions to mitigate foreclosures and support affordable loan modifications for homeowners who have been impacted by the pandemic and recession. The letters requested additional guidance to servicers to help inform borrowers of forbearance options and ensure that borrowers can access relief. However, with only one exception, the letters clearly stated that FHFA should not consider these efforts when evaluating whether the Enterprises met the housing goals. FHFA will continue to work closely with the Enterprises to provide assistance to those adversely affected by the COVID–19 pandemic. FHFA is continually reviewing forbearance policies and will institute changes as appropriate. Updated policies and guidance can be found on the FHFA website.[14] When determining whether the Enterprises met the housing goals in 2020, FHFA will continue to evaluate the Enterprises quantitatively.

Finally, some comment letters raised issues beyond the scope of this housing goals rule, and those comments will not be addressed in this final rule. For example, some comment letters referenced the potential impact of the tight underwriting conditions during the pandemic as well as the potential impact of the Enterprise Regulatory Capital Framework re-proposed rule. FHFA announced its final rule on the Enterprise Regulatory Capital Framework on November 18, 2020.[15] Appropriately capitalizing each Enterprise is critical to ensuring that the secondary mortgage market supports access to affordable mortgage credit for low- and moderate-income borrowers and minority borrowers during periods of financial stress, when these borrowers are potentially most vulnerable to loss of access to affordable mortgage credit. FHFA is carefully monitoring the impact of pandemic-related market and underwriting changes on the availability of affordable homeownership for low-income households. FHFA will consider these impacts as it develops its proposed housing goals rule for 2022 and beyond.

[10] 12 CFR 1282.21(a); 12 U.S.C. 4566(b).

[11] *See* 85 FR 49312 (Aug. 13, 2020).

[12] Two of the comment letters were joint letters representing thirteen advocacy organizations.

[13] *See https://www.fhfa.gov/AboutUs/Reports/Pages/Annual-Housing-Report-2020.aspx.*

[14] *See https://www.fhfa.gov/Homeownersbuyer/MortgageAssistance/Pages/Coronavirus-Assistance-Information.aspx.*

[15] *See https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/Enterprise-Regulatory-Capital-Framework-Final-Rule.aspx.*

III. Summary of Final Rule

A. Benchmark Levels for the Single-Family Housing Goals for 2021

The final rule establishes the benchmark levels for the single-family housing goals and subgoal for 2021 as follows:

Goal	Criteria	Current benchmark level for 2018–2020	Benchmark level for 2021
Low-Income Home Purchase Goal	Home purchase mortgages on single-family, owner-occupied properties with borrowers with incomes no greater than 80 percent of area median income.	24 percent	24 percent.
Very Low-Income Home Purchase Goal.	Home purchase mortgages on single-family, owner-occupied properties with borrowers with incomes no greater than 50 percent of area median income.	6 percent	6 percent.
Low-Income Areas Home Purchase Subgoal.	Home purchase mortgages on single-family, owner-occupied properties with:. • Borrowers in census tracts with tract median income of no greater than 80 percent of area median income; or. • Borrowers with income no greater than 100 percent of area median income in census tracts where (i) tract income is less than 100 percent of area median income, and (ii) minorities comprise at least 30 percent of the tract population. .	14 percent	14 percent.
Low-Income Refinancing Goal	Refinancing mortgages on single-family, owner-occupied properties with borrowers with incomes no greater than 80 percent of area median income.	21 percent	21 percent.

The single-family housing goals also include a Low-Income Areas Home Purchase Goal that the regulation defines as the benchmark level for the Low-Income Areas Home Purchase Subgoal plus an additional ''disaster areas'' increment that FHFA determines each year based on Federal Emergency Management Agency declarations of disasters. The final rule does not make any change to the criteria or process for setting the additional disaster areas increment for 2021.

B. Benchmark Levels for the Multifamily Housing Goals for 2021

The final rule establishes the benchmark levels for the multifamily goal and subgoals for 2021 as follows:

Goal	Criteria	Current benchmark level for 2018-2020	Benchmark level for 2021
Low-Income Goal	Units affordable to families with incomes no greater than 80 percent of area median income in multifamily rental properties with mortgages purchased by an Enterprise	315,000 units	315,000 units
Very Low-Income Subgoal	Units affordable to families with incomes no greater than 50 percent of area median income in multifamily rental properties with mortgages purchased by an Enterprise	60,000 units	60,000 units
Low-Income Small Multifamily Subgoal	Units affordable to families with incomes no greater than 80 percent of area median income in small multifamily rental properties (5 to 50 units) with mortgages purchased by an Enterprise	10,000 units	10,000 units

IV. Single-Family Housing Goals

The final rule establishes the benchmark levels for the single-family housing goals for 2021. FHFA considered the required statutory factors described below in setting the benchmark levels for the single-family housing goals.

The Safety and Soundness Act requires FHFA to consider the following seven factors in setting the single-family housing goals:

1. National housing needs;
2. Economic, housing, and demographic conditions, including expected market developments;
3. The performance and effort of the Enterprises toward achieving the housing goals in previous years;
4. The ability of the Enterprises to lead the industry in making mortgage credit available;
5. Such other reliable mortgage data as may be available;
6. The size of the purchase money conventional mortgage market, or refinance conventional mortgage market, as applicable, serving each of the types of families described, relative to the size of the overall purchase money mortgage market or the overall refinance mortgage market, respectively; and
7. The need to maintain the sound financial condition of the Enterprises.[16]

FHFA has considered each of these seven statutory factors in setting the benchmark levels for each of the single-family housing goals and subgoal.

In setting the benchmark levels for the single-family housing goals and subgoal, FHFA typically relies on statistical market models as one important consideration in evaluating these statutory factors. The statistical market models generate a point forecast for each goal as well as a confidence interval for the point forecast. FHFA then considers other statutory factors, as well as other relevant policy issues, to select a specific point forecast within the confidence interval as the benchmark level. However, due to the severe nature of the COVID–19 pandemic and the associated uncertainty going forward, FHFA has determined that the data used to create the statistical market models is not sufficient to reflect economic conditions for 2021.

Current Economic Conditions

Uncertainty over public health and the economic impacts of the COVID–19 pandemic have dealt a severe blow to the U.S. economy. The sudden drop in economic activity in March 2020 created widespread disruptions and resulted in an unprecedented level of job losses. The unemployment rate jumped from 3.5 percent in February to 14.7 percent in April.[17] Inflation-adjusted consumer expenditures, which account for about two-thirds of gross domestic product (GDP), declined 7.3 percent in March. On June 8, the Business Cycle Dating Committee of the National Bureau of Economic Research officially declared that the U.S. economy fell into a recession in

[16] 12 U.S.C. 4562(e)(2)(B).

[17] The Bureau of Labor Statistics (BLS), which publishes the unemployment rate and other labor statistics each month, noted that the April unemployment rate probably understated the share of unemployed workers in the labor force because many workers who should have been classified as ''unemployed on temporary layoff'' were most likely misclassified as ''employed absent from work'' in the Current Population Survey. A BLS analysis of the underlying data suggests that, had that misclassification not occurred, the April unemployment rate would have been nearly 5 percentage points higher. *See* Bureau of Labor Statistics, ''Frequently Asked Questions: The Impact of the Coronavirus (COVID–19) Pandemic on the Employment Situation for April 2020'' (May 8, 2020), *https://go.usa.gov/xvM73.*

February, ending one of the longest economic expansions in history.[18]

The depth and duration of this recession and the path to economic recovery remain uncertain. However, the unemployment rate steadily declined from its April peak to 7.9 percent in September 2020 as economic activity slowly resumed.[19] Real GDP growth further declined from an annual rate of negative 5.0 percent in the first quarter of the year to negative 31.4 percent in the second quarter, before rising at an annual rate of 33.1 percent in the third quarter.[20]

According to the most recent estimate published by the Congressional Budget Office (CBO),[21] the COVID–19 pandemic and associated social distancing triggered a sharp contraction in output in the second quarter of 2020, but the CBO projected that real GDP would grow rapidly in the second half of 2020 and the first half of 2021. Strong GDP growth is projected to continue thereafter but at a slower pace.

This is in line with the economic projections at the Federal Open Market Committee (FOMC) meeting in September 2020. The real GDP growth for 2020 was projected to be negative 3.7 percent, an improvement from negative 6.5 percent at the June meeting.[22] Real GDP growth was projected to be 4.0 percent in 2021 as the economy recovers, and then 2.5–3.0 percent in the following two years. Other variables such as the projected unemployment rate also improved, declining from 9.3 percent in the June projection to 7.6 percent in the September projection.

The implications for the primary and secondary mortgage markets continue to unfold as policymakers consider further responses to the economic disruption caused by the COVID–19 pandemic. Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to address some of the most pressing impacts of the economic disruption, including extending unemployment benefits through July. The availability of credit has contracted in the mortgage market due to a variety of factors, including additional down payment and loan-to-value restrictions and generally tightened underwriting requirements. Nevertheless, mortgage origination activity for home purchases has remained robust after its sharp decline in May 2020 as borrowers have sought to take advantage of the historic low interest rates for mortgages. Forecasts released by the Mortgage Bankers Association (MBA) in October indicate that overall home purchases and refinance mortgage originations could total $3.18 trillion in 2020, the most since 2003 ($3.81 trillion).[23]

FHFA will continue to monitor how these circumstances impact various segments of the market, including those targeted by the housing goals. For instance, the pandemic and the resulting economic disruption resulted in tightening of credit, job losses, and uncertainty, which may have left some low-income households unable to refinance. However, the size of the impact on the low-income share of households among all home purchase and refinance mortgages continues to be hard to ascertain.

National Housing Trends

At the start of 2020, the American housing market was in a strong position overall. After falling for 12 consecutive years, the U.S. homeownership rate reached 65.1 percent in 2019, with first-time homebuyers becoming an increasingly larger share of the homebuying market, helping to drive its overall expansion.[24] Affordability challenges for low-income households remained, however. While interest rates have remained low since the Great Recession, home prices have climbed steadily, with real prices more than 5.0 percent above their 2006 peak by the middle of 2020, according to the quarterly, seasonally adjusted, purchase-only FHFA House Price Index®. The median home price to median household income ratio, which is often used to measure affordability, declined nationally from a high of 4.7 in 2005 to a low of 3.3 in 2011, then steadily rose to 4.2 in 2018.[25] As of the second quarter of 2020, the ratio was estimated to be 4.0, based on data from Moody's. FHFA will continue to monitor this metric throughout 2020.

Recent Market Developments

In response to the COVID–19 pandemic, financial markets and economic activity endured a severe dislocation in March, and housing markets were no exception. Initially, the combination of social distancing measures and heightened economic concerns caused home sales to drop significantly and homebuilders to pull back on new housing starts. Single-family housing starts declined sharply in March (down 14.9 percent) and April (down 22.8 percent), but have been growing since May, indicating a partial recovery. Starts in September represented an 8.5 percent increase compared to August.[26] Further, the seasonally adjusted annual rate of housing starts in September 2020 was higher than September 2019.

The full impact of the COVID–19 pandemic and ensuing uneven recovery on the low-income home purchase market is still unfolding. While uncertainty about the extent and continuation of the recovery remains as the pandemic endures, the summer months represented a strong, but likely uneven rebound. Policy measures such as the CARES Act have helped mitigate the disruption. Additionally, the Federal Reserve's actions to keep interest rates low have buoyed the housing market, and borrowers have sought to purchase and refinance their homes to take advantage of the low interest rate environment. However, it is not clear whether this represents an actual increase in mortgage originations and refinances, or a bringing forward of the pipeline as would-be borrowers make intended transactions sooner rather than later. Some comment letters noted the uneven impact of the pandemic on low-income and low-wealth households. It is likely that the full extent of the COVID–19 pandemic's impact on housing markets will not be known until well after the virus is contained. The Enterprises are showing strong housing goals performance in 2020, although performance has varied at times throughout the year. The uneven impact of the pandemic and recovery will be considered by FHFA while evaluating the feasibility of the goals as part of the Enterprise housing goals performance determination process for 2020.

Thus, while Enterprise performance on the housing goals has tended to exceed the benchmark levels set by FHFA in recent years, the economic

[18] *See https://www.nber.org/cycles/june2020.html.*

[19] *See https://www.bls.gov/news.release/empsit.nr0.htm,* accessed on 10/5/2020.

[20] *See https://www.bea.gov/news/2020/gross-domestic-product-third-quarter-2020-advance-estimate,* accessed on 11/4/2020.

[21] Congressional Budget Office, ''An Update to the Economic Outlook: 2020–2030,'' published on July 2, 2020, accessed on 7/8/2020 at *https://www.cbo.gov/publication/56442.*

[22] *See https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20200916.pdf,* accessed on 10/5/2020.

[23] *See https://www.mba.org/2020-press-releases/october/mba-forecast-purchase-originations-to-increase-85-to-record-154-trillion-in-2021.*

[24] U.S. Census Bureau, ''Quarterly Residential Vacancies and Homeownership,'' Fourth Quarter 2019, Release Number: CB20–05, available at *https://www.census.gov/housing/hvs/files/qtr419/Q419press.pdf.*

[25] Joint Center for Housing Studies of Harvard University, ''The State of the Nation's Housing 2020,'' available at *https://www.jchs.harvard.edu/state-nations-housing-2020.*

[26] U.S. Census Bureau, ''Monthly New Residential Construction,'' October 2020, Release Number: CB20–155, available at *https://www.census.gov/construction/nrc/pdf/newresconst.pdf.*

disruption and uncertainty seen in 2020 support keeping the levels for 2021 unchanged from 2018–2020.

Past Performance of the Enterprises

Table 1 provides the annual performance of both Enterprises on the single-family housing goals between 2010 and 2019. The performance of the Enterprises in 2019 is the most recent complete year of data and shows that both Enterprises exceeded the benchmark levels set by FHFA for each of the single-family housing goals, continuing the recent trend of Enterprise performance above the benchmark levels for the single-family housing goals for 2018–2020. While FHFA has monitored Enterprise performance in 2020 on a continual basis, that information is considered non-public until the calendar year is complete.

Table 1: Enterprise Single-Family Housing Goals Performance (2010-2019)

Low-Income Home Purchase Goal										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	27.2	26.5	26.6	24	22.8	23.6	22.9	24.3	25.5	26.6
Benchmark	27	27	23	23	23	24	24	24	24	24
Fannie Mae Performance	25.1*	25.8*	25.6	23.8	23.5	23.5*	22.9	25.5	28.2	27.8
Freddie Mac Performance	27.8	23.3*	24.4	21.8*	21*	22.3*	23.8	23.2*	25.8	27.4
Very Low-Income Home Purchase Goal										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	8.1	8	7.7	6.3	5.7	5.8	5.4	5.9	6.5	6.6
Benchmark	8	8	7	7	7	6	6	6	6	6
Fannie Mae Performance	7.2*	7.6*	7.3	6*	5.7	5.6*	5.2*	5.9	6.7	6.5
Freddie Mac Performance	8.4	6.6*	7.1	5.5*	4.9*	5.4*	5.7	5.7*	6.3	6.8
Low-Income Areas Home Purchase Goal										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	24	22	23.2	22.1	22.1	19.8	19.7	21.5	22.6	22.9
Benchmark	24	24	20	21	18	19	17	18	18	19
Fannie Mae Performance	24.1	22.4	22.3	21.6	22.7	20.4	20.2	22.9	25.1	24.5
Freddie Mac Performance	23.8*	19.2*	20.6	20*	20.1	19	19.9	20.9	22.6	22.9
Low-Income Areas Home Purchase Subgoal										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	12.1	11.4	13.6	14.2	15	15.2	15.9	17.1	18	18.1
Benchmark	13	13	11	11	11	14	14	14	14	14
Fannie Mae Performance	12.4	11.6	13.1	14	15.5	15.6	16.2	18.3	20.1	19.5
Freddie Mac Performance	10.8*	9.2*	11.4	12.3	13.6	14.5	15.6	16.4	17.3	18.0
Low-Income Refinance Goal										
	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	20.2	21.5	22.3	24.3	25	22.5	19.8	25.4	30.7	24
Benchmark	21	21	20	20	20	21	21	21	21	21
Fannie Mae Performance	20.9	23.1	21.8	24.3	26.5	22.1	19.5*	24.8	31.2	23.8
Freddie Mac Performance	22	23.4	22.4	24.1	26.4	22.8	21	24.8	27.3	22.4

**Numbers marked with asterisks indicate that the Enterprise failed to meet the goal.*

Tables 2 through 5 provide additional detail on the recent performance of the Enterprises for each of the single-family goals and subgoal. The tables show the number as well as the share of goal-qualifying loans that the Enterprises acquired from 2013–2019. In 2018 and 2019, the Enterprises increased the number of goals-qualifying loans they acquired at the same time that their overall single-family mortgage purchase volume increased.

Table 2: Low-Income Home Purchase Goal

	Performance						
Year	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	24.0%	22.8%	23.6%	22.9%	24.3%	25.5%	26.6%
Benchmark	23%	23%	24%	24%	24%	24%	24%
Fannie Mae Performance							
Low-Income Home Purchase Mortgages	193,660	177,846	188,891	221,628	263,296	294,559	298,702
Total Home Purchase Mortgages	814,066	757,870	802,432	966,800	1,032,567	1,044,098	1,075,032
Low-Income % of Home Purchase Mortgages	23.8%	23.5%	23.5%	22.9%	25.5%	28.2%	27.8%
Freddie Mac Performance							
Low-Income Home Purchase Mortgages	93,425	108,948	129,455	153,434	165,555	199,429	235,811
Total Home Purchase Mortgages	429,086	519,731	579,340	644,988	713,901	774,394	860,669
Low-Income % of Home Purchase Mortgages	21.8%	21.0%	22.3%	23.8%	23.2%	25.8%	27.4%

Table 3: Very Low-Income Home Purchase Goal

	Performance						
Year	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	6.30%	5.70%	5.80%	5.40%	5.90%	6.50%	6.6%
Benchmark	7%	7%	6%	6%	6%	6%	6%
Fannie Mae Performance							
Very Low-Income Home Purchase Mortgages	48,810	42,872	45,022	49,932	60,561	69,952	70,214
Total Home Purchase Mortgages	814,066	757,870	802,432	966,800	1,032,567	1,044,098	1,075,032
Very Low-Income % of Home Purchase Mortgages	6.0%	5.7%	5.6%	5.2%	5.9%	6.7%	6.5%
Freddie Mac Performance							
Very Low-Income Home Purchase Mortgages	23,705	25,232	31,146	36,837	40,848	48,823	58,136
Total Home Purchase Mortgages	429,086	519,731	579,340	644,988	713,901	774,394	860,669
Very Low-Income % of Home Purchase Mortgages	5.5%	4.9%	5.4%	5.7%	5.7%	6.3%	6.8%

Table 4: Low-Income Areas Home Purchase Subgoal

	Performance						
Year	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	14.2%	15.2%	15.2%	15.9%	17.1%	18.0%	18.1%
Benchmark	11%	11%	14%	14%	14%	14%	14%
Fannie Mae Performance							
Low-Income Area Home Purchase Mortgages	86,430	91,691	99,723	125,956	152,102	167,265	166,709
High-Minority Area Home Purchase Mortgages	27,425	25,650	25,349	30,535	36,942	42,099	42,732
Subgoal-Qualifying Total Home Purchase Mortgages	113,855	117,341	125,072	156,491	189,044	209,364	209,441
Total Home Purchase Mortgages	814,066	757,870	802,432	966,800	1,032,567	1,044,098	1,075,032
Low-Income Area % of Home Purchase Mortgages	14.0%	15.5%	15.6%	16.2%	18.3%	20.1%	19.5%
Freddie Mac Performance							
Low-Income Area Home Purchase Mortgages	40,444	55,987	67,172	80,805	94,961	106,815	123,953
High-Minority Area Home Purchase Mortgages	12,177	14,808	16,601	19,788	22,190	27,310	30,770
Subgoal-Qualifying Total Home Purchase Mortgages	52,621	70,795	83,773	100,593	117,151	134,125	154,723
Total Home Purchase Mortgages	429,086	519,731	579,340	644,988	713,901	774,394	860,669
Low-Income Area % of Home Purchase Mortgages	12.3%	13.6%	14.5%	15.6%	16.4%	17.3%	18.0%

Table 5: Low-Income Refinance Goal

	Performance						
Year	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Actual Market	24.3%	25.0%	22.5%	19.8%	25.4%	30.7%	24.0%
Benchmark	20%	20%	21%	21%	21%	21%	21%
Fannie Mae Performance							
Low-Income Refinance Mortgages	531,611	222,329	231,380	248,698	223,768	196,230	234,249
Total Refinance Mortgages	2,186,541	840,506	1,045,258	1,274,342	902,123	629,816	985,932
Low-Income % of Refinance Mortgages	24.3%	26.5%	22.1%	19.5%	24.8%	31.2%	23.8%
Freddie Mac Performance							
Low-Income Refinance Mortgages	320,962	131,921	182,594	174,708	143,475	104,843	159,322
Total Refinance Mortgages	1,331,034	514,936	800,369	830,888	578,548	384,593	712,376
Low-Income % of Refinance Mortgages	24.1%	25.6%	22.8%	21.0%	24.8%	27.3%	22.4%

Comments on the Proposed Single-Family Housing Goals

Single-family housing goals benchmarks. The majority of comment letters focused on the proposed single-family housing goals. Most commenters, including the Enterprises and trade associations, supported the proposal to maintain the 2020 levels of the benchmarks for 2021 due to the uncertainty caused by the pandemic. A number of policy advocacy organizations recommended higher benchmark levels for the low-income purchase goal, raising it from 24 percent to 27 percent. FHFA recognizes that Enterprise performance in recent years has generally exceeded the benchmark levels, but FHFA believes the goals should not be increased for 2021 in light of the market disruption and continued market uncertainty. FHFA will reevaluate the benchmark levels of all of the single-family housing goals in developing the proposed housing goals rule for 2022 and beyond.

Two comment letters from policy advocacy organizations also recommended requiring the Enterprises to meet both the prospective benchmark level and the retrospective market level in order to meet a goal. FHFA considered this alternative in the 2015–2017 housing goals rulemaking and determined that requiring an Enterprise to meet either of the two measures continued to be the most appropriate method for evaluating performance on the single-family housing goals.[27] As discussed in the 2015–2017 and 2018–2020 housing goals final rules, FHFA utilizes the two-part approach to balance the risks of its two component tests. The benchmark level enables the Enterprises to plan ahead to meet a goal, but it is based on forecasts driven by prior market conditions that may not necessarily reflect current or future market conditions. The retrospective market measure helps provide an important safety valve that reduces the risk of a housing goal potentially motivating unsafe or unsound practices in the event of unpredictable market conditions.

FHFA market model. Three comment letters from policy advocacy organizations expressed interest in seeing the market model paper that is typically released with the housing goals proposed rule, which describes the FHFA forecast for the single-family housing goals. The economic model in the paper typically plays a significant role in how FHFA arrives at the single-family benchmark levels. FHFA did not develop a market model paper for the proposed rule this year because FHFA is not relying on the economic model as the rationale for setting the benchmark levels as the market disruption caused by the pandemic is ongoing and is not yet reflected in the data that is used in the model. During 2021, FHFA will develop a proposed housing goals rule for 2022 and beyond, and plans to develop and release a market model paper with that proposed rule.

Temporary adjustment factors. One comment letter from a policy advocacy organization recommended that FHFA consider allowing short-term adjustment factors and bonus points to support or expand access where there are gaps in the market. FHFA is continually monitoring and adjusting its overall regulatory approach to addressing homeownership gaps and access to credit for underserved families, including gaps that may be developing in these markets as a result of the COVID–19 pandemic. FHFA will consider additional options to address these gaps in developing the proposed rule on housing goals for 2022 and beyond.

Low-Income Refinance Goal. One comment letter from a policy advocacy organization highlighted a concern that lower-income and lower-wealth homeowners are not benefitting from the refinance boom and the historically low interest rates to save money on their mortgage payments. The letter recommended that FHFA and the Enterprises ensure rate term refinances are accessible and affordable to lower-income families. FHFA is closely monitoring the refinance market overall and will continue to track Enterprise data on borrower income for the low-income refinance goal.

Low-Income Areas Subgoal. Three comment letters from policy advocacy organizations expressed interest in FHFA's ongoing analysis of the low-income areas subgoal. The letters voiced concerns about the potential for displacement of lower-income residents and requested that more data be made public, specifically around borrower income of goals-qualifying loans. FHFA notes that annual loan-level data from the Enterprises and HMDA is available in the FHFA Annual Housing Report, which includes information about borrower income, among other characteristics. FHFA has continued to analyze the data from HMDA and the Enterprises related to this goal and is providing relevant data in tables 6 through 8 below.

Under the housing goals regulation, the Enterprises can meet the low-income areas home purchase subgoal by acquiring home purchase mortgages that are either: (1) Originated for borrowers located in low-income census tracts (defined as census tracts with median income less than or equal to 80 percent of area median income(AMI)); or (2) originated for borrowers with incomes less than or equal to AMI who reside in minority census tracts (defined as census tracts with a minority population of at least 30 percent and a tract median income of less than 100 percent of

[27] *See https://www.fhfa.gov/SupervisionRegulation/Rules/Pages/2015-2017-Enterprise-Housing-Goals-Final-Rule.aspx.*

AMI).[28] There are no borrower income requirements for criterion (1). While Enterprise mortgage acquisitions could qualify under either or both criteria, the share of the Enterprises' mortgage acquisitions satisfying criterion (1) has been consistently higher than the share of Enterprise mortgage acquisitions satisfying criterion (2) in recent years. For example, among the Enterprises' mortgage acquisitions in 2019, 15.0 percent of mortgages met only criterion (1), 10.2 percent met only criterion (2), and 6.4 percent met both criteria as can be seen in table 6 below. All of these shares have been increasing steadily since 2010.

Table 6: Composition of Low-Income Areas Home Purchase Subgoal

Distribution of Borrowers By Census Tract Location: HMDA Home Purchases						
		(A)				(B)
	Grand Total	L I	L I, not H M	H M and L I	H M, not L I	H M
Year	**Low-Income Area Subgoal**	**All Low-Income Areas**	**Low-Income Areas that are not High Minority Areas**	**High Minority Areas that are also Low-Income Areas**	**High Minority Areas that are not Low-Income Areas**	**All High-Minority Areas**
2010	12.1%	9.2%	5.6%	3.6%	2.9%	6.5%
2011	11.4%	8.8%	5.5%	3.3%	2.6%	5.9%
2012	13.5%	10.3%	6.0%	4.3%	3.2%	7.5%
2013	14.1%	10.9%	6.6%	4.3%	3.1%	7.4%
2014	15.0%	12.0%	7.5%	4.6%	3.0%	7.5%
2015	15.1%	12.2%	7.6%	4.6%	2.9%	7.5%
2016	15.9%	12.9%	8.1%	4.8%	2.9%	7.7%
2017	17.0%	14.0%	8.7%	5.3%	3.1%	8.3%
2018	17.9%	14.7%	9.1%	5.5%	3.3%	8.8%
2019	18.1%	14.7%	9.0%	5.7%	3.4%	9.1%
Distribution of Borrowers By Census Tract Location: Enterprise Home Purchases						
		(A)				(B)
	Grand Total	L I	L I, not H M	H M and L I	H M, not L I	H M
Year	**Low-Income Area Subgoal**	**All Low-Income Areas**	**Low-Income Areas that are not High Minority Areas**	**High Minority Areas that are also Low-Income Areas**	**High Minority Areas that are not Low-Income Areas**	**All High-Minority Areas**
2010	11.6%	8.7%	5.2%	3.5%	2.9%	6.4%
2011	10.7%	8.1%	5.1%	3.1%	2.6%	5.7%
2012	12.6%	9.3%	5.4%	3.9%	3.3%	7.2%
2013	13.4%	10.2%	6.2%	4.0%	3.2%	7.2%
2014	14.7%	11.6%	7.0%	4.5%	3.2%	7.7%
2015	15.1%	12.1%	7.4%	4.6%	3.0%	7.7%
2016	16.0%	12.8%	7.9%	4.9%	3.1%	8.0%
2017	17.5%	14.1%	8.5%	5.6%	3.4%	9.0%
2018	18.9%	15.1%	8.8%	6.3%	3.8%	10.1%
2019	18.8%	15.0%	8.7%	6.4%	3.8%	10.2%

Source: FHFA's tabulation of Home Mortgage Disclosure Act (HMDA) and Enterprises' data. Conventional conforming single-family owner-occupied 1st lien non-HOEPA originations.

FHFA's analysis of HMDA data in table 7 shows that both the low-income areas and the high-minority areas have increasing shares of borrowers with incomes at or above 100 percent of AMI, although loans to borrowers with incomes over 100 percent of AMI do not qualify for the minority areas component of the goal. For instance, the share of loans made to borrowers with incomes greater than 100 percent of AMI and residing in these low-income census tracts increased from 38.8 percent in 2010 to 44.2 percent in 2016, after dropping to 36.5 percent in 2012. This share has been relatively stable since then, with a 43.3 percent share in 2019. Nonetheless, borrowers with higher incomes have made up an increasing share of the mortgage market in the low-income areas. A similar trend exists among borrowers residing in high minority census tracts, with the share of higher income borrowers increasing from 42.5 percent in 2010 to 50 percent in 2016. That share declined to 47.8 percent in 2019 after hovering around 49 percent in 2018 and 2019.

[28] *See* 12 CFR 1281.1 and 1282.12(f).

Table 7: Borrower Income Relative to AMI (HMDA)

Borrowers Residing in Low-Income Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	17.8%	17.7%	19.0%	15.4%	14.1%	14.1%	12.3%	13.0%	12.6%	12.9%
Borrower Income > 50% and ≤ 80% AMI	28.0%	26.6%	29.3%	28.4%	27.9%	27.9%	27.4%	27.8%	26.7%	28.1%
Borrower Income > 80% and ≤ 100% AMI	14.3%	13.9%	13.9%	14.7%	14.9%	14.9%	15.3%	15.2%	14.5%	14.4%
Borrower Income > 100% and ≤ 120% AMI	10.1%	10.0%	10.0%	10.8%	11.3%	11.3%	11.8%	11.6%	11.0%	10.9%
Borrower Income > 120% AMI	28.7%	30.5%	26.5%	29.3%	30.9%	30.8%	32.4%	31.4%	33.6%	32.4%
Income Missing	1.0%	1.4%	1.3%	1.3%	0.9%	1.0%	0.9%	0.9%	1.5%	1.2%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Borrowers Residing in High-Minority Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	14.9%	15.0%	14.6%	11.3%	10.1%	10.3%	9.4%	9.9%	9.9%	10.0%
Borrower Income > 50% and ≤ 80% AMI	27.1%	26.4%	26.8%	24.9%	24.4%	24.7%	24.6%	25.2%	24.4%	26.0%
Borrower Income > 80% and ≤ 100% AMI	14.6%	14.3%	14.1%	14.7%	14.8%	14.9%	15.2%	15.3%	14.9%	15.0%
Borrower Income > 100% and ≤ 120% AMI	10.9%	10.6%	11.0%	11.7%	12.0%	12.2%	12.4%	12.2%	11.8%	11.7%
Borrower Income > 120% AMI	31.6%	32.4%	32.3%	36.0%	37.8%	37.0%	37.6%	36.5%	37.5%	36.1%
Income Missing	1.0%	1.3%	1.3%	1.4%	0.9%	1.0%	0.8%	0.9%	1.5%	1.2%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Definitions:

Low-income census tracts = Census tracts with median income ≤ 80% Area Median Income (AMI)

High-minority census tracts = Census tracts where (i) tract median income ≤ 100% Area Median Income (AMI); and (ii) minorities comprise at least 30 pecent of the tract population.

Source: FHFA's tabulation of HMDA data.

Table 8 shows this trend among the Enterprises' mortgage acquisitions in these areas until 2016, but the share has been noticeably declining since then. For example, the share of loans made to borrowers with incomes greater than 100 percent of AMI and residing in these low-income census tracts increased from 40.7 percent in 2010 to 42.8 percent in 2016. However, that share has steadily declined since then, dropping to a low of 37 percent in 2019. This trend is similar among borrowers residing in high minority census tracts, with the share of higher income borrowers increasing from 45.4 percent in 2010 to 48.5 percent in 2016, after dropping to a low of 42.8 percent in 2012. This share has since declined to 42.8 percent in 2019.

Table 8: Borrower Income Relative to AMI (Enterprise Loans Only)

Borrowers Residing in Low-Income Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	16.7%	16.3%	18.2%	14.5%	13.4%	13.4%	13.1%	13.9%	15.2%	15.3%
Borrower Income > 50% and ≤ 80% AMI	27.7%	26.3%	28.6%	28.2%	28.4%	28.4%	28.5%	29.5%	31.4%	31.8%
Borrower Income > 80% and ≤ 100% AMI	14.8%	14.4%	14.6%	15.3%	15.5%	15.6%	15.6%	15.7%	16.0%	16.0%
Borrower Income > 100% and ≤ 120% AMI	10.8%	10.9%	10.8%	11.5%	11.7%	11.8%	11.9%	11.8%	11.3%	11.3%
Borrower Income > 120% AMI	29.9%	32.0%	27.7%	30.5%	31.0%	30.7%	30.9%	29.2%	26.1%	25.7%
Income Missing	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Borrowers Residing in High-Minority Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	13.3%	12.9%	15.2%	11.5%	10.3%	10.3%	10.0%	10.5%	11.3%	11.5%
Borrower Income > 50% and ≤ 80% AMI	26.1%	24.9%	27.0%	26.1%	25.7%	25.5%	25.8%	26.9%	28.5%	29.1%
Borrower Income > 80% and ≤ 100% AMI	15.1%	14.7%	14.9%	15.5%	15.7%	15.9%	15.7%	16.0%	16.6%	16.6%
Borrower Income > 100% and ≤ 120% AMI	11.6%	11.4%	11.5%	12.4%	12.6%	12.8%	12.6%	12.6%	12.4%	12.3%
Borrower Income > 120% AMI	33.8%	36.2%	31.3%	34.6%	35.7%	35.5%	35.9%	34.1%	31.2%	30.5%
Income Missing	0.2%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Definitions:

Low-income census tracts = Census tracts with median income ≤ 80% Area Median Income (AMI)

High-minority census tracts = Census tracts where (i) tract median income ≤ 100% Area Median Income (AMI); and (ii) minorities comprise at least 30 pecent of the tract population.

Source: FHFA's tabulation of Enterprises' data.

FHFA will continue to monitor this data and seek further input on the impact of this subgoal in developing the proposed rule on housing goals for 2022 and beyond.

Benchmark Levels for the Single-Family Housing Goals for 2021

The final rule sets the benchmark levels for each of the single-family housing goals and the subgoal for 2021 at the same levels that applied for 2018–2020. Based on the factors described in detail above and in the proposed rule, and after consideration of the comments received in response to the proposed rule, FHFA believes that extending these benchmark levels to 2021 will provide achievable yet challenging targets for the Enterprises.

V. Multifamily Housing Goals

This final rule also establishes the benchmark levels for the multifamily housing goals for 2021. FHFA considered the following six statutory factors as required by the Safety and Soundness Act in setting the benchmark levels for the multifamily housing goals:

1. National multifamily mortgage credit needs and the ability of the Enterprises to provide additional liquidity and stability for the multifamily mortgage market;

2. The performance and effort of the Enterprises in making mortgage credit available for multifamily housing in previous years;

3. The size of the multifamily mortgage market for housing affordable to low-income and very low-income families, including the size of the multifamily markets for housing of a smaller or limited size;

4. The ability of the Enterprises to lead the market in making multifamily mortgage credit available, especially for multifamily housing affordable to low-income and very low-income families;

5. The availability of public subsidies; and

6. The need to maintain the sound financial condition of the Enterprises.[29] FHFA has considered each of these statutory factors in setting the benchmark levels for each of the multifamily housing goals.

The multifamily housing goals are measured based on the total volume of affordable multifamily mortgage purchases rather than on a percentage of multifamily mortgage purchases. Another difference between the single-family and multifamily housing goals is that there are separate single-family housing goals for home purchase and refinancing mortgages, while the multifamily housing goals include all Enterprise multifamily mortgage purchases, regardless of the purpose of the loan.

Performance on the multifamily housing goals is measured solely against a benchmark level, without any retrospective market measure. The absence of a retrospective market measure for the multifamily housing goals results, in part, from the lack of comprehensive data about the multifamily mortgage market. Unlike the single-family mortgage market, for which HMDA data provide a reasonably comprehensive dataset about single-family mortgage originations each year, the multifamily mortgage market (including the affordable multifamily mortgage market segment) has no comparable source of data.

The lack of comprehensive data for the multifamily mortgage market is even more acute with respect to the segments of the market that are targeted to low-income families, defined as families with incomes at or below 80 percent of AMI, and very low-income families, defined as families with incomes at or below 50 percent of AMI. As required by the Safety and Soundness Act, FHFA determines affordability of multifamily units based on a unit's rent and utility expenses not exceeding 30 percent of the area median income standard for low- and very low-income families.[30]

[29] 12 U.S.C. 4563(a)(4).

[30] 12 U.S.C. 4563(c).

Current Economic Conditions, National Housing Needs, and Recent Market Developments

The pandemic has impacted the multifamily affordable housing market and renters across the country. In February 2020, the multifamily originations market appeared as strong as it had been in 2019. However, by November 2020, MBA released a forecast projecting a 21 percent decline in multifamily originations from $364 billion in 2019 to $288 billion in 2020. MBA noted that ''through the first three quarters of 2020, multifamily sales volume was 41 percent lower than a year earlier, with multifamily originations down just 17 percent. The strong level of refinance activity of multifamily mortgages, particularly into Fannie Mae, Freddie Mac and FHA loans, is lifting overall originations activity from where it might otherwise be, and is driving differences between property types and capital sources.'' [31] MBA anticipated a partial recovery, with total multifamily mortgage originations projected to be $305 billion in 2021, higher than the projected volume for 2020 but still well below the 2019 level.

The public subsidies made available since March, which have helped the affordable housing sector and low-income households to some degree, are temporary and some have expired. The CARES Act provided supplemental unemployment benefits to help people pay their rent, which expired on July 31. In September, the Center for Disease Control issued an eviction moratorium, which ends on December 31, 2020. This action will help many renters stay in their homes, but without additional support for owners of multifamily buildings, landlords may be in a difficult financial position. There are bills under consideration to provide or extend additional support, but there is considerable uncertainty over the nature of this support.

FHFA has taken numerous actions to support the market and provide relief to renters since March 2020. For example, on March 23, FHFA provided forbearance to Enterprise-backed multifamily property owners on the condition that they suspend eviction of tenants struggling to pay rent due to the pandemic.[32] On June 29, FHFA announced extended forbearance agreements for multifamily property owners with existing forbearance agreements for up to three months, for a total forbearance of up to six months.[33] While mortgage payments are in forbearance, the landlord must suspend all evictions for renters unable to pay rent, along with enhanced protections for renters. On May 4, FHFA directed the Enterprises to publish online multifamily property lookup tools so that tenants can determine if the multifamily property in which they reside has an Enterprise-backed mortgage and falls under the CARES Act's 120-day eviction moratorium.[34] On August 6, FHFA announced that multifamily property owners in new forbearance agreements must inform tenants in writing about tenant protections, and that the Enterprises are improving their online multifamily property loan look-up tools.[35]

While the multifamily market has generally performed well during the pandemic, the market is characterized by a number of trends that have continued for multiple years, including the continued market focus on the construction of high-end, luxury apartments and the steady decline in the number of low-cost rentals. Nationwide, there has been a loss of four million low-cost rental units (rents less than $800 per month) since 2011.[36] There is a particularly acute shortfall of affordable units for extremely low-income renters (earning up to 30 percent of AMI) that was acknowledged as a persistent problem even before the COVID–19 pandemic began. For instance, as a recent report from the Department of Housing and Urban Development notes, it is increasingly difficult for housing developers and landlords to provide decent rental housing at rates that are affordable to American working families and more vulnerable households.[37] In 2017, only 59 affordable units were available per 100 very low-income renter households, and only 40 affordable units were available per 100 extremely low-income renter households.[38]

The full impact on the stock of low-cost rental units in the wake of the COVID–19 pandemic and broader economic downturn is not yet known. According to a survey in May 2020 of multifamily construction firms, 53 percent of firms experienced construction delays due to issues like permitting or construction moratoriums.[39] In the short-term, the pandemic might exacerbate the already-constrained supply as lower housing mobility rates limit the number of low-cost options for renters as current residents stay in place. A study using the 2018 American Community Survey data showed demand for low-cost units was already high while availability was extremely low.[40] Additional tightening at the low end of the market could pose significant affordability challenges to low- and middle-income renters.

Further, renters living in single-family homes and smaller multifamily buildings, along with the owners of those properties, are more likely to be negatively affected by the pandemic economic downturn. According to one study, over half of renters with at-risk wages due to the pandemic live in single-family rental housing with 1–4 units.[41] The same study estimates that nearly 20 percent of renters in small multifamily properties (5 to 50 units) may have difficulty paying full rent if at-risk wages are lost, compared to 12 percent of renters living in larger multifamily properties. This could, in turn, make it difficult for the owners of those properties, who are more likely to be small, individual investors, to remain financially stable through the pandemic.[42]

[31] *See https://www.mba.org/2020-press-releases/november/mba-forecast-commercial/multifamily-lending-to-fall-34-percent-in-2020.*

[32] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Moves-to-Provide-Eviction-Suspension-Relief-for-Renters-in-Multifamily-Properties.aspx.*

[33] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Provides-Tenant-Protections.aspx.*

[34] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Tools-to-Help-Renters-Find-Out-if-They-are-Protected-from-Eviction.aspx.*

[35] *See https://www.fhfa.gov/Media/PublicAffairs/Pages/Multifamily-Property-Owners-in-Forbearance-Now-Required-to-Inform-Tenants-of-Eviction-Suspension-and-Tenant-Protections.aspx.*

[36] Joint Center for Housing Studies of Harvard University, ''The State of the Nation's Housing 2019,'' available at *https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf.*

[37] U.S. Department of Housing and Urban Development, ''Worst Case Housing Needs: 2019 Report to Congress,'' June 19, 2020, accessed on 7/10/2020 at *https://www.huduser.gov/PORTAL/sites/default/files/pdf/worst-case-housing-needs-2020.pdf.*

[38] A unit is considered affordable if gross rent (rent and utilities) does not exceed 30 percent of renter income, for purposes of the HUD report.

[39] National Multifamily Housing Council, 2020 NMHC Construction Survey, available at *https://www.nmhc.org/research-insight/2020-nmhc-construction-survey/2020-nmhc-construction-survey-round-3/.*

[40] Joint Center for Housing Studies of Harvard University, ''The Continuing Decline of Low-Cost Rentals,'' May 11, 2020, accessed on 6/30/2020 at *https://www.jchs.harvard.edu/blog/the-continuing-decline-of-low-cost-rentals/.*

[41] ''At-risk wages'' are wages associated with ''At Risk Jobs,'' which are defined as those in services, retail, recreation, transportation and travel, and oil extraction. Joint Center for Housing Studies of Harvard University, ''Pandemic Will Worsen Housing Affordability for Service, Retail, and Transportation Workers,'' March 30, 2020, accessed on 6/30/2020 at *https://www.jchs.harvard.edu/blog/pandemic-will-worsen-housing-affordability-for-service-retail-and-transportation-workers/.*

[42] Joint Center for Housing Studies of Harvard University, ''COVID–19 Rent Shortfalls in Small

Continued

Conservatorship Scorecard Caps

Enterprise performance on the multifamily housing goals is heavily influenced by the caps on total multifamily business that FHFA has established as conservator of the Enterprises. The multifamily volume caps are intended to focus on FHFA's other conservatorship goal: Maintaining the presence of the Enterprises as a backstop for the multifamily finance market while not impeding the participation of private capital. The multifamily volume caps reflect the share of the multifamily origination market that FHFA has determined to be an appropriate market share for the Enterprises. The multifamily volume caps are intended to prevent the Enterprises from crowding out capital sources and restrain the rapid growth of the Enterprises' multifamily businesses that started in 2011.

While the conservatorship scorecard caps, including the target level for mission-driven loans, play a significant role in determining the multifamily purchase volume and affordable share for the Enterprise multifamily businesses, the multifamily housing goals target specific segments as required by the Safety and Soundness Act. FHFA will continue to ensure that the conservatorship scorecard caps and target levels for mission-driven loans for 2021 are aligned with the 2021 Enterprise housing goals.

Past Performance on the Multifamily Low-Income Housing Goal

The multifamily low-income housing goal is based on the total number of rental units in multifamily properties financed by mortgages purchased by the Enterprises that are affordable to low-income families, defined as families with incomes less than or equal to 80 percent of the area median income. Since 2016, each Enterprise has performed significantly above the benchmark level for the multifamily low-income housing goal each year.

Table 9: Low-Income Multifamily Goal

	Performance							
Year	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Fannie Mae Benchmark	285,000	265,000	250,000	300,000	300,000	300,000	315,000	315,000
Freddie Mac Benchmark	225,000	215,000	200,000	300,000	300,000	300,000	315,000	315,000
Fannie Mae Performance								
Low-Income Multifamily Units	375,924	326,597	262,050	307,510	352,368	401,145	421,813	385,763
Total Multifamily Units	501,256	430,751	372,072	468,798	552,785	630,868	628,230	596,137
Low-Income % Total	75.0%	75.8%	70.4%	65.6%	63.7%	63.6%	67.1%	64.7%
Freddie Mac Performance								
Low-Income Multifamily Units	298,529	254,628	273,434	379,042	406,958	408,096	474,062	455,451
Total Multifamily Units	377,522	341,490	366,377	514,275	597,399	630,037	695,587	661,417
Low-Income % of Total Units	79.1%	74.6%	74.6%	73.7%	68.1%	64.8%	68.2%	68.9%

Past Performance on the Multifamily Very Low-Income Housing Subgoal

The multifamily very low-income housing subgoal includes units affordable to very low-income families, defined as families with incomes no greater than 50 percent of AMI. Both Enterprises have surpassed the benchmark level for the multifamily very low-income housing subgoal by a significant margin in recent years.

Table 10: Very Low-Income Multifamily Goal

	Performance							
Year	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Fannie Mae Benchmark	80,000	70,000	60,000	60,000	60,000	60,000	60,000	60,000
Freddie Mac Benchmark	59,000	50,000	40,000	60,000	60,000	60,000	60,000	60,000
Fannie Mae Performance								
Very Low-Income Multifamily Units	108,878	78,071	60,542	69,078	65,910	82,674	80,891	79,649
Total Multifamily Units	501,256	430,751	372,072	468,798	552,785	630,868	628,230	596,137
Very Low-Income % of Total Units	21.7%	18.1%	16.3%	14.7%	11.9%	13.1%	12.9%	13.4%
Freddie Mac Performance								
Very Low-Income Multifamily Units	60,084	56,742	48,689	76,935	73,030	92,274	105,612	112,773
Total Home Purchase Mortgages	377,522	341,490	366,377	514,275	597,399	630,037	695,587	661,417
Very Low-Income % of Total Units	15.9%	16.6%	13.3%	15.0%	12.2%	14.6%	15.2%	17.1%

Past Performance on the Small Multifamily Low-Income Housing Subgoal

The small multifamily low-income housing subgoal is based on the total number of units in small multifamily properties financed by mortgages purchased by the Enterprises that are affordable to low-income families, defined as families with incomes less than or equal to 80 percent of the AMI. A small multifamily property is defined as a property with 5 to 50 units. Both Enterprises have met the small multifamily low-income housing subgoal each year in recent years.

Buildings,'' May 26, 2020, accessed on 6/30/2020 at *https://www.jchs.harvard.edu/blog/covid-19-rent-shortfalls-in-small-buildings/.*

Table 11: Small (5-50) Low-Income Multifamily Goal

	Performance							
Year	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
Small Low-Income Multifamily Benchmark				6,000	8,000	10,000	10,000	10,000
Fannie Mae Performance								
Small Low-Income Multifamily Units	16,801	13,827	6,732	6,731	9,312	12,043	11,890	17,832
Total Small Multifamily Units	26,479	21,764	11,880	11,198	15,211	20,375	17,894	25,565
Low-Income % of Total Small Multifamily Units	63.5%	63.5%	56.7%	60.1%	61.2%	59.1%	66.4%	69.8%
Freddie Mac Performance								
Small Low-Income Multifamily Units	829	1,128	2,076	12,801	22,101	39,473	39,353	34,847
Total Small Multifamily Units	2,194	2,375	4,659	21,246	33,984	55,116	53,893	46,879
Low-Income % of Total Small Multifamily Units	37.8%	47.5%	44.6%	60.3%	65.0%	71.6%	73.0%	74.3%

Comments on Multifamily Housing Goals

A number of comment letters expressed general support for maintaining the current levels of the multifamily housing goals. Three comment letters addressed multifamily issues in detail.

One comment letter from a policy advocacy organization suggested that FHFA should raise the multifamily benchmarks in light of recent performance but did not specify new benchmark levels. Multifamily originations have been adversely affected by the pandemic with current market forecasts projecting a steep decline for 2020 and a partial recovery in 2021, supporting FHFA's decision to maintain the current benchmark levels for 2021.

A second comment letter on multifamily issues from a trade association expressed concerns about the impact on the Enterprises of multifamily property owners struggling to stay viable when renters are unable to pay rent. FHFA's COVID–19 policies are designed to respond to and support both renters and property owners. FHFA is monitoring multifamily loan performance in light of these circumstances and will continue to take action or change policies as appropriate.

Another letter from a trade association encouraged FHFA to allow USDA section 538 and section 515 loans to receive housing goals credit, in order to expand the secondary market for these rural programs. The current housing goals regulation permits FHFA to determine that multifamily mortgages under programs involving Federal guarantees or insurance should be counted if the financing needs addressed by the particular mortgage program are not well served.[43] In light of this comment, FHFA will explore this issue and evaluate possible action under the current regulation.

Benchmark Levels for the Multifamily Housing Goals for 2021

The final rule sets the benchmark levels for each of the multifamily housing goal and subgoals for 2021 at the same levels as 2018–2020. As described above, FHFA considered the statutory factors including current economic conditions, national housing needs, recent market developments, the most recent conservatorship scorecard cap levels, and the past performance of the Enterprises in meeting each goal.

The Enterprises are showing strong goals performance in 2020 despite the COVID–19 disruption, and FHFA will continue to monitor their progress throughout the year. Taking the Enterprises' past performance and the projected partial recovery in 2021 into account, FHFA believes that maintaining the current benchmark levels will be sufficiently challenging for the Enterprises while also providing adequate support to the affordable housing market segment.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) requires that regulations involving the collection of information receive clearance from the Office of Management and Budget (OMB). The final rule does not contain any information collection requirement that would require OMB approval under the Paperwork Reduction Act. Therefore, FHFA has not submitted the rule to OMB for review.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. Such an analysis need not be undertaken if the agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b). FHFA has considered the impact of the final rule under the Regulatory Flexibility Act. The General Counsel of FHFA certifies that the rule will not have a significant economic impact on a substantial number of small entities because the regulation applies only to Fannie Mae and Freddie Mac, which are not small entities for purposes of the Regulatory Flexibility Act.

VIII. Congressional Review Act

In accordance with the Congressional Review Act (5 U.S.C. 801 *et seq.*), FHFA has determined that this final rule is a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 12 CFR Part 1282

Mortgages, Reporting and recordkeeping requirements.

Authority and Issuance

For the reasons stated in the preamble, under the authority of 12 U.S.C. 4511, 4513, and 4526, FHFA amends part 1282 of Title 12 of the Code of Federal Regulations as follows:

PART 1282—ENTERPRISE HOUSING GOALS AND MISSION

■ 1. The authority citation for part 1282 continues to read as follows:

Authority: 12 U.S.C. 4501, 4502, 4511, 4513, 4526, 4561–4566.

■ 2. Section 1282.12 is amended by revising paragraphs (c)(2), (d)(2), (f)(2), and (g)(2) to read as follows:

§ 1282.12 Single-family housing goals.

* * * * *

(c) * * *

(2) The benchmark level, which for 2021 shall be 24 percent of the total

[43] *See* 12 CFR 1282.16(b)(3).

number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(d) * * *

(2) The benchmark level, which for 2021 shall be 6 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

* * * * *

(f) * * *

(2) The benchmark level, which for 2021 shall be 14 percent of the total number of purchase money mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

(g) * * *

(2) The benchmark level, which for 2021 shall be 21 percent of the total number of refinancing mortgages purchased by that Enterprise in each year that finance owner-occupied single-family properties.

■ 3. Section 1282.13 is amended by revising paragraphs (b) through (d) to read as follows:

§ 1282.13 Multifamily special affordable housing goal and subgoals.

* * * * *

(b) *Multifamily low-income housing goal.* The benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to low-income families shall be at least 315,000 dwelling units affordable to low-income families in multifamily residential housing financed by mortgages purchased by the Enterprise for 2021.

(c) *Multifamily very low-income housing subgoal.* The benchmark level for each Enterprise's purchases of mortgages on multifamily residential housing affordable to very low-income families shall be at least 60,000 dwelling units affordable to very low-income families in multifamily residential housing financed by mortgages purchased by the Enterprise for 2021.

(d) *Small multifamily low-income housing subgoal.* The benchmark level for each Enterprise's purchases of mortgages on small multifamily properties affordable to low-income families shall be at least 10,000 dwelling units affordable to low-income families in small multifamily properties financed by mortgages purchased by the Enterprise for 2021.

Mark A. Calabria,

Director, Federal Housing Finance Agency.

[FR Doc. 2020–28083 Filed 12–18–20; 8:45 am]

BILLING CODE 8070–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0689; Product Identifier 2020–NM–060–AD; Amendment 39–21359; AD 2020–26–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2013–18–08, which applied to certain The Boeing Company Model 737–200, –200C, –300, –400, and –500 series airplanes. AD 2013–18–08 required repetitive inspections for cracking of certain skin panels of the fuselage, and of the fuselage skin along certain chem-milled lines, and corrective actions if necessary. AD 2013–18–08 also included a terminating action for the repetitive inspections of certain areas. This AD retains those actions, expands the nondestructive inspection (NDI) area, and adds airplanes to the applicability. This AD was prompted by reports of additional cracking in certain horizontal and vertical chem-milled step locations outside of those identified in AD 2013–18–08. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 25, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 25, 2021.

ADDRESSES: For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; telephone 562–797–1717; internet *https://www.myboeingfleet.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0689.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0689; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: James Guo, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5357; fax: 562–627–5210; email: *james.guo@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2013–18–08, Amendment 39–17581 (78 FR 60660, October 2, 2013) (AD 2013–18–08). AD 2013–18–08 applied to certain The Boeing Company Model 737–200, –200C, –300, –400, and –500 series airplanes. The NPRM published in the **Federal Register** on August 17, 2020 (85 FR 49978). The NPRM was prompted by reports of additional cracking in certain horizontal and vertical chem-milled step locations outside of those identified in AD 2013–18–08. The NPRM proposed to continue to require repetitive inspections for cracking of the fuselage skin along certain chem-milled lines and applicable on-condition actions, and to expand the NDI area. The NPRM also proposed to continue to provide terminating action for repetitive inspections of certain modified or repaired areas. The NPRM also proposed to add airplanes to the applicability. The FAA is issuing this AD to address fatigue cracking of the skin panels, which could result in sudden fracture and failure of the skin panels of the fuselage, and consequent rapid decompression of the airplane.

Comments

The FAA gave the public the opportunity to participate in developing this AD. The following presents the comments received on the NPRM and the FAA's response to each comment. An individual had no objection to the NPRM.

Effect of Winglets on Accomplishment of the Proposed Actions

Aviation Partners Boeing stated that accomplishing Supplemental Type Certificate (STC) ST01219SE does not

affect compliance with the proposed actions.

The FAA agrees with the commenter. Paragraph (c) of the proposed AD has been redesignated as paragraph (c)(1) of this AD, and paragraph (c)(2) has been added to this AD to state that installation of STC ST01219SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01219SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirement of 14 CFR 39.17.

Request To Revise Certain Language in the Preamble

Boeing asked that the FAA change the language under the section titled ''Actions Since AD 2013–18–08 was Issued.'' Boeing asked that the FAA refer to the ''NDI inspection'' instead of the ''repetitive inspection.''

Boeing also asked that the FAA change the language under the section titled ''Proposed AD Requirements.'' Boeing asked that the FAA refer to the expanded area for the existing NDI inspection instead of referring to the expanded area for the existing inspection.

Boeing requested these changes because Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, expands only the initial and repetitive NDI areas and not the detailed visual inspection area.

The FAA acknowledges that the expanded inspections are only to the NDI area. Those sections of the preamble do not reappear in the final rule; however, the FAA clarified that the NDI area is expanded in the Summary and Discussion sections.

Conclusion

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously, and minor editorial changes. The FAA has determined that these minor changes:

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

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020. This service information describes procedures for repetitive detailed and non-destructive tests (NDTs) (including external medium frequency eddy current (MFEC), external magneto optical imaging (MOI), external c-scan, external sliding probe, external high frequency eddy current (HFEC), external low frequency eddy current (LFEC), internal ultrasonic phased array (UTPA), or internal ultrasonic); inspections for cracking of the fuselage skin along all horizontal and vertical chem-milled locations with a history of cracking between stations (STAs) 259.5 and 1016; and applicable on-condition actions. On-condition actions include repair; LFEC inspections of certain repairs for cracking; detailed inspections of certain repairs for cracking and loose, missing, or damaged fasteners; replacement of loose, missing, or damaged fasteners; and preventative modifications. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

The FAA estimates that this AD affects 141 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product
Inspections	Up to 165 work-hours × $85 per hour = Up to $14,025 per inspection cycle.	$0	Up to $1,977,525 per inspection cycle.

The FAA estimates the following costs to do any necessary corrective actions required based on the results of the inspections. The FAA has no way of determining the number of aircraft that might need these corrective actions:

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
Up to 185 work-hours × $85 per hour = Up to $15,725.	$*	Up to $15,725.

*The FAA has received no definitive data that enables providing parts costs for the on-condition actions specified in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2013–18–08, Amendment 39–17581 (78 FR 60660, October 2, 2013), and

■ b. Adding the following new AD:

2020–26–04 The Boeing Company: Amendment 39–21359; Docket No. FAA–2020–0689; Product Identifier 2020–NM–060–AD.

(a) Effective Date

This AD is effective January 25, 2021.

(b) Affected ADs

This AD replaces AD 2013–18–08, Amendment 39–17581 (78 FR 60660, October 2, 2013) (AD 2013–18–08).

(c) Applicability

(1) This AD applies to The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020.

(2) Installation of Supplemental Type Certificate (STC) ST01219SE does not affect the ability to accomplish the actions required by this AD. Therefore, for airplanes on which STC ST01219SE is installed, a ''change in product'' alternative method of compliance (AMOC) approval request is not necessary to comply with the requirements of 14 CFR 39.17.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by reports of additional cracking in the horizontal and vertical chem-milled step locations outside of those identified in AD 2013–18–08. The FAA is issuing this AD to address fatigue cracking of the skin panels, which could result in sudden fracture and failure of the skin panels of the fuselage, and consequent rapid decompression of the airplane.

(f) Compliance

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

(g) Required Actions for Group 1 Through 25 Airplanes

For airplanes identified as Group 1 through 25 in Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, except as specified in paragraph (h) of this AD: At the applicable times specified in paragraph 1.E., ''Compliance,'' of Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, do all applicable actions identified as ''RC'' (required for compliance) in, and in accordance with, the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020. Actions identified as terminating action in Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, terminate the applicable required actions of this AD, provided the terminating action is done in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, uses the phrase ''the original issue date of this service bulletin,'' this AD requires using ''the effective date of this AD.''

(2) Where Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, specifies contacting Boeing for repair instructions, this AD requires doing the repair before further flight using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(i) Required Actions for Group 26 Airplanes

For airplanes identified as Group 26 in Alert Service Bulletin 737–53A1346, dated March 27, 2020: Within 120 days after the effective date of this AD, inspect the fuselage skin along certain chem-milled lines for cracks, using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: *9-ANM-LAACO-AMOC-Requests@faa.gov.*

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

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

(4) AMOCs approved previously for AD 2013–18–08 are approved as AMOCs for the corresponding provisions of Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020, which are required by paragraph (g) of this AD.

(5) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (j)(5)(i) and (ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. If a step or substep is labeled ''RC Exempt,'' then the RC requirement is removed from that step or substep. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

(ii) Steps not labeled as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the RC steps, including substeps and identified figures, can still be done as specified, and the airplane can be put back in an airworthy condition.

(k) Related Information

For more information about this AD, contact James Guo, Aerospace Engineer, Airframe Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 562–627–5357; fax: 562–627–5210; email: *james.guo@faa.gov.*

(l) Material Incorporated by Reference

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

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

(i) Boeing Alert Service Bulletin 737–53A1346, dated March 27, 2020.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

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

Issued on December 7, 2020.

Ross Landes,

Deputy Director for Regulatory Operations, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28029 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0729; Project Identifier AD–2020–00620–E; Amendment 39–21355; AD 2020–25–13]

RIN 2120–AA64

Airworthiness Directives; CFM International, S.A. Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain CFM International, S.A. (CFM) LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, LEAP–1A35A model turbofan engines. This AD was prompted by an investigation by CFM that showed a subsurface anomaly in a part manufactured using the same material as the LEAP–1A high-pressure turbine (HPT) stage 2 disk. This AD requires an ultrasonic inspection (UI) of the HPT stage 2 disk and replacement of any HPT stage 2 disk that fails the UI with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 25, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 25, 2021.

ADDRESSES: For service information identified in this final rule, contact CFM International, S.A., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: (877) 432–3272; email: *fleetsupport@ge.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759. It is also available at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0729.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0729; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Christopher McGuire, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7120; fax: (781) 238–7199; email: *Chris.McGuire@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain CFM International, S.A. LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, LEAP–1A35A model turbofan engines. The NPRM published in the **Federal Register** on July 24, 2020 (85 FR 44798). The NPRM was prompted by an investigation by CFM that showed a subsurface anomaly in a part manufactured using the same material as the LEAP–1A HPT stage 2 disk. In the NPRM, the FAA proposed to require an UI of the HPT stage 2 disk and replacement of any HPT stage 2 disk that fails the UI with a part eligible for installation. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from one commenter, the Air Line Pilots Association, International. The commenter supported the NPRM without change.

Conclusion

The FAA reviewed the relevant data, considered the comment received, and determined that air safety requires adopting the AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, this AD is adopted as proposed in the NPRM.

Related Service Information Under 1 CFR part 51

The FAA reviewed CFM Service Bulletin LEAP–1A–72–00–0405–01A–930A–D, Issue 001, dated March 5, 2020. The Service Bulletin specifies procedures for performing an UI of the HPT stage 2 disk. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Costs of Compliance

The FAA estimates that this AD affects 148 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
UI of HPT stage 2 disk	8 work-hours × $85 per hour = $680	$0	$680	$100,640

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace HPT stage 2 disk in case of failed inspection	.25 work-hours × $85 per hour = $21.25	$286,000	$286,021.25

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–25–13 CFM International, S.A.: Amendment 39–21355; Docket No. FAA–2020–0729; Project Identifier AD–2020–00620–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 25, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to CFM International, S.A. (CFM) LEAP–1A23, LEAP–1A24, LEAP–1A24E1, LEAP–1A26, LEAP–1A26CJ, LEAP–1A26E1, LEAP–1A29, LEAP–1A29CJ, LEAP–1A30, LEAP–1A32, LEAP–1A33, LEAP–1A33B2, LEAP–1A35A model turbofan engines with a high-pressure turbine (HPT) stage 2 disk, part number (P/N) 2466M52G03 or P/N 2788M26G01, and with a serial number listed in Table 1 of CFM Service Bulletin (SB) LEAP–1A–72–00–0405–01A–930A–D, Issue 001, dated March 5, 2020, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by an investigation by CFM that discovered a subsurface anomaly in a part manufactured from the same material used to manufacture the LEAP–1A HPT stage 2 disk. The FAA is issuing this AD to prevent failure of the LEAP–1A HPT stage 2 disk. The unsafe condition, if not addressed, could result in uncontained release of the HPT stage 2 disk, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) At the next piece part exposure after the effective date of this AD, perform an ultrasonic inspection of the HPT stage 2 disk in accordance with the Accomplishment Instructions, paragraph 5.A.(1), of CFM SB LEAP–1A–72–00–0405–01A–930A–D, Issue 001, dated March 5, 2020.

(2) Replace any disk that fails the inspection required by paragraph (g)(1) of this AD with a part eligible for installation.

(h) Definition

For the purpose of this AD, a part eligible for installation is an HPT stage 2 disk not affected by this AD, or an HPT stage 2 disk that has been inspected in accordance with the Accomplishment Instructions, paragraph 5.A.(1), of CFM SB LEAP–1A–72–00–0405–01A–930A–D, Issue 001, dated March 5, 2020, and is not rejected by the inspection limits as specified in the service information.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

For more information about this AD, contact Christopher McGuire, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7120; fax: (781) 238–7199; email: *Chris.McGuire@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) CFM Service Bulletin LEAP–1A–72–00–0405–01A–930A–D, Issue 001, dated March 5, 2020.

(ii) [Reserved]

(3) For CFM service information identified in this AD, contact CFM International, S.A., Aviation Operations Center, 1 Neumann Way, M/D Room 285, Cincinnati, OH 45125; phone: (877) 432–3272; email: *fleetsupport@ge.com.*

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For

information on the availability of this material at the FAA, call (781) 238–7759.

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

Issued on December 4, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27985 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0778; Product Identifier 2020–NM–097–AD; Amendment 39–21362; AD 2020–26–07]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2019–23–05, which applied to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. AD 2019–23–05 required revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. This AD continues to require revising the existing maintenance or inspection program, as applicable, to incorporate those new or more restrictive airworthiness limitations, and also requires revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations; as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 25, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 25, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain other publication listed in this AD as of January 13, 2020 (84 FR 67169, December 9, 2019).

ADDRESSES: For EASA material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; phone: +49 221 8999 000; email: *ADs@easa.europa.eu;* internet: *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* For Dassault service information identified in this final rule, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; phone: 201–440–6700; internet: *https://www.dassaultfalcon.com.* You may view this IBR material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0778.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0778; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3226; email: *tom.rodriguez@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0115, dated May 20, 2020 (EASA AD 2020–0115) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Dassault Aviation Model MYSTERE–FALCON 900 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019) (AD 2019–23–05). AD 2019–23–05 applied to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. The NPRM published in the **Federal Register** on August 19, 2020 (85 FR 50970). The NPRM was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The NPRM proposed to continue to require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The NPRM also proposed to require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, as specified in a EASA AD.

The FAA is issuing this AD to address reduced structural integrity of the airplane. See the MCAI for additional background information.

Comments

The FAA gave the public the opportunity to participate in developing this final rule. The FAA has considered the comments received.

Support for the NPRM

Ian Reineck indicated support for the NPRM.

Request To Include Actions in the Cost Estimate

Ian Reineck requested that the cost estimate be revised to include structural upkeep per flight hours, rather than solely maintenance work hours. The commenter stated this is what determines the core functions inside aviation maintenance schedules. The commenter also stated this would be inclusive, regardless of operator, but still reflect the cost of an average operator's inspection through the quantity of accumulated flight time on the airplane. The commenter concluded that, if flight time is not presented in the inspection cost, it presents another problem: These aircraft may change ownership or operator-ship as they age.

The FAA infers that the commenter is requesting that the FAA include the costs in this AD for complying with the actions (*e.g.,* inspections) that are specified in the airworthiness limitations document referenced in EASA AD 2020–0115. The FAA disagrees because those actions are not directly required by this AD. Additionally, the FAA does not distribute the costs over time because the cost estimates have been

standardized to include the larger whole cost of the requirement, not the more uniform cost per flight hour, which the FAA has determined is best to inform the broadest user base. The cost information provided in this AD describes only the direct costs of the specific actions required by this AD. This AD requires only revising the existing maintenance or inspection program, as applicable, to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2020–0115, and provides a compliance time to phase in the initial actions. Section 91.403(c) of the Federal Aviation Regulations (14 CFR 91.403(c)) requires the actions once the maintenance or inspection program is changed. Therefore, we have not changed this final rule in this regard.

Conclusion

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

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

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0115 describes new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This AD also requires Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual, which the Director of the Federal Register approved for incorporation by reference as of January 13, 2020 (84 FR 67169, December 9, 2019).

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

Costs of Compliance

The FAA estimates that this AD affects 105 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD.

The FAA estimates the total cost per operator for the retained actions from AD 2019–23–05 to be $7,650 (90 work-hours × $85 per work-hour).

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the agency recognizes that this number may vary from operator to operator. In the past, the agency has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate.

The FAA estimates the total cost per operator for the new actions to be $7,650 (90 work-hours × $85 per work-hour).

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019), and

■ b. Adding the following new AD:

2020–26–07 Dassault Aviation: Amendment 39–21362; Docket No. FAA–2020–0778; Product Identifier 2020–NM–097–AD.

(a) Effective Date

This airworthiness directive (AD) is effective January 25, 2021.

(b) Affected ADs

(1) This AD replaces AD 2019–23–05, Amendment 39–19799 (84 FR 67169, December 9, 2019) (AD 2019–23–05).

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

(c) Applicability

This AD applies to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Reason

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Revision of Existing Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (i) of AD 2019–23–05, with no changes. Within 90 days after January 13, 2020 (the effective date of AD 2019–23–05), revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Chapter 5–40,

Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual. The initial compliance times for doing the tasks are at the times specified in Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual, or within 90 days after January 13, 2020, whichever occurs later. The term ''LDG'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total airplane landings. The term ''FH'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total flight hours. The term ''FC'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means total flight cycles. The term ''M'' in the ''First Inspection'' column of any table in the service information specified in this paragraph means months since the date of issuance of the original airworthiness certificate or the date of issuance of the original export certificate of airworthiness. Accomplishing the maintenance or inspection program revision required by paragraph (i) of this AD terminates the requirements of this paragraph.

(h) Retained Restrictions on Alternative Actions or Intervals, With a New Exception

This paragraph restates the requirements of paragraph (h) of AD 2019–23–05, with a new exception. Except as required by paragraph (i) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions or intervals are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (m)(1) of this AD.

(i) New Maintenance or Inspection Program Revision

Except as specified in paragraph (j) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0115, dated May 20, 2020 (EASA AD 2020–0115). Accomplishing the maintenance or inspection program revision required by this paragraph terminates the requirements of paragraph (g) of this AD.

(j) Exceptions to EASA AD 2020–0115

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2020–0115 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2020–0115 specifies revising ''the approved AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, to incorporate the ''limitations, tasks and associated thresholds and intervals'' specified in paragraph (3) of EASA AD 2020–0115 within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2020–0115 is at the applicable ''associated thresholds'' specified in paragraph (3) of EASA AD 2020–0115, or within 90 days after the effective date of this AD, whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2020–0115 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2020–0115 does not apply to this AD.

(k) New Provisions for Alternative Actions or Intervals

After the maintenance or inspection program has been revised as required by paragraph (i) of this AD, no alternative actions (*e.g.,* inspections) or intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2020–0115.

(l) Terminating Actions for Certain Requirements in AD 2010–26–05

Accomplishing the actions required by paragraph (g) or (i) of this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, for Dassault Aviation Model MYSTERE–FALCON 900 airplanes.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Large Aircraft Section, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the Large Aircraft Section, International Validation Branch, send it to the attention of the person identified in paragraph (n) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(i) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(ii) AMOCs approved previously for AD 2019–23–05 are approved as AMOCs for the corresponding provisions of EASA AD 2020–0115 that are required by paragraph (i) of this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Dassault Aviation's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(n) Related Information

For more information about this AD, contact Tom Rodriguez, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3226; email: *tom.rodriguez@faa.gov.*

(o) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on January 25, 2021.

(i) European Union Aviation Safety Agency (EASA) AD 2020–0115, dated May 20, 2020.

(ii) [Reserved]

(4) The following service information was approved for IBR on January 13, 2020 (84 FR 67169, December 9, 2019).

(i) Chapter 5–40, Airworthiness Limitations, Revision 24, dated September 2018, of the Dassault Aviation Falcon 900 Maintenance Manual.

(ii) [Reserved]

(5) For EASA AD 2020–0115, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(6) For Dassault service information, contact Dassault Falcon Jet Corporation, Teterboro Airport, P.O. Box 2000, South Hackensack, NJ 07606; phone: 201–440–6700; internet: *https://www.dassaultfalcon.com.*

(7) You may view this material at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0778.

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

Issued on December 8, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–28012 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0877; Airspace Docket No. 20–ASW–8]

RIN 2120–AA66

Amendment of Class E Airspace; Mineola and Kenedy, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amends amend the Class E airspace extending upward from 700 feet above the surface at Mineola Wisener Field, Mineola, TX, and Kenedy Regional Airport, Kenedy, TX. This action is the result of airspace reviews caused by the decommissioning of the Quitman VHF and Three Rivers omnidirectional range (VOR) navigation aids as part of the VOR Minimum Operational Network (MON) Program. The name of the airport is also being updated to coincide with the FAA's aeronautical database.

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

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

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

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

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

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (85 FR 67324; October 22, 2020) for Docket No. FAA–2020–0877 to amend the Class E airspace extending upward from 700 feet above the surface at Mineola Wisener Field, Mineola, TX, and Kenedy Regional Airport, Kenedy, TX. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

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

Availability and Summary of Documents for Incorporation by Reference

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

The Rule

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

Amends the Class E airspace extending upward from 700 feet above the surface to within a 6-mile (decreased from a 6.3-mile) radius of Mineola Wisener Field, Mineola, TX;

And amends the Class E airspace extending upward from 700 feet above the surface at Kenedy Regional Airport, Kenedy, TX, by removing the Three Rivers VORTAC and the associated extensions from the airspace legal description; updates the name of the airport (previously Karnes County Airport) to coincide with the FAA's aeronautical database; and removes the city associated with the airport to comply with changes to FAA Order 7400.2M, Procedures for Handling Airspace Matters.

This action is the result of airspace reviews caused by the decommissioning of the Quitman and Three Rivers VORs, which provided navigation information for the instrument procedures these airports, as part of the VOR MON Program.

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

Regulatory Notices and Analyses

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

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

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

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

* * * * *

ASW TX E5 Mineola, TX [Amended]

Mineola Wisener Field, TX
(Lat. 32°40′36″ N, long. 95°30′39″ W)
Wood County Airport-Collins Field, TX
(Lat. 32°44′32″ N, long. 95°29′47″ W)

That airspace extending upward from 700 feet above the surface within a 6-mile radius of Mineola Wisener Field, and within a 6.4-mile radius of Wood County Airport-Collins Field, and within 3.8 miles east and 5.7 miles west of the 182° bearing from the Wood County Airport-Collins Field extending from the 6.4-mile radius of Wood County Airport-Collins Field to 21.3 miles south of Wood County Airport-Collins Field.

* * * * *

ASW TX E5 Kenedy, TX [Amended]

Kenedy Regional Airport, TX
(Lat. 28°49′30″ N, long. 97°51′56″ W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Kenedy Regional Airport.

Issued in Fort Worth, Texas, on December 15, 2020.

Martin A. Skinner,

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

[FR Doc. 2020–27923 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF JUSTICE

28 CFR Part 58

[Docket No: EOUST 105]

RIN 1105–AB30

Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11

AGENCY: Executive Office for United States Trustees (EOUST), Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice (Department), through its component, EOUST, issues this final rule (Rule) in accordance with Section 602 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The BAPCPA authorizes the Department to issue rules requiring uniform periodic reports (periodic reports) by debtors-in-possession or trustees in cases under chapter 11 of title 11. These periodic reports are to be used by all chapter 11 debtors who do not qualify as a ''small business debtor'' as defined in the Bankruptcy Code. This Rule benefits the public by streamlining existing periodic reporting requirements and eliminating more than 150 existing report forms.

DATES: This Rule is effective June 21, 2021.

ADDRESSES: EOUST, 441 G Street NW, Suite 6150, Washington, DC 20530.

FOR FURTHER INFORMATION CONTACT: Ramona D. Elliott, Deputy Director/General Counsel or Nan R. Eitel, Associate General Counsel for Chapter 11 Practice, at (202) 307–1399 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On November 10, 2014, the Department published a notice of proposed rulemaking (NPRM), Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed under Chapter 11 of Title 11. *See* 79 FR 66659. The comment period closed on January 9, 2015. In order to accommodate requests by certain commenters to meet with representatives of the EOUST to discuss the NPRM and to provide an opportunity for interested persons to express their views directly to EOUST officials, on February 17, 2016, the EOUST held a public hearing (Public Hearing) on the NPRM and reopened the comment period for an additional 85 days. *See* 80 FR 74739.

Interested persons were afforded the opportunity to participate in the rulemaking process through written comments to the NPRM during the two comment periods and through testimony at the Public Hearing. All public comments and the transcript of the Public Hearing are available at *www.regulations.gov,* and are discussed below. This Rule finalizes the NPRM, with changes discussed below, and implements the periodic reports to be used by debtors-in-possession or trustees in chapter 11 cases that do not qualify as ''small business debtors'' under the Bankruptcy Code.

Discussion of the Rule

The administration of chapter 11 bankruptcy cases is entrusted to the debtor-in-possession under 11 U.S.C. 1107(a) or, if circumstances warrant, a trustee appointed under 11 U.S.C. 1104. Debtors-in-possession and trustees must account for the receipt, administration, and disposition of all property; provide information concerning the estate and the estate's administration as parties in interest request; and file periodic reports and summaries of a debtor's business, including a statement of receipts and disbursements, and such other information as the United States Trustee or the United States Bankruptcy Court requires. 11 U.S.C. 1106(a)(1), 1107(a); Fed. R. Bankr. P. 2015 (a)(2), (a)(3). The monthly periodic report filed during the case prior to the confirmation of a plan of reorganization is generally known as the Monthly Operating Report (MOR). The quarterly periodic report filed subsequent to the confirmation of a plan of reorganization and before the case is closed is generally known as the Post-confirmation Report (PCR). There are currently more than 150 different local MOR and PCR forms in use around the country. This Rule would replace those local forms with a single MOR form (UST Form 11–MOR) and a single PCR form (UST Form 11–PCR) for use in all United States Trustee Program (USTP) jurisdictions. In doing so, the Rule strikes the best achievable practical balance between: (1) The reasonable needs of the public for information about the operational results of the Federal bankruptcy system; (2) economy, simplicity, and lack of undue burden on persons with a duty to file periodic reports; and (3) appropriate privacy concerns and safeguards.

Though debtors-in-possession and trustees may incur modest startup costs when adapting to the new forms, they will nonetheless benefit from the simplicity that the uniform forms offer and the elimination of a patchwork of localized requirements. Among other benefits, the Rule ensures that report filers need not change accounting systems when entering bankruptcy. And as noted below, the USTP will release

the new uniform report forms in a dynamic PDF-fillable format to ease the completion burdens on report filers, which may be retrieved from the USTP's website at no cost.

External stakeholders will likewise benefit from the consistency that uniform MOR and PCR forms offer. The information collected by UST Form 11–MOR will be used by the court, creditors, the United States Trustee and other parties in interest to evaluate a chapter 11 debtor's progress through the bankruptcy system, including the likelihood of a plan of reorganization being confirmed and whether the case is being prosecuted in good faith. *See* 11 U.S.C. 1129(a). Much of the information is already collected in the various existing local forms, but not in a uniform or consistent way that facilitates the national compilation of data essential to transparency and accountability.

In specific cases, information collected by UST Form 11–MOR will assist the court and parties in interest in ascertaining the following: (1) Whether there is a substantial or continuing loss to or diminution of the bankruptcy estate; (2) whether there is a reasonable likelihood of rehabilitation; (3) whether there exists gross mismanagement of the bankruptcy estate; (4) whether the debtor may have violated a cash collateral order or other order of the bankruptcy court; (5) whether the debtor is timely paying postpetition taxes; (6) whether the debtor is engaging in the unauthorized disposition of assets through sales or otherwise; (7) whether the debtor is complying with its obligation to maintain appropriate insurance so as to avoid a risk to the estate or to the public; (8) whether the debtor is complying with its obligation to pay fees due under 28 U.S.C. 1930; and, (9) in the case of an individual debtor, if applicable, whether the debtor is complying with his or her obligation to pay domestic support obligations. This information contributes to the decision by the United States Trustee, or by a creditor or other party in interest, to file a motion to dismiss the bankruptcy case, to seek conversion of the case to a case under chapter 7, or to seek an order directing the appointment of a chapter 11 trustee. The information in the periodic reports is also relevant evidence that the court may consider in determining whether to grant such relief. *See, e.g.,* 11 U.S.C. 1112(b)(4)(A), (B), (C), (D), (E), (I), (J), (K), and (P); and 1104(a). The court may also use this information when considering *sua sponte* action.

The information collected by UST Form 11–PCR will be used to evaluate whether a chapter 11 debtor is performing as anticipated under a confirmed plan. Specifically, information collected by UST Form 11–PCR will assist the court and parties in interest in ascertaining the following: (1) Whether a debtor is able to substantially consummate a confirmed plan; (2) whether the debtor is in material default under a confirmed plan; and (3) whether the debtor is paying fees required under 28 U.S.C. 1930. If the debtor fails to perform under the confirmed plan, the United States Trustee, creditors, or other parties in interest may bring an appropriate motion to dismiss the case, revoke a confirmed plan, or convert the case to a case under chapter 7. *See* 11 U.S.C. 1112(b)(4)(K), (M), and (N); 11 U.S.C. 1144.

The periodic reports include sufficient information to inform creditors and other interested parties of the debtor's financial affairs, but are simple enough to provide ready, meaningful access to the information. Moreover, the periodic reports accomplish the goals of uniformity and transparency regarding a debtor's financial condition and business activities.

The periodic reports are uniform and will be filed as ''smart forms'' with the United States Bankruptcy Court in which the chapter 11 case is pending via the court's Case Management/Electronic Case Filing System (CM/ECF). A ''smart form'' is a document that is data-embedded. When the document is saved into the industry standard Portable Document Format (PDF), stored data tags are then available for extraction and searching. In contrast, when a form is not data-embedded, the PDF is simply an image of the form, and the data is not uniformly available for searching or extraction. The data-embedded form builds upon the existing Adobe PDF/A standards (Versions 1.4–1.7). Once the periodic reports are finalized, the current data schema (DTD) will be found on *www.justice.gov/ust.* Once the periodic reports are finalized, debtors-in-possession, chapter 11 trustees, and members of the public may obtain blank ''smart form'' periodic reports from the USTP website at *www.justice.gov/ust* or from their respective vendors of case management software.

Once filed with a bankruptcy court, the periodic reports will be available to the general public at the office of the clerk of the United States Bankruptcy Court where the case is pending during the hours established by the bankruptcy clerk of court. Members of the public should contact the clerk's office of individual bankruptcy courts to obtain information about the policies and procedures for inspection of periodic reports filed in any particular case. Periodic reports filed in cases are also available through the internet by accessing the website for the Administrative Office of the United States Courts known as Public Access to Court Electronic Records (PACER) at *www.pacer.psc.uscourts.gov.* In order to access court records through PACER, users must register and obtain a user name and password. In addition, users must pay a fee for obtaining records through PACER.

Finally, the promulgation of the periodic reports accomplishes Congress's directive that the Department issue uniform forms for periodic reports for debtors-in-possession and chapter 11 trustees. The forms will also assist policy-makers, scholars, and the public in better understanding the bankruptcy system. Instead of many different versions of the periodic reports, debtors-in-possession and chapter 11 trustees will use the same two forms. The consistency and uniformity of the periodic report forms will also assist the public, creditors and other parties-in-interest in understanding the administration of chapter 11 bankruptcy cases, especially when such parties are located in a different region or jurisdiction from where the bankruptcy case is located. Scholars and members of the public may also be able to obtain aggregate data with the necessary software. Uniformity and consistency in the information collected may also facilitate national aggregation, which will assist Congress in its efforts to analyze bankruptcy trends and make policy decisions, without imposing significant additional burdens upon trustees and debtors-in-possession.

Discussion of Public Comments

The EOUST received nine public submissions in response to the first public comment period on the NPRM and three public comments in response to the second public comment period on the NPRM. The EOUST heard testimony of five witnesses at the Public Hearing. The EOUST considered all of the comments and the testimony of the witnesses, and in response, the EOUST has modified the Rule. These modifications include clarifying, revising, or expanding various provisions, requiring the submission of three standard financial statements (non-individual debtors only), and making technical edits. In addition, the EOUST has modified the periodic reports and instructions. Some changes were made to conform the forms and instructions to the Rule modifications

and other changes were made to clarify the forms and instructions. Summaries of the comments and the EOUST's responses are discussed below.

A. General Comments

1. Mandatory Information v. Supporting Documentation

Comment: The commenters expressed divergent views regarding whether the Rule requires report filers to provide too little or too much information on UST Form 11–MOR. The tension, in this regard, was between collecting the minimum information required by the statute and collecting more comprehensive business information than the NPRM proposed.

For example, one commenter stated that the MOR should contain information similar to that required by the Securities and Exchange Commission (SEC) for publicly traded companies. The commenter further advocated that the supporting documentation listed in section 58.8(d)(1) through (10) of the NPRM should be mandatory in any case with assets exceeding $100 million. The NPRM identified:

(1) A statement of cash receipts and disbursements;

(2) A balance sheet;

(3) A profit and loss statement;

(4) An aged summary of accounts receivable;

(5) An aged summary schedule of postpetition liabilities;

(6) A statement of capital assets;

(7) A schedule of payments to professionals;

(8) A schedule of insider payments;

(9) Bank statements and reconciliations; and

(10) Descriptions of asset sale transactions.

The commenter further suggested that parties in interest should have the right to seek supplemental documentation from debtors with assets less than $100 million by petitioning the United States Trustee or the court. The EOUST also received a comment that debtors should be required to include projections, risk factors, potential conflicts of interest, and other material financial information, including management discussions and analysis, insider transactions, and material company events. Another commenter asserted that requiring very detailed financial reports would be less burdensome on the USTP, creditors, and governmental authorities than requiring more extensive supporting documents on an ad hoc basis, and that smaller business and individual debtors may seek to be excused from preparing certain supplemental documents.

By contrast, one commenter stated that the Rule asks too much and would be unduly burdensome, particularly on individual debtors. Another commenter noted that providing detailed supplemental documentation to any party in interest may be problematic if there are no confidentiality or non-disclosure agreements in place. The EOUST also received a comment asserting that the debtor should be required to meet with the United States Trustee at the start of the case to discuss the debtor's reporting requirements and capabilities, and agree on the supplemental documentation that may be required.

Response: The Rule strikes a reasonable balance between ensuring that the debtor provides sufficient information to enable the court, creditors, and other parties in interest to ascertain the debtor's financial condition and not overburdening the report filer. In addition, the use of a uniform form ensures that certain statistical information is accessible as required by the statute. The Rule and the periodic report forms achieve this balance, while remaining adaptable to the circumstances of both individual debtors and large corporate enterprises. The more extensive reporting requirements suggested by two of the commenters shift that balance by proposing to make far more information mandatory for a significant segment of chapter 11 debtors. Most debtors hold less than $100 million in assets and are not publicly traded companies subject to ongoing SEC reporting. And, as a witness noted at the Public Hearing, entities subject to SEC reporting only submit that detailed information on a quarterly and annual basis, rather than monthly. Requiring information akin to the public disclosures mandated by the SEC is impractical, expensive, and burdensome. The periodic reports are not a substitute for SEC filings, nor are SEC filings a substitute for periodic reports. If parties in interest seek this information, it is available from all publicly traded debtors in their SEC filings. Finally, the Rule does not abridge parties' rights to seek additional information through informal inquiry or in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

The EOUST agrees, however, that certain financial statements should be mandatory for every non-individual debtor. Accordingly, the EOUST has modified the NPRM to require non-individual debtors to file:

(1) A Statement of Cash Receipts and Disbursements;

(2) A Balance Sheet; and

(3) A Statement of Operations (Profit or Loss Statement) with each Monthly Operating Report.

Virtually every debtor has or should maintain these three common financial statements. Under current USTP practice, various field offices often require these three financial statements as attachments to their local periodic report forms. The EOUST has created a new section 58.8(d)(3) providing for the submission of additional supporting documentation at the discretion of the United States Trustee, which supporting documentation was previously provided for in former section 58.8(d)(4)–(11). In cases requiring formal enforcement, the USTP must seek relief from the bankruptcy court. *See* 11 U.S.C. 1112(b)(4).

The EOUST also agrees with the commenters who suggested that the debtor and the United States Trustee should confer early in the case, whether at the Initial Debtor Interview (''IDI'') or some other initial meeting, to discuss the debtor's reporting capabilities and the supplemental documentation that the debtor will be required to file. Field offices typically schedule IDIs within the first few weeks after the petition date and before the first scheduled meeting of creditors under 11 U.S.C. 341 (the ''Section 341 Meeting''). The EOUST modified the instructions for UST Form 11–MOR to clarify that this initial meeting should occur before both the first MOR due date and the Section 341 Meeting.

2. Publicly Available Data

Comment: The EOUST received a comment asserting that data collected in the MORs and PCRs should be publicly available in a national searchable database. The commenter suggested that the phrase ''may be data enabled to facilitate the national compilation of data'' in the preamble to the Rule should be changed to ''shall be data enabled to facilitate the national compilation of data.''

Response: The EOUST accepts the recommendation by clarifying how the periodic report forms will function as electronic documents. Section 58.8(j)(2) of the Rule clearly provides that the ''Periodic Reports shall be filed via the United States Bankruptcy Courts' Case Management/Electronic Case Filing System (CM/ECF) as a 'smart form,' meaning the reports are data-embedded.''

The EOUST has replaced the term ''data-enabled'' in the NPRM with ''data-embedded.'' The periodic report forms will be read only data-embedded forms, which are the type of forms used by the U.S. Courts.

The EOUST rejects the suggestion that the EOUST should create a publicly searchable database of information collected from the periodic reports. The statute does not require the creation of a publicly searchable database. Instead, the statute requires that the periodic reports ''facilitate compilation of data and maximum possible access of the public, both by physical inspection at one or more central filing locations, and by electronic access through the internet or appropriate media.'' 28 U.S.C. 589b(b). Accordingly, the public can obtain the filed periodic reports from any bankruptcy clerk's office and can also extract the embedded data through PACER with appropriate software.

3. Certification, Service, Filing Deadlines

a. Certification of Periodic Reports (§ 58.8(i))

Comment: One commenter asserted that retaining the periodic reports with original ''wet'' signatures for five years is burdensome and contrary to the Paperwork Reduction Act (PRA). Another commenter suggested that retaining periodic reports with either original signatures or an electronic copy of the signed periodic report should be sufficient.

Response: The EOUST concludes that retaining the periodic reports with original holographic signatures is not burdensome. The requirement does not create additional, duplicative, or unnecessary paperwork; it merely ensures that the original document is preserved for a period of time. The retention of original holographic signatures is important to the efforts of the EOUST, as well as the Department of Justice, to combat abusive bankruptcy practices through criminal prosecution and civil enforcement. Although defendants repudiate signatures in a small minority of cases, the availability of the original signature is key to overcoming such a defense, and, also, in the view of prosecutors, deters defendants from contesting the authenticity of signatures in the first instance. In addition to the authenticity of the signature itself, electronic signatures are more easily manipulated and appended to documents without the authorization or knowledge of the signatory. *See also* Letter from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to the Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice and Procedure, Admin. Office of the U.S. Courts (Feb. 13, 2014) (on file with author), *available at https://www.regulations.gov/document?D=USC-RULES-BK-2013-0001-0128.*

In addition, preservation of the periodic reports with original signatures is not a collection of information from the public under the PRA. *See* 44 U.S.C. 3506(c)(1). Even if the PRA were implicated, the EOUST provided the requisite notice under the PRA that retention of documents with original signatures will be required. *See* 44 U.S.C. 3506(c)(2).

b. Declaration Upon Knowledge and Belief

Comment: One commenter suggested that the periodic reports should be signed under penalty of perjury with the qualification that the report and any attachments thereto are true and correct to the best of the signer's ''knowledge and belief.''

Response: The EOUST declines to add the qualification. The EOUST concluded that the ''knowledge and belief'' language may contradict or undermine the purpose of signing the periodic reports under the penalty of perjury, which is a stricter standard, to ensure that the information provided in the periodic reports is reliable and accurate. Moreover, the ''knowledge and belief'' language is not consistent with the official bankruptcy forms promulgated by the Judicial Conference of the United States. For example, Official Form 101 requires debtors to certify that they ''have examined this petition, and [they] declare under penalty of perjury that the information provided is true and correct.'' Thus, adding ''knowledge and belief'' language to the periodic reports would inappropriately create inconsistent standards for truthfulness.

c. Signature on the UST Form 11–PCR

Comment: The EOUST received a comment that the signature line of the UST Form 11–PCR should be changed to add the designation ''Plan Trustee'' or ''Plan Administrator.''

Response: The EOUST agrees with this recommendation, in part. Rather than identify an exhaustive number of report filer titles, the EOUST modified the signature line to provide for any authorized signatory.

d. Service of the Periodic Reports

Comment: The EOUST received several comments regarding service of the periodic reports. Two commenters stated that the debtor should not be required to serve UST Form 11–MOR on each member of any Official Committee of Unsecured Creditors or on any governmental taxing authority because doing so would be unduly burdensome. One of these commenters also stated that confidentiality issues may arise if the Rule requires the debtor to serve supplemental documentation to ''any party in interest'' that has not agreed to confidentiality or non-disclosures. The same commenter also stated that UST Form 11–PCR should be served on any post-confirmation committee.

Response: The EOUST agrees that service upon individual members of the committee is unnecessary when the committee has engaged counsel and has modified the Rule accordingly. The EOUST disagrees with the suggestion that the MOR should not be served upon taxing authorities. Periodic reports must specify whether tax returns have been timely filed and whether tax payments have been timely made since the date of the order for relief. 28 U.S.C. 589b(e)(5). Service of the periodic reports on taxing authorities provides the relevant taxing authorities with a meaningful opportunity to review the representations made. The EOUST also modified section 58.8(b) of the Rule to permit taxing authorities to opt out of being served with the periodic reports. Finally, concerns about confidentiality as to supplemental information may be addressed on a case by case basis at the initial meeting between the United States Trustee and the debtor.

e. Filing Deadlines (§§ 58.8(e), (g))

Comment: One commenter stated that the Rule should establish a uniform national due date for all periodic reports of the 25th of each month. Two commenters focused on the initial due date for the UST Form 11–MOR. One stated that the first report should be due in the second full month of the case and should cover the period from the filing date to the end of the first full month. A second commenter stated that the initial report should be filed by the earlier of (1) the 60th day after the order for relief or (2) the 30th day after the end of the first full calendar month after the order for relief. With respect to the UST Form 11–PCR, the EOUST received one comment that the Rule should clearly state that the Post Confirmation Report is filed quarterly only after the plan is confirmed. Another commenter noted that the phrase ''confirmation of the plan'' is unclear as to whether it is the date of entry of the confirmation order or the effective date of the plan. Finally, one commenter advocated that the Rule should permit the flexibility to make the filing deadline coincide with SEC reporting deadlines for those debtors that are public registrants.

Response: The EOUST agrees that a uniform due date for periodic reports should be established, where

practicable, but declines to adopt any other due date suggestions. The EOUST modified the Rule to provide that both periodic reports are due on the 21st day of the month immediately following the reporting period, subject to any local bankruptcy rule that requires a different due date. The Rule balances the practical concerns of a report filer, other parties' need for information early in a case, and any local bankruptcy rules. A 60-day delay in filing the initial MOR would permit a debtor to operate with less transparency for the critical first two months of the case.

Additionally, the EOUST has maintained the same important balance in setting the initial MOR due date. The 20th of the month cut off addresses the concern regarding the burden of filing a partial month report by not requiring the filing of a MOR for a period that is fewer than ten days. The EOUST also declines to adjust the filing deadline for debtors who are public registrants so that it coincides with SEC reporting deadlines. The uniform deadline provides necessary predictability, while maintaining the flexibility to permit consistency with local bankruptcy rules. Because they require different reported information, quarterly SEC filing deadlines are not relevant to the monthly periodic reports. Finally, the EOUST has modified the Rule and instructions to clarify that Form 11–PCR is required to be filed following the effective date of a confirmed plan.

4. Accounting Methods (§ 58.8(h))

a. Generally Accepted Accounting Principles

Comment: Two commenters stated that Generally Accepted Accounting Principles (GAAP) may not be the appropriate accounting method and will be unduly burdensome for those debtors who do not regularly use it. One of these commenters added that GAAP accounting would be particularly difficult for individual debtors because most individuals do not use this accounting method, nor do they keep books in the same manner businesses do. The other commenter added that reference in the Rule to ''Statement of Position 90–7'' should be changed to Financial Accounting Standards Board Accounting Standards Codification (FASB ASC) 852, Reorganizations.

Response: The EOUST concludes that debtors who do not already follow GAAP will not be required to adopt GAAP to prepare the periodic reports. Accordingly, the EOUST has modified the Rule to permit debtors to complete the periodic reports using the accounting method the debtor used prepetition. The EOUST has also removed references to Statement of Position 90–7 and has replaced it with a reference to Financial Accounting Standards Board Accounting Standards Codification (FASB ASC) 852, Reorganizations.

b. Inventory Costing Methodology

Comment: One commenter asserted that the debtor should be required to disclose its inventory costing method as well as any change to such method.

Response: The EOUST agrees that this information is beneficial. While the Rule required no modifications, the EOUST has modified the UST Form 11–MOR and the instructions to include costing methodology disclosure.

B. Comments on Specific Provisions of the Rule

1. Professional Fees

a. Reporting Professional Fees on an as Incurred or as Approved Basis (§§ 58.8(b)(8), 58.8(f)(3))

Comment: Five commenters stated that the debtor should be required to report fees as incurred rather than, or in addition to, those approved by the bankruptcy court. The commenters assert that reporting fees as incurred would allow for earlier monitoring of fees generally, would provide a more timely picture of the debtor's cash flow, and would provide notice of fees that are incurred but do not necessarily require court approval, such as fees paid to a secured creditor under loan agreements or financing orders or fees paid to ordinary course professionals.

Response: The statute specifically provides that the periodic reports ''shall'' include ''all professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief . . .,'' and the language in the Rule at section 58.8(b)(8) mirrors this provision. *See* 28 U.S.C. 589b(e)(6). The EOUST concludes that debtors should provide the information required by the statute, and if necessary, on a case by case basis and as requested by the United States Trustee, provide cash disbursement registers or ledgers as permitted by section 58.8(d)(3)(H) of the Rule. In addition, when interim fee procedures exist, the amount of fees ''as incurred'' is available from other sources such as periodic fee applications and monthly fee statements of estate professionals. The additional supporting documentation pertaining to cash disbursements and these other sources present a meaningful picture of the financial operations of the debtor's business.

b. Itemization of Specific Professional Fees (§ 58.8(b)(8))

Comment: Seven commenters stated that the MOR should provide separate line items for each professional with a more detailed description of the professional's role in the case to better understand case staffing and costs. One commenter advocated that the breakdown of professional fees should be by type (bankruptcy professional; nonbankruptcy professional; ordinary course professionals; secured lender; committee or other professionals). Others suggested that itemization by firm and type of service (*e.g.,* legal or accounting) would be sufficient, and one commenter suggested that the EOUST should provide a better definition of the term ''nonbankruptcy matters'' in order to avoid inconsistent application of that term. One commenter stated that requiring individual debtors to separate bankruptcy from non-bankruptcy fees would be burdensome. Two commenters added that there should be a specific line item for efficiency counsel because separate disclosure of efficiency counsel fees would allow a more thorough review of how each firm is used and would encourage the appropriate assignment of tasks. A third commenter, while not specifically referring to efficiency counsel, agreed with this rationale.

Response: The EOUST agrees that professional fees should be reported in more detail for the reasons given by the commenters. Three kinds of professional fees are paid in a bankruptcy case:

(1) Those allowed and approved by the court after a fee application (traditional bankruptcy fees);

(2) Those approved to be paid under an ''ordinary course professional'' order, and generally capped by a certain amount each month and in the aggregate, and requiring a fee application if the amount billed exceeds the cap (OCP fees); and

(3) Those paid to professionals based upon contractual rights, such as fees for secured creditors' counsel that are authorized to be paid under a financing, adequate protection, or cash collateral order (contractual fees).

The statute requires that fees incurred on behalf of the debtor be reported separately from ''those that would have been incurred absent a bankruptcy case.'' 28 U.S.C. 589b(e)(6). OCP fees will often be for non-bankruptcy work, such as fees incurred in a state court tort action, and are required to be reflected on the periodic reports. However, unlike traditional bankruptcy fees and OCP

fees, contractual fees are not limited or reviewed by the court. It may also be difficult to breakout which contractual fees were incurred in connection with the bankruptcy case and which contractual fees would have been incurred regardless of whether a bankruptcy case was filed. Requiring a debtor to report a secured lender's fees on its periodic reports in similar detail to estate professionals' fees would impose undue burdens on the report filer, because it would require the report filer to find out this information from third parties who may not be forthcoming. Finally, the EOUST must also reject the suggestion not to require individual debtors to segregate bankruptcy from nonbankruptcy fees because the statute requires this segregation. *See* 28 U.S.C. 589b(e)(6).

The EOUST has modified the form and the instructions for both the MOR and PCR to add line items for lead counsel, efficiency counsel, co-counsel, local counsel, financial professionals, and other professionals. If warranted by the facts of the case, the United States Trustee may request that the debtor attach a supplemental schedule that identifies all fees and expenses for professionals employed in the bankruptcy case per renumbered section 58.8(d)(3)(D) of the Rule.

The EOUST also agrees that the definition of ''nonbankruptcy matters'' should be clarified. Accordingly, the EOUST has added a definition of ''nonbankruptcy matters'' in the periodic report instructions.

2. Individual Chapter 11 Debtors (§ 58.8(c))

a. Separate UST Form MOR–11 and PCR–11 for Individual Debtors

Comment: One commenter advocated that a separate form should be created for individual debtors because the commenter believed that the proposed forms were too complicated. Another commenter suggested that high wealth individual debtors with complex financial structures should use a more detailed MOR form than that proposed.

Response: The statute prescribes ''uniform forms for—periodic reports by debtors in possession or trustees.'' 28 U.S.C. 589b(a)(2). It does not specify separate forms for individual debtors, high wealth or otherwise. The EOUST has revised the forms and instructions, however, to clarify which sections apply to individual debtors. The EOUST has modified Part 8 of UST Form 11–MOR to better reflect the types of disbursements typically made by individual debtors. If further information is needed from high wealth individual debtors, the United States Trustee may exercise discretion and request it. And finally, parties seeking more detailed information from debtors may seek that information through informal inquiry or in accordance with the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.

b. Requirements To Report Certain Business Activity Is Burdensome and Confusing to Individual Debtors

Comment: Two commenters focused on the burden that would be placed on individual chapter 11 debtors if they were required to provide income statements, statements of operations, or other supporting documents identified in section 58.8(d) of the NPRM because most individual debtors do not keep these kinds of records. Another commenter suggested that individual debtors should be required to provide this information unless they obtain a waiver from the United States Trustee.

Response: The NPRM imposed identical document production requirements on individual and non-individual debtors. The EOUST considered the competing comments regarding the scope of the supplemental documentation requirements placed on individual debtors and has modified section 58.8(d) and has added new section 58.8(d)(2) to provide that individuals need not provide supplemental documentation unless the United States Trustee requests it in the United States Trustee's discretion.

3. Jointly Administered Cases

Comment: One commenter stated that the Rule should clarify whether reporting in jointly administered cases should be on a per entity, nonconsolidated basis or whether jointly administered debtors may be permitted to submit one single consolidating form.

Response: The EOUST agrees and has modified the Rule to clarify that periodic reports in jointly administered cases shall be filed on a per entity, nonconsolidated basis. Use of a single consolidating form in jointly administered cases would make data extraction difficult and would require the creation of a separate form and a separate data-extraction process for jointly administered cases, which would impose undue costs and burdens. Moreover, the EOUST has observed that some debtors that presently file consolidating forms in certain districts are not providing sufficient information on a per-debtor basis. Requiring each debtor in a jointly administered case to file a separate MOR addresses this problem. Accordingly, the EOUST has modified sections 58.8(b) and 58.8(f) to clarify that, in jointly administered cases, unless otherwise required by the United States Trustee in the United States Trustee's discretion, each jointly administered debtor is required to file a separate periodic report on a nonconsolidated basis. The EOUST also made conforming changes to the instructions for each form.

4. Full-Time Employees (§ 58.8(b)(3))

Comment: One commenter suggested that the Rule should require the debtor to report both full-time (or full-time equivalent) and part-time employees in order to reflect a fuller picture of whether jobs were saved or created during the bankruptcy case.

Response: The statute requires that the periodic reports include the ''number of full-time employees as of the date of the order for relief and at the end of each reporting period since the case was filed.'' 28 U.S.C. 589b(e)(6). The Rule conforms to the statute.

The EOUST considered the potential benefits offered by the additional categories of full-time equivalent and part-time employees. Though reporting the additional employee categories might provide a broader picture of the debtor's workforce, the EOUST concludes that the additional categories would be too subjective and variable, and therefore, would be unlikely to provide meaningful information regarding whether jobs were saved or created.

5. Taxes and Insurance (§§ 58.8(b)(9), (b)(14))

Comment: Two commenters suggested that the debtor should be required to itemize what tax and insurance payments have been made. One of those commenters further inquired whether risk management products (such as swaps or other derivatives) are considered ''insurance'' for the purposes of the MOR.

Response: The EOUST agrees that itemization of tax and insurance payments would be beneficial and has modified UST Form 11–MOR to include additional lines for reporting the different types of tax and insurance payments. The Rule does not require amendment because it very broadly requires the reporting of tax and insurance payments. Section 58.8(d)(3) further permits the United States Trustee to request additional documentation on a case by case basis, if necessary, to present a complete picture of the financial operations of the debtor. Finally, the EOUST has modified the form instructions to clarify that risk management products such as

swaps and other derivatives are not considered insurance for the purposes of the MORs.

6. Payments Made on Prepetition Debt (§ 58.8(b)(10))

Comment: One commenter stated that the Rule should not limit disclosure of payments toward prepetition debt to those solely to secured lenders or lessors, but should include payments on unsecured debt as well. Another commenter noted that the Rule should include undersecured debt and debts in which the security interest is in dispute.

Response: The EOUST concludes that the wording in draft section 58.8(b)(10) could give rise to different and contradictory interpretations. Therefore, the EOUST has modified section 58.8(b)(10) to clarify that report filers should include all payments of prepetition debt (including unsecured debt).

7. Payments to or on Behalf of Insiders (§ 58.8(b)(12))

Comment: Two commenters stated that the report filer should be required to explain the nature and type of insider transactions, rather than simply list the payments made.

Response: The EOUST agrees that additional information regarding unusual transactions, such as insider transactions, is often beneficial. The Rule does not require amendment because the United States Trustee has the discretion to request this documentation under former section 58.8(d)(11) (renumbered as section 58.8(d)(3)(E)). UST Form 11–MOR has been modified to add space for additional information concerning insider transactions.

8. Cash Flow and Other Statements (§ 58.8(d))

Comment: One commenter stated that the Rule should require report filers to submit the following statements:

(1) Statement of changes in cash flow;

(2) Statement of changes in equity (deficit); and

(3) Intercompany account balances.

Response: While the EOUST agrees that these documents may be valuable on a case by case basis, the Rule does not require amendment because these items are already included in former section 58.8(d)(11) (renumbered as section 58.8(d)(3)(I)). The EOUST has modified the instructions for UST Form 11–MOR to include these items in the list of supplemental documentation the United States Trustee may request.

9. Balance Sheets, Statement of Capital Assets (§ 58.8(d))

Comment: One commenter stated that the debtor's balance sheet should mirror the disclosures required by the SEC's Regulation S–X and that the Statement of Capital Assets should include the original cost, amortization to date, amortization method and life for each major component of capital assets.

Response: The EOUST disagrees. The MOR does not supplant required SEC filings. Parties in interest can obtain this information from public companies' securities filings. Moreover, requiring these disclosures from non-publicly traded companies and individuals may impose undue burdens.

10. Accounts Receivable (§ 58.8(d))

Comment: One commenter stated that the report filer should be required to report accounts receivable both gross and net of any reserves. The commenter also stated that the debtor should be required to report the total of accounts receivable both prepetition and postpetition because prepetition accounts receivable may not be available.

Response: The EOUST recognizes that additional information concerning accounts receivable may be beneficial, but disagrees with the comment and concludes that accounts receivable should be reported consistent with the debtor's prepetition accounting practices. Though the Rule does not require amendment, the EOUST has modified the instructions to UST Form 11–MOR to permit the reporting of additional detail regarding accounts receivable.

11. Post-Confirmation Reports: Disbursements and Transfers (§ 58.8(f))

Comment: One commenter asserted that the report filer should be required to report cash and property transfers separately. Another commenter stated that the report filer should be required to report noncash distributions of securities in the reorganized debtor and the value of noncash distributions.

Response: The EOUST agrees that separate reporting of the information requested by both commenters would be beneficial. The EOUST has modified the UST Form 11–PCR to include line items for transfers of securities and other noncash property, though the Rule does not require amendment. The statute also requires the debtor to report, ''by class, the recoveries, expressed in aggregate dollar values.'' 28 U.S.C. 589b(e)(7). Thus, the EOUST has added a line to the PCR instructions requiring those debtors making distributions of securities or other property to use the valuation method described in the disclosure statement, regardless of the value of the securities or other property on the distribution date. If the disclosure statement does not give a value for the securities or other property or does not describe the valuation method, the report filer should provide an explanation of how the securities or other property have been valued for the purposes of the PCR.

Summary of Changes in Final Rule

The final Rule differs from the NPRM in the following ways:

1. Section 58.8(a) has been modified to include an additional clarifying sentence providing that the Rule does not excuse, supersede, or otherwise modify any applicable nonbankruptcy reporting obligations.

2. Section 58.8(b) has been modified to permit taxing authorities to opt out of being served with periodic reports.

3. Section 58.8(b) and section 58.8(f) now provide that in jointly administered cases each debtor, trustee, reorganized debtor, or other authorized party charged with administering a confirmed plan is required to file a separate periodic report on a nonconsolidated basis, unless otherwise required by the United States Trustee in the United States Trustee's discretion.

4. Section 58.8(b)(10) has been modified to require the reporting of all payments of unsecured debt.

5. Section 58.8(d)(1) now requires non-individual debtors to file:

(a) A statement of cash receipts and disbursements;

(b) A balance sheet; and

(c) A statement of operations (profit and loss statement) with each MOR.

6. Section 58.8(d)(2) has been added to provide the United States Trustee with the discretion to require individual debtors to file the documentation identified in § 58.8(d)(1). Section 58.8(d)(3) provides the United States Trustee with the discretion to require any debtor or trustee to provide any other supporting documentation necessary to present a complete picture of the financial operations of the estate.

7. Former §§ 58.8(d)(4) through (11), that provide for the submission of additional supporting documentation at the discretion of the United States Trustee, have been moved into new section 58.8(d)(3).

8. Sections 58.8(e) and (g) now provide that MORs and PCRs are due by the 21st day of the relevant month, subject to any local bankruptcy rule that requires a different due date. Section 58.8(g) also clarifies that PCR forms are

required to be filed following the effective date of a confirmed plan.

9. Section 58.8(h) clarifies that a debtor may use whatever accounting method the debtor used prepetition and does not require GAAP of all debtors. Section 58.8(h) also deletes the reference to ''Statement of Position 90–7'' and replaces it with ''Accounting Standards Codification 852, Reorganizations, Financial Accounting Standards Board.''

10. The term ''data-enabled'' in § 58.8(j)(2) has been replaced with the term ''data-embedded.''

Executive Orders 12866, 13563, and 13771—Regulatory Review

This Rule has been drafted and reviewed in accordance with

(1) Executive Order 12866, ''Regulatory Planning and Review'' section 1(b), Principles of Regulation;

(2) Executive Order 13563 ''Improving Regulation and Regulatory Review'' section 1(b) General Principles of Regulation; and

(3) Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs'' section 3(a), Annual Regulatory Cost Submissions to the Office of Management and Budget (OMB).

This Rule is not a ''significant regulatory action'' under Executive Order 12866, and, accordingly, this Rule has not been reviewed by OMB.

Executive Orders 12866 and 13563 direct all agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 emphasizes the need to identify incremental costs and requires approximation of the total costs or savings associated with the regulation over future fiscal years. The Department has assessed the costs and benefits and costs savings of this regulation and believes that the regulatory approach selected maximizes net benefits and, after minimal initial costs, will yield costs savings.

It is estimated that the cost to the government for developing these periodic reports is approximately $67,000. The estimated cost to develop a system to store information extracted from these reports and to analyze the data is approximately $144,000. The USTP anticipates using existing information technology resources to meet the costs associated with developing the periodic reports and a system to store the information extracted from the reports. The USTP expects the initial investment to be offset within the first four years of implementation. Beyond these amounts, there will be no additional cost to the government or to the public, and costs savings to the government are expected from updating these reports to an electronic format.

Because debtors-in-possession and trustees are already required to complete periodic reports, the Rule is not a new layer of regulation. *See* 11 U.S.C. 704, 1106, and 1107. Moreover, the Rule imposes no obligations on the general public because only debtors-in-possession and trustees for chapter 11 bankruptcy cases are responsible for filing periodic reports. By contrast, the information disclosed in the periodic reports is of vital importance to the bankruptcy process. The reported information assists the courts, creditors, and other stakeholders in assessing, among other things, the likelihood of rehabilitation, whether the bankruptcy estate has been mismanaged, and whether the estate maintains adequate insurance coverage to protect both creditors and the general public from harm.

Periodic report forms are currently used across the country, but the format and content of the forms vary by region, office, and district. The use of congressionally required uniform forms for periodic reports will assist policy-makers, scholars, and the public in better understanding the bankruptcy system. Instead of many different versions of periodic report forms, currently numbering over a hundred, debtors-in-possession and trustees will use the same data-embedded forms.

Requiring a uniform periodic report will aid external stakeholders by providing consistency across different jurisdictions and also helping to streamline the processing of reports by the USTP. Uniformity and consistency will also assist counsel, creditors, and other stakeholders with a national presence in their analysis of the disclosed information. Additional administrative requirements for external parties are expected to be minimal. On the basis of these considerations, the Rule for uniform periodic reports would provide net benefits to the USTP and the general public.

The total estimated cost to implement and maintain the proposed system is $211,000. This cost is expected to be offset over time by increased efficiency in the data entry process. The USTP has processed approximately 100,000 periodic reports on average over the past 10 fiscal years, with each periodic report requiring 1–2 minutes of data entry time on average. At an estimated salary of $56/hour plus benefit costs, average data entry processing costs for periodic reports total approximately $124,000. Continuing the current process would cost approximately $480,000 in 2016 dollars through 2026, while the anticipated savings from implementing the proposed process would exceed the upfront implementation cost by over $150,000 during that time span. These savings would be sustained over time, with an annualized cost savings of approximately $113,000 in perpetuity. Such savings are critical because they will allow the USTP to redeploy scarce resources to other important priorities.

In addition to the tangible cost savings expected to be generated, there would be a number of intangible benefits. The benefits considered include the benefits to the chapter 11 debtors-in-possession and chapter 11 trustees who are obligated to file periodic reports, as well as benefits to the courts, creditors, parties in interest, bankruptcy professionals who represent the various constituencies in the cases, the USTP, and external stakeholders including the public, policy-makers, and scholars.

The Rule benefits report filers by replacing outdated paper forms which vary by local jurisdiction with standardized, updated forms in an electronic format that promotes clarity and certainty. The Rule benefits the court, creditors, and other parties in interest in bankruptcy cases by simplifying the intake, organization, and understanding of these periodic reports.

The Rule benefits professionals who represent debtors-in-possession in bankruptcy cases in multiple districts by reducing the burden associated with identifying and complying with varying local requirements in filing periodic reports. In other words, uniformity and consistency will allow these professionals to operate more efficiently and with greater accuracy.

The Rule benefits the USTP by standardizing the collection of congressionally required data elements in an electronic format that facilitates automated analysis, therefore streamlining and reducing the time necessary to review and draw conclusions from the information provided on the forms.

Lastly, the Rule benefits the public by making the collection of information mandated by the Bankruptcy Code and Rules more transparent, thereby

promoting greater understanding of the bankruptcy system and its stakeholders. Policy-makers and scholars in particular will benefit from the accessibility of electronic bankruptcy data, which can be more readily aggregated, analyzed, and shared in the updated, standardized format than in the current idiosyncratic local formats, which require manual collection and review.

In sum, the Department is confident the Rule provides multiple benefits to the public, while imposing minimal initial streamlining costs borne by the USTP that will yield substantial cost savings in future fiscal years.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Director has reviewed this Rule and by approving it certifies that it will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that chapter 11 small business debtors are not required to complete these periodic reports. Pursuant to Section 435 of the BAPCPA, the Judicial Conference of the United States has developed a periodic report, entitled Official Form 425C ''Monthly Operating Report for Small Business Under Chapter 11,'' for use by small business debtors as defined by the Bankruptcy Code. *See* 11 U.S.C. 101(51D), 308.

Paperwork Reduction Act

These periodic reports are associated with an open bankruptcy case. Therefore, the exemption under 5 CFR 1320.4(a)(2) applies.

Unfunded Mandates Reform Act of 1995

This Rule does not require the preparation of an assessment statement in accordance with the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531. This Rule does not include a federal mandate that may result, in the aggregate, in the annual expenditure by State, local, and tribal governments, or by the private sector, of more than the annual threshold established by the Act ($123 million in 2005, adjusted annually for inflation). Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This Rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.* This Rule will not 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, and innovation; or have significant adverse effects on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Privacy Act Statement

28 U.S.C. 589b authorizes the collection of the information in the periodic reports. As part of the debtor-in-possession's or trustee's reporting obligations, the United States Trustee will review the information contained in these reports. The United States Trustee will not share the information with any other entity unless authorized under the Privacy Act, 5 U.S.C. 552a *et seq.* EOUST has published a System of Records Notice that delineates the routine use exceptions authorizing disclosure of information. *See* 71 FR 59818, 59819 (Oct. 11, 2006), JUSTICE/UST–001, ''Bankruptcy Case Records and Associated Files.'' Providing this information is mandatory under 11 U.S.C. 704, 1106, and 1107.

List of Subjects in 28 CFR Part 58

Bankruptcy, Trusts and trustees.

For the reasons set forth in the preamble, 28 CFR part 58 is amended as set forth below.

PART 58—[AMENDED]

■ 1. The authority citation for part 58 continues to read as follows:

Authority: 5 U.S.C. 301, 552; 11 U.S.C. 109(h), 111, 521(b), 727(a)(11), 1141(d)(3), 1202; 1302, 1328(g); 28 U.S.C. 509, 510, 586, 589b.

■ 2. Add § 58.8 to read as follows:

§ 58.8 Uniform Periodic Reports in Cases Filed Under Chapter 11 of Title 11.

(a) *Scope.* The requirements of this section apply to all chapter 11 debtors who do not qualify as a ''small business debtor'' under 11 U.S.C. 101(51D). Nothing in this section shall excuse, supersede, or otherwise modify any applicable nonbankruptcy reporting obligations, including, but not limited to, those set forth in chapters 2a through 2e of title 15 of the United States Code.

(b) *UST Form 11–MOR, Monthly Operating Report.* Debtors-in-possession (debtor) and chapter 11 trustees (trustee) must file with the court and serve upon the United States Trustee, any official committee appointed under 11 U.S.C. 1102, any governmental unit charged with responsibility for collection or determination of any tax arising out of the estate's operation, and any requesting party in interest monthly operating reports using UST Form 11–MOR (MOR). In jointly administered cases, unless otherwise required by the United States Trustee in the United States Trustee's discretion, each jointly administered debtor is required to file a separate MOR on a nonconsolidated basis. The MOR must contain the following:

(1) Information about the industry classification, published by the Department of Commerce, for the businesses conducted by the debtor;

(2) Length of time the case has been pending as of the end of the reporting period;

(3) Number of full-time employees as of the date of the order for relief and at the end of each reporting period since the case was filed;

(4) Cash receipts, cash disbursements, and profitability of the debtor during the reporting period and cumulatively since the date of the order for relief;

(5) Asset and liability status as of the end of the reporting period;

(6) Assets sold or transferred outside the ordinary course of business (with or without court approval) during the reporting period and cumulatively since the date of the order for relief;

(7) Income statement, commonly referred to as a statement of operations, for the reporting period;

(8) All professional fees approved by the court in the case during the reporting period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not);

(9) Information about whether tax returns and tax payments since the date of the order for relief have been timely filed and made;

(10) Payments made on pre-petition debt during the reporting period;

(11) Payments made outside the ordinary course of business without court approval during the reporting period;

(12) Payments made to or on behalf of insiders during the reporting period;

(13) Postpetition borrowing during the reporting period;

(14) Information about insurance, including workers' compensation, casualty/property, and general liability during the reporting period;

(15) Information about whether disclosure statements and plans of reorganization have been filed with the court during the reporting period; and

(16) Information about the payment of quarterly fees to the United States Trustee during the reporting period.

(c) *Individual chapter 11 debtors.* Individual debtors also must complete Part 8 of the MOR, which includes the following:

(1) Total income during the reporting period, including income from salary, wages, self-employment, and any other source;

(2) Total expenses during the reporting period, including expenses related to self-employment, and unusual or significant unanticipated expenses;

(3) Difference between total income in paragraph (c)(1) of this section and total expenses in paragraph (c)(2) of this section;

(4) Debts (that are not related to self-employment) that were incurred since the petition filing date, which are past due; and

(5) Information about whether all required domestic support obligation payments (as that term is defined by 11 U.S.C. 101(14A)) have been paid.

(d) *Supporting MOR documents.* (1) Unless the United States Trustee in the United States Trustee's discretion provides otherwise, any non-individual debtor or trustee must file with the court and serve upon the United States Trustee, any official committee appointed under 11 U.S.C. 1102, any governmental unit charged with responsibility for collection or determination of any tax arising out of the estate's operation, and any requesting party in interest the following documentation:

(i) Statement of cash receipts and disbursements that shows all cash receipts and cash disbursements for all bank and investment accounts;

(ii) Balance sheet containing the summary and detail of the assets, liabilities, and equity (net worth) or deficit of the estate. The estate's prepetition liabilities and retained earnings must be reported separately from the estate's postpetition liabilities and retained earnings; and

(iii) Statement of operations (profit or loss statement) that compares the estate's actual performance with projected performance.

(2) At the discretion of the United States Trustee, an individual debtor may be required to file with the court and serve upon the United States Trustee, any official committee appointed under 11 U.S.C. 1102, any governmental unit charged with responsibility for collection or determination of any tax arising out of the estate's operation, and any requesting party in interest the documentation identified in paragraph (d)(1) of this section.

(3) At the discretion of the United States Trustee, the debtor or trustee may be required to file with the court and serve upon the United States Trustee, any official committee appointed under 11 U.S.C. 1102, any governmental unit charged with responsibility for collection or determination of any tax arising out of the estate's operation, and any requesting party in interest the following documentation:

(i) Accounts receivable aging, which is an aged summary of accounts receivable including total receivables, net of doubtful accounts;

(ii) Postpetition liabilities aging, which is an aged summary schedule of postpetition liabilities segregated by general payables, amounts owed to professionals, taxes, etc.;

(iii) Statement of capital assets that identifies the book value of all capital assets on the petition date, the book value at the beginning of the reporting period, any additions or deletions including depreciation, and the book value at the end of the reporting period;

(iv) Schedule of payments to professionals that identifies all fees and expenses for all professionals employed in the bankruptcy case;

(v) Schedule of payments to insiders that includes all payments made by the debtor to any person or entity considered an insider under 11 U.S.C. 101(31);

(vi) Bank statements and bank reconciliations that reflect all bank accounts and banking transactions;

(vii) Descriptions of assets sold or transferred outside the ordinary course of business during the reporting period, and the terms of such sales or transfers;

(viii) Registers or ledgers documenting the estate's cash disbursements during the reporting period;

(ix) Statement of cash flows during the reporting period;

(x) Other transactional documents, including real estate settlement documents, contracts, or loan documents for the reporting period; and

(xi) Other records.

(e) *Deadlines for filing and submitting MOR.* The MOR must be filed with the court and submitted to the United States Trustee on a monthly basis. Unless otherwise provided by local rule, each MOR must be filed by no later than the 21st day of the month immediately following the reporting period covered by the MOR. The MOR must be filed every month until one of the following occurs:

(1) The effective date of a confirmed plan of reorganization;

(2) The conversion of the case to a case under another chapter; or

(3) The dismissal of the case.

(f) *UST Form 11–PCR, Post-confirmation Report.* Following the effective date of a confirmed plan, reorganized debtors and any other authorized parties who have been charged with administering the confirmed plan must file with the court and serve upon the United States Trustee, any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, and any requesting party in interest quarterly post-confirmation reports using UST Form 11–PCR. In jointly administered cases, unless otherwise required by the United States Trustee in the United States Trustee's discretion, each jointly administered debtor, reorganized debtor, or other authorized party who has been charged with administering a confirmed plan is required to file a separate PCR on a nonconsolidated basis. The PCR must contain the following:

(1) Date the petition was filed and the date of plan confirmation;

(2) Summary of all post-confirmation amounts disbursed. This summary must be segregated into disbursements during the most recent reporting period and total disbursements since the date of the confirmation order;

(3) All preconfirmation professional fees approved by the court in the case for the most recent period and cumulatively since the date of the order for relief (separately reported, for the professional fees incurred by or on behalf of the debtor, between those that would have been incurred absent a bankruptcy case and those not);

(4) Information regarding the recoveries of holders of claims under confirmed plans. This information must be expressed in aggregate dollar values and, in the case of claims, as a percentage of total claims of the class allowed;

(5) Information on whether a final decree has been entered or is anticipated to be entered; and

(6) Information about the payment of quarterly fees to the United States Trustee during the reporting period.

(g) *Deadlines for filing and submitting PCR.* The PCR must be filed with the court and submitted to the United States Trustee on a quarterly basis. Unless otherwise provided by local rule, each PCR must be filed not later than the 21st day following the last day of the reporting (previous) quarter. The PCR must be filed every quarter until one of the following occurs:

(1) The date of the final decree;

(2) The conversion of the case to a case under another chapter; or

(3) The dismissal of the case.

(h) *Accounting methods.* Generally Accepted Accounting Principles

(GAAP) are required to be used when completing the Periodic Reports, except if the debtor used a different set of accounting standards prepetition or if the United States Trustee or an order of the court otherwise modifies the GAAP requirement. If the debtor uses GAAP accounting, supporting documents must comply with GAAP, such as the Financial Accounting Standards Board's Accounting Standards Codification 852, ''Reorganizations.''

(i) *Certification of Periodic Reports' accuracy.* The Periodic Reports must be certified under penalty of perjury that they are true and correct by an individual who is authorized under applicable law to certify on behalf of the debtor, trustee, reorganized debtor, or other authorized party who has been charged with administering a confirmed plan. The debtor's, trustee's, reorganized debtor's, or other authorized party's attorney must maintain possession of the Periodic Reports with original holographic signatures for five years, unless otherwise provided by local rule. In addition to the obligations imposed by (l)(2), a pro se debtor must submit the Periodic Reports with original holographic signatures to the office of the United States Trustee in the district in which the bankruptcy case is pending.

(j) *Mandatory usage of Periodic Reports.* The Periodic Reports must be utilized by debtors and trustees when completing their monthly operating reports or post-confirmation reports. The Periodic Reports shall be used without alteration, except as otherwise provided in this rule, in a particular UST Form 11–MOR or UST Form 11–PCR, or in the instructions for UST Form 11–MOR or UST Form 11–PCR. The Periodic Reports may be modified to permit minor changes not affecting wording or the order of presenting information. All debtors and chapter 11 trustees serving in districts where a United States Trustee is serving must use the Periodic Reports in the administration of their cases, in the same manner and with the same content, as set forth in this Rule.

(1) All Periodic Reports may be electronically or mechanically reproduced so long as the content and the form remain consistent with the Periodic Reports as they are posted on EOUST's website; and

(2) The Periodic Reports shall be filed via the United States Bankruptcy Courts' Case Management/Electronic Case Filing System (CM/ECF) as a ''smart form,'' meaning the reports are data-embedded.

Dated: December 8, 2020.

Clifford J. White III,

Director, Executive Office for United States Trustees.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2020–0639]

RIN 1625–AA00

Safety Zone; Narragansett Bay, Quonset, RI

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the navigable waters within a 1,700 foot radius of the barge M. J. VERROCHI located in Narragansett Bay, Quonset, RI. The safety zone is needed to protect personnel, vessels, and the marine environment from the potential hazards created by dredging operations that include drilling and blasting. When enforced, entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Southeastern New England or designated representative.

DATES:

Effective date: This rule is effective from December 30, 2020 through January 31, 2021.

Comments due date: Comments and related material must be received by the Coast Guard on or before December 31, 2020.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2020–0639 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule. You may submit comments identified by docket number USCG–2020–0639 using the Federal eRulemaking Portal at *http://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email the Waterways Management Division, U.S. Coast Guard Sector Southeastern New England, telephone 401–435–2342, email *SENEWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rule Making
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a Notice of Proposed Rulemaking (NPRM) with respect to this rule because it is impracticable. The Coast Guard did not receive sufficient details to evaluate the drilling and blasting in Narragansett Bay until November 23, 2020. It is impracticable to publish an NPRM because we must establish this safety zone by December 30, 2020, but lack sufficient time to collect public comments and to address them before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register**. For reasons stated in the preceding paragraph, delaying the effective date of this rule would be impracticable and contrary to the public interest because timely action is needed to respond to the potential safety hazards associated with the drill and blast project.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port (COTP) Sector Southeastern New England has determined that potential hazards exist with the loading of explosives, transit of explosives and storage of explosives on the barge M. J. VERROCHI during the drill and blast project. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone.

IV. Discussion of the Rule

This rule establishes a safety zone from December 30, 2020 through January 31, 2021. The safety zone will cover all navigable waters within 1,700 feet of the barge M. J. VERROCHI used for dredging operations in Narragansett Bag near Quonset, RI. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the barge M. J. VERROCHI conducts dredging operations that include drilling and blasting. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The Coast Guard will notify the public and local mariners of this safety zone through appropriate means, which may include, but are not limited to; publication in the Local Notice to Mariners and Broadcast Notice to Mariners via marine Channel 16 (VHF–FM) in advance of any enforcement.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

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

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. This safety zone will restrict vessel traffic from entering or transiting in Narragansett Bay within 1,700 foot radius around the barge M. J. VERROCHI. Moreover, the Coast Guard will issue Broadcast Notice to Mariners via VHF–FM marine channel 16 about the safety zone, and vessel traffic will be able to seek permission from COTP to safely transit through the zone.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone on the navigable waters of Narragansett Bay, RI that will prohibit entry within a 1,700 foot radius of the barge M. J. VERROCHI. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to

coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

VI. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

We encourage you to submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* If your material cannot be submitted using *http://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

We accept anonymous comments. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. For more about privacy and the docket, visit *http://www.regulations.gov/privacyNotice.*

Documents mentioned in this TIR as being available in the docket, and all public comments, will be in our online docket at *http://www.regulations.gov* and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted or a final rule is published.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T01–0639 to read as follows:

§ 165.T01–0639 Safety Zone; Narragansett Bay, Quonset, RI.

(a) *Location.* The following area is a safety zone: All navigable waters from surface to bottom, within a 1,700 foot radius around the barge M. J. VERROCHI located in Narragansett Bay, Quonset, RI.

(b) *Enforcement Periods.* This section is enforceable 24 hours a day from December 30, 2020 through January 31, 2021, but will only be enforced when deemed necessary by the COTP Southeastern New England.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard assigned to units under the operational control of U.S. Coast Guard Sector Southeastern New England.

(2) Vessels requiring entry into this safety zone must request permission from the COTP or a designated representative. To seek entry into the safety zone, contact the COTP or the COTP's representative by telephone at 508–457–3211 or on VHF–FM channel 16.

(3) Persons and vessels permitted to enter this safety zone must transit at their slowest safe speed and comply with all lawful directions issued by the COTP or the designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public through Broadcast Notice to Mariners of any changes in the planned schedule.

Dated: December 15, 2020.

C.J. Glander,

Captain, U.S. Coast Guard, Captain of the Port Sector Southeastern New England.

[FR Doc. 2020–28111 Filed 12–18–20; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2019–0009]

RIN 0651–AD33

Small Entity Government Use License Exception

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

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) is amending the rules of practice in patent cases to clarify and expand exceptions to the rule pertaining to government use licenses and their effect on small entity status for purposes of paying reduced patent fees. The rule change is designed to support independent inventors, small business concerns, and nonprofit organizations in filing patent applications and to encourage collaboration with the Federal Government by expanding the opportunities to qualify for the small entity patent fees discount for inventions made during the course of federally funded or federally supported research.

DATES: *Effective date:* This final rule is effective on January 20, 2021.

FOR FURTHER INFORMATION CONTACT: James Engel, Senior Legal Advisor, Office of Patent Legal Administration, by phone at 571–272–7725, or by email at *James.Engel@uspto.gov;* or Marina Lamm, Patent Attorney, Office of Policy and International Affairs, by phone at 571–272–5905, or by email at *Marina.Lamm@uspto.gov.*

SUPPLEMENTARY INFORMATION: The USPTO is amending the rules of practice in patent cases at 37 CFR 1.27 to clarify and expand exceptions to the rule pertaining to government use licenses and their effect on small entity status for purposes of paying reduced patent fees, so as to support independent inventors, small business concerns, and nonprofit organizations in filing patent applications. The government use license exceptions in this rulemaking are the only exceptions to the general rule that every party holding rights to an invention must qualify as a small entity under 37 CFR 1.27 in order for small entity status to be claimed in a patent application.

The first exception—in section 1.27(a)(4)(i)—covers a government use license that a Federal employee-inventor is obligated to grant if he/she is allowed to retain title to the workplace invention pursuant to a rights determination under Executive Order (E.O.) 10096. The Office is amending the regulations to specify that this exception applies to the use license reserved to the Federal Government when a Federal employee, including an employee of a Federal laboratory, is allowed, under 15 U.S.C. 3710d(a), to retain title to the workplace invention. The Office is also expanding the exception to cover a government use license to a Federal agency arising from an inventor's retention of rights under 35 U.S.C. 202(d), when the inventor is

the employee of a small business or nonprofit organization contractor performing research under a funding agreement with the Federal agency, and the government use license is equivalent to that specified in 35 U.S.C. 202(c)(4). Retention of rights by the inventor under 35 U.S.C. 202(d) becomes possible when the contractor performing research under a Federal funding agreement does not elect to retain title to the invention, and the Federal agency is not interested in pursuing the patent rights either. Provided the Federal agency receives no more than the government use license and there is no other interest in the invention held by a party not qualifying as a small entity, the inventor who otherwise qualifies for small entity status is not prohibited from claiming small entity status as a result of retaining rights under 35 U.S.C. 202(d), to his or her invention.

The second exception—in section 1.27(a)(4)(ii)—provides that a small business concern or nonprofit organization, which otherwise qualifies as a small entity for purposes of paying reduced patent fees under 37 CFR 1.27, is not disqualified as a small entity because of a license to a Federal agency pursuant to 35 U.S.C. 202(c)(4). Section 202(c)(4) reserves to the Federal agency a government use license in any invention made by a ''contractor'' (*e.g.,* small business concern or nonprofit organization) pursuant to activities under a ''funding agreement,'' as those terms are defined in 35 U.S.C. 201(b) and (c), when the contractor elects to retain title to a subject invention. It was brought to the USPTO's attention that much uncertainty existed as to whether the paragraph (a)(4)(ii) exception applies in cases in which there is a Federal employee co-inventor. In response, this rule amends 37 CFR 1.27(a)(4)(ii) to refer to 35 U.S.C. 202(e)(1), which permits the Federal agency, in the case of a Federal employee co-inventor, to ''license or assign whatever rights it may acquire in the subject invention to the nonprofit organization, small business firm, or non-Federal inventor . . . '' Section 1.27(a)(4)(ii) is being clarified to explicitly state that when the Federal agency takes action under 35 U.S.C. 202(e)(1) to place all ownership rights with the contractor, leaving to the Federal agency only the government use license under 35 U.S.C. 202(c)(4), the exception under section 1.27(a)(4)(ii) still applies. This is appropriate, given that a small entity contractor joint owner of a patent has the right to ''make, use, offer to sell, or sell the patented invention within the United States, or import the patented invention into the United States, without the consent of and without accounting to the other owners'' pursuant to 35 U.S.C. 262. Furthermore, Federal agency action to assign rights under 35 U.S.C. 202(e)(1) leaves to the Federal agency only the government use license, which is what the Federal agency would have acquired had there been no Federal employee co-inventor.

Cooperative research and development agreements (CRADAs) are another important tool to promote collaboration between Federal agencies and non-Federal parties, including those qualified as small entities. In support of research consistent with the mission of the Federal ''laboratory'' as that term is defined in 15 U.S.C. 3710a(d)(2), under CRADAs, the Government, through its laboratories, provides personnel, facilities, equipment, intellectual property, or other resources, except for funds to non-Federal parties, and the non-Federal parties provide their own resources, which may include funds, for the collaborative activities. A CRADA may stipulate that the collaborating party assumes responsibility for the filing and prosecution of a patent application directed to a joint invention made under the CRADA and retains title to such invention, with the goal of achieving the practical application of technology advancements through commercialization. The Federal law providing for CRADAs (15 U.S.C. 3710a) reserves an obligatory government use license in exchange for ownership rights retained by the collaborating party much the same way as discussed above with respect to Federal funding agreements and Government employee inventions. It was reported that some small businesses and nonprofit organizations were hesitant to enter into CRADAs with the Federal Government because, prior to this rulemaking, they would have automatically lost their small entity status and would have to pay full patent fees (undiscounted patent fees) as a result of granting the government use license or the Government's interest in a joint invention. In response to these concerns, and in order to encourage small business and nonprofit organization collaborating parties to take the initiative for filing and prosecuting patent applications for their inventions at no expense to the Government, this rule expands the exceptions in 37 CFR 1.27(a)(4) by adding a new section, 1.27(a)(4)(iii), that covers government use licenses that arise in certain situations when an otherwise qualifying small entity retains ownership rights to its invention made under a CRADA. This expansion of the government use license exception, as it pertains to federally supported research, is consistent with the President's ''Return on Investment Initiative,'' as it applies to transferring technology to the private sector that originated from federally funded research or non-funded research performed at a Federal agency laboratory. *See* NIST Special Publication 1234 titled ''Return on Investment Initiative for Unleashing American Innovation'' (April 2019).

Background: The Patent and Trademark Law Amendments Act, Public Law 96–517, 94 Stat. 3015 (Dec. 12, 1980)—commonly referred to as the Bayh-Dole Act—added chapter 18 (sections 200 *et seq.*) to 35 U.S.C. to ''encourage maximum participation . . . in federally supported research and development efforts'' (35 U.S.C. 200) by giving small businesses and nonprofit organizations the ability to elect to retain title to their inventions made under Federal funding agreements. For more than 35 years prior to this rulemaking, the USPTO has provided the exception—now at 37 CFR 1.27(a)(4)(ii)—for Bayh-Dole Act government use licenses under 35 U.S.C. 202(c)(4). Similar to the Bayh-Dole Act, the Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480, 94 Stat. 2311 (Oct. 21, 1980), as amended by the Federal Technology Transfer Act of 1986, Public Law 99–502, 100 Stat. 1785 (Oct. 20, 1986) (FTTA), seeks to promote development and utilization of technologies made with Federal support. Unlike the Bayh-Dole Act, whereby support is in the form of Federal funding, the FTTA, among other things, authorized CRADAs as the basis for research collaboration between Federal agencies and private sector businesses and organizations, including small business concerns and nonprofit organizations. Unlike 35 U.S.C. 202(c)(4) government use licenses, the patent rules did not previously provide an exception for government use licenses reserved to the Government under CRADAs in exchange for the small business concern or nonprofit organization's retention of ownership rights to its invention made during research at the partnering Federal laboratory. In response to feedback from Federal agencies concerning the importance of the small entity discount to promote collaboration with small businesses and nonprofit organizations and technology transfer efforts of Federal agencies and laboratories, the USPTO is revising the patent rules to

add a government use license exception that applies to small entities that make an invention under a CRADA with a Federal laboratory.

The statutory provisions for CRADAs, similar to those for Federal funding agreements under the Bayh-Dole Act, reserve to the Federal Government use licenses for inventions made under a CRADA. 35 U.S.C. 202(c)(4), which provides the Bayh-Dole Act version of the government use license, and the CRADA government use license found in 15 U.S.C. 3710a(b)(2) and 3710a(b)(3)(D), are practically identical in scope. As set forth in 35 U.S.C. 202(c)(4):

> With respect to any invention in which the contractor elects rights, the Federal agency shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States any subject invention throughout the world.

Under the Bayh-Dole Act provisions, the awardee of Federal funding is called a ''contractor.'' Under the CRADA provisions of the FTTA, the term used for a participating non-Federal party is ''collaborating party.'' In addition, the CRADA government use license refers to ''the laboratory'' or ''the Government'' as the recipient, rather than ''the Federal agency.''

The patent rules continue to provide a government use license exception for licenses arising under 35 U.S.C. 202(c)(4). Being added are exceptions for government use licenses that may arise under a CRADA pursuant to 15 U.S.C. 3710a(b)(2) or 3710a(b)(3)(D). Section 3710a(b)(2) concerns the use license reserved to the Government for an invention made solely by employees of the collaborating party, and section 3710a(b)(3)(D) concerns the use license reserved to the Government when the laboratory waives ownership rights to a subject invention made by the collaborating party or an employee of the collaborating party. This rulemaking adds to 37 CFR 1.27 a new paragraph (a)(4)(iii) providing an additional exception for government use licenses under 15 U.S.C. 3710a(b)(2) and 3710a(b)(3)(D) for inventions made by small entities under a CRADA with a Federal laboratory.

Further, with respect to the exception for the government use license under 35 U.S.C. 202(c)(4) as it existed prior to this rulemaking, it was reported to the USPTO that small business firms and nonprofit organizations had become increasingly concerned that contributions of Federal employees in joint inventions could eliminate their entitlement to small entity status. In response, the section 1.27(a)(4)(ii) exception—the so-called ''federal licensing safe harbor provision''—is amended to clarify in a new paragraph (B) that the exception applies when there is a Federal employee co-inventor, and action is taken under 35 U.S.C. 202(e)(1) by the Federal agency. Under section 202(e)(1), the funding Federal agency may license or assign whatever rights the Federal agency acquired in the subject invention, made by the contractor with a Federal employee co-inventor, to the contractor, in accordance with the provisions of 35 U.S.C. chapter 18, which include a government use license. The section 1.27(a)(4)(ii) exception is amended to explicitly apply, under new paragraph (B), to such situations. When an employee of the small entity contractor and an employee of the Federal agency are co-inventors, the small entity contractor, by virtue of an assignment from the contractor employee or the employee's current obligation to assign, would still have an undivided ownership interest in the joint invention. The undivided interest to the joint owner is provided at 35 U.S.C. 262. The requirement for an assignment or a currently existing obligation to assign is set forth in *Board of Trustees of Leland Stanford Junior University* v. *Roche Molecular Systems, Inc.,* 563 U.S. 776 (2011), where the Court held: ''[o]nly when an invention belongs to the contractor does the Bayh-Dole Act come into play.'' *Id.* at 790. In addition, '' . . . unless there is an agreement to the contrary, an employer does not have rights in an invention 'which is the original conception of the employee alone.' '' *Id.* at 786. Accordingly, when action is taken by the Federal agency under 35 U.S.C. 202(e)(1), the contractor could elect to retain full ownership rights. These ownership rights would be the same as those retained by a contractor under new paragraph (A) of section 1.27(a)(4)(ii), which applies when the subject invention was made solely by the small entity contractor employee(s). 35 U.S.C. 202(e) refers to this as ''consolidating rights.''

Consistent with the foregoing, this rule change clarifies that a use license under 35 U.S.C. 202(c)(4) resulting from a funding agreement with a Federal agency does not preclude claiming small entity status in the case of a Federal employee co-inventor when the Federal agency employing such co-inventor took action pursuant to 35 U.S.C. 202(e)(1), to exclusively license or assign whatever rights currently held or that it may acquire in the subject invention to the small business concern or nonprofit organization, subject to the license under 35 U.S.C. 202(c)(4). This is set forth in new paragraph (B) of section 1.27(a)(4)(ii). Of course, claiming small entity status in such a case would also require that no other interest in the invention is held by a party not qualifying as a small entity. Thus, new paragraph (B) clarifies, but does not change, the applicability of section 1.27(a)(4)(ii) in cases in which consolidation of rights to a small entity contractor has occurred under 35 U.S.C. 202(e)(1). This clarification is important, given that prior to this rulemaking, there may have been uncertainty as to whether the section 1.27(a)(4)(ii) exception could ever apply in cases in which there is a Federal employee co-inventor. Accordingly, notwithstanding the effective date of this rulemaking, for any small business concern or nonprofit organization contractor to which new paragraph (B) of section 1.27(a)(4)(ii) applies, the three-month time period under 37 CFR 1.28(a) for requesting a refund based on later establishment of small entity status is not affected by this rulemaking. This accounts for the possibility that a small business concern or nonprofit organization contractor, to which paragraph (B) of section 1.27(a)(4)(ii) applies, might have paid full fees within three months prior to the effective date of this rulemaking based on a misunderstanding of the applicability of section 1.27(a)(4)(ii) as it existed prior to this rulemaking. In that event, the small business concern or nonprofit organization qualifying as a small entity, by virtue of paragraph (B) of section 1.27(a)(4)(ii), could take advantage of the provisions under 37 CFR 1.28(a) to obtain a refund based on later establishment of small entity status. A refund request under section 1.28(a) is really a request for a partial refund, since a section 1.28(a) refund is based on applying a discount subsequent to payment of the full fee.

Section 1.28(a) requires that the request for a refund of the excess amount, and an accompanying assertion of small entity status, be ''filed within three months of the date of timely payment of the full fee.'' Except for the three-month window of opportunity provided by 37 CFR 1.28(a), the failure to establish status as a small entity in any application or patent prior to paying, or at the time of paying, any fee (1) precludes payment of the fee in the small entity amount, and (2) precludes a refund, pursuant to 37 CFR 1.26, of any portions of fees paid prior to establishing status as a small entity. Accordingly, any request for a refund under section 1.28(a) based on the clarifying effect of new paragraph (B) of

section 1.27(a)(4)(ii) would only be appropriate if filed within three months of payment of the full fee, notwithstanding the effective date of this final rule. Because section 1.27(a)(4)(iii) sets forth a new government use license exception not available prior to the effective date of this rulemaking, a refund under section 1.28(a) for later establishment of small entity status on the basis of the new section 1.27(a)(4)(iii) exception could be obtained only for full patent fees that were timely paid on or after the effective date of this rulemaking and requested within three months of payment of the full fee.

Regarding new section 1.27(a)(4)(iii), which applies to government use licenses arising under a CRADA where the small entity retains all ownership rights, paragraph (B) covers situations in which the Federal laboratory took action under 15 U.S.C. 3710a(b)(3)(D), to waive in whole any right of ownership the Government may have to the subject invention made by the small business concern or nonprofit organization. Paragraph (A) of section 1.27(a)(4)(iii) applies to government use licenses arising in situations in which the invention to which title is retained, was made solely by the employee of the small business concern or nonprofit organization. Thus, consolidation of rights to a small entity collaborating party, under the CRADA provision of 15 U.S.C. 3710a(b)(3)(D), is treated similarly to the way in which consolidation of rights to a contractor, under the Bayh-Dole Act provision of 35 U.S.C. 202(e)(1), is treated under 37 CFR 1.27(a)(4)(ii). All the exceptions under 37 CFR 1.27(a)(4)(i) through (iii) require that the Government or the Federal agency receive no more than the applicable government use license and that there is no other interest in the invention held by a party not qualifying as a small entity.

New section 1.27(a)(4)(iv) is added to specify that regardless of whether a government use license exception applies, no refund under 37 CFR 1.28(a) is available for any patent fee paid by the Government.

When the exception at 37 CFR 1.27(a)(4) was originally promulgated, the basis for the exception, as it related to the obligatory license to the Federal government under 35 U.S.C. 202(c)(4), was ''to avoid frustrating the intent of Public Law 97–247 and Pub. L. 96–517 when taken together.'' See Revision of Patent Practice, 49 FR 548, Jan. 4, 1984. (Pub. L. 97–247 was a 1982 appropriations act from which the small entity discount originated, and Public Law 96–517 is a reference to the Bayh-Dole Act of 1980.) No such basis exists for extending the government use license exceptions to the micro entity provisions. In addition, although the USPTO can provide for government use license exceptions for small entity status qualification, these exceptions cannot apply for purposes of qualifying as a micro entity on the gross income basis. The reason for this is that the statute authorizing micro entity patent fee discounts—35 U.S.C. 123(a)(4)—disqualifies an entity from micro entity status if it has assigned, granted, or conveyed a license or other ownership interest in the invention to an entity that exceeded the gross income limit (currently $206,109) in its previous calendar year's gross income. Because a ''gross national income'' is attributed to the United States each year, any government use license runs afoul of the 35 U.S.C. 123(a)(4) qualification requirement. Accordingly, a government use license may not disqualify an applicant from a small entity status, but does disqualify the applicant from micro entity status. This applies to micro entity status on the ''institution of higher education basis'' under section 1.29(d) as well as micro entity status on the ''gross income basis'' under section 1.29(a). A clarifying amendment to 37 CFR 1.29 is made in order to explicitly reflect this.

Discussion of Regulatory Changes: These rule changes amend 37 CFR 1.27(a)(4) to clarify and expand the exceptions to the general rule that every party holding rights to an invention must qualify as a small entity under 37 CFR 1.27 in order for small entity status to be properly claimed.

A new introductory clause is added to 37 CFR 1.27(a)(4) to limit eligibility for each government use license exception to patent applications filed and prosecuted at no expense to the Government, with the exception of any expense taken to deliver the application and fees to the USPTO on behalf of the applicant. A new paragraph (a)(4)(iv) is added to 37 CFR 1.27 to specify that regardless of whether a government use license exception applies, no refund under 37 CFR 1.28(a) is available for any patent fee paid by the Government. To overcome any reluctance of research partners to take responsibility for seeking patent protection of federally supported inventions, the new section 1.27(a)(4) introductory clause, combined with new paragraph (a)(4)(iv), should encourage small business concern and nonprofit organization contractors and collaborators to take the lead in seeking patent protection.

The regulations at 37 CFR 1.27(a)(4)(i) have long provided an exception for a government use license resulting from a rights determination under E.O. 10096, wherein title to the invention is retained by a Federal employee-inventor (''a person'' as defined in 37 CFR 1.27(a)(1)). That exception is being amended to acknowledge the regulations contained in 37 CFR part 501, which implement E.O. 10096. This is done by making reference in the rule to 37 CFR 501.6, which substantially incorporates the E.O. 10096 criteria for the determination of rights in and to any invention made by a Government employee. This exception, as amended by this rulemaking, remains in section 1.27(a)(4)(i) under a new paragraph (A). A new paragraph (B) is added to section 1.27(a)(4)(i), referring to 15 U.S.C. 3710d(a), which provides for disposal of title to an invention from the Federal agency to the Federal employee-inventor, as well as the conditions under which the employee obtains or retains title to the invention, subject to a government use license. Accordingly, paragraphs 1.27(a)(4)(i)(A) and (B) both relate to the government use license exception in the context of Federal employee-inventors who retain title to their work inventions, subject to a government use license. Also added to section 1.27(a)(4)(i) is a new paragraph (C) for government use licenses to a Federal agency resulting from retention of rights by the inventor under 35 U.S.C. 202(d), when a small business concern or nonprofit organization contractor does not elect to retain title to an invention made by its employee under a Federal funding agreement. Provided the Federal agency receives no more than the government use license, and there is no other interest in the invention held by a party not qualifying as a small entity, the inventor who otherwise qualifies for small entity status is not prohibited from claiming small entity status as a result of retaining rights under 35 U.S.C. 202(d), to his or her invention. This exception is contingent upon the inventor meeting the conditions applicable under 37 CFR 401.9, to an employee/inventor of the small business firm or nonprofit organization contractor not electing to retain title. (37 CFR part 401 implements the provisions of the Bayh-Dole Act codified in 35 U.S.C. 200–212.) Compared to what was proposed in the February 5, 2020, notice of proposed rulemaking (NPRM) at 85 FR 6476, the language of new paragraph 1.27(a)(4)(i)(C) is changed for clarity. For example, a specific reference to the 35 U.S.C. 202(c)(4) government use license was added, as well as the term ''employee/inventor,'' which is the term

37 CFR 401.9 uses to refer to the contractor's employee. No new requirement is added to paragraph 1.27(a)(4)(i)(C) compared to the proposed requirements. Thus, section 1.27(a)(4)(i) continues to apply to small entity ''persons,'' as defined in 37 CFR 1.27(a)(1), and as amended by this rulemaking, sets forth three types of government use licenses that would not disqualify a patent applicant from claiming small entity status for purposes of paying reduced patent fees.

With respect to ''small business concerns'' and ''nonprofit organizations,'' as defined in 37 CFR 1.27(a)(2) and (3), there are generally two types of agreements into which they enter with the Federal Government that are pertinent to this rulemaking: (1) Federal funding agreements under the Bayh-Dole Act (as defined in 35 U.S.C. 201(b)), and (2) CRADAs, as provided for in 15 U.S.C. 3710a. Both of these agreements require a government use license to be granted to the Federal Government by the entity or person retaining title to an invention made under such agreement. The regulations at section 1.27(a)(4)(ii) continue to provide an exception for Bayh-Dole Act government use licenses under 35 U.S.C. 202(c)(4). To clarify that exception, new paragraphs (A) and (B) are added to section 1.27(a)(4)(ii). Paragraph 1.27(a)(4)(ii)(A) applies to the situation in which the invention under a Federal funding agreement was made solely by employees of the small business concern or nonprofit organization. Paragraph 1.27(a)(4)(ii)(B) addresses situations in which there is a Federal employee co-inventor.

Prior to this rulemaking, the patent rules did not provide any exception for use licenses reserved to the Government under a CRADA. The rule change provides an additional exception, in a new section 1.27(a)(4)(iii), for government use licenses for inventions made by small entities under a CRADA in situations under 15 U.S.C. 3710a(b)(2) and 3710a(b)(3)(D), wherein the small entity retains title to the invention.

Section 1.29 is amended to clarify that the government use license exceptions under 37 CFR 1.27(a)(4) do not apply for purposes of micro entity status qualification. The baseline small entity requirement under sections 1.29(a)(1) and (d)(1) cannot be met if qualification as a small entity under 37 CFR 1.27 depends on one of the government use license exceptions specified in 37 CFR 1.27(a)(4).

Response to Comments

The USPTO published a notice proposing changes to the rules of practice in patent cases to clarify and expand exceptions to the rule pertaining to government use licenses and their effect on small entity status for purposes of paying reduced patent fees, so as to support independent inventors, small business concerns, and nonprofit organizations in filing patent applications. *See* Small Entity Government Use License Exception, 85 FR 6476 (February 5, 2020). In response, the Office received two comments, one from a nonprofit association and one from an attorney, both of which fully endorsed the purpose and the content of the proposed changes. The Office thanks these commenters for their feedback.

Rulemaking Considerations

A. Administrative Procedure Act: The changes in this rulemaking involve rules of agency practice and procedure, and/or interpretive rules. *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)); *Nat'l Org. of Veterans' Advocates* v. *Sec'y of Veterans Affairs,* 260 F.3d 1365, 1375 (Fed. Cir. 2001) (Rule that clarifies interpretation of a statute is interpretive.); *Bachow Commc'ns Inc.* v. *FCC,* 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 standard for reviewing claims.).

Accordingly, prior notice and opportunity for public comment for the changes in this rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. *See Perez,* 135 S. Ct. at 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)(A))). However, the Office chose to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act: Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish an NPRM, the agency must prepare and make available for public comment an Initial Regulatory Flexibility Analysis, unless the agency certifies under 5 U.S.C. 605(b) that the proposed rule, if implemented, will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605. The Senior Counsel for Regulatory and Legislative Affairs in the Office of General Law of the USPTO certified to the Chief Counsel for Advocacy of the Small Business Administration that the NPRM will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b). For the reasons set forth herein, the Senior Counsel for Regulatory and Legislative Affairs in the Office of General Law of the USPTO has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities.

The USPTO is amending the rules of practice in patent cases to clarify and expand exceptions to the rule pertaining to government use licenses and their effect on small entity status for purposes of paying reduced patent fees, so as to support independent inventors, small business concerns, and nonprofit organizations in filing patent applications. To be entitled to pay small entity patent fees, all parties holding rights in the invention must qualify for small entity status. Prior to this rulemaking, there were two exceptions to this rule, both of which continue to apply, as clarified and expanded by this rulemaking. Both these exceptions relate to government use licenses granted under the law by independent inventors, small business concerns, or nonprofit organizations otherwise qualifying as a small entity, where such entities retain title to their inventions. The first exception applies when an inventor employed by the Federal Government has an obligation to grant the government use license in the workplace invention in which the inventor obtains title pursuant to a rights determination under E.O. 10096. This exception continues to apply and is amended to clarify that it applies to employees of Federal laboratories under 15 U.S.C. 3710d(a). The second exception applies when the government use license in the Government-funded invention is an obligation (pursuant to 35 U.S.C. 202(c)(4)) under a funding

agreement with a Federal agency. This exception is expanded to cover the situations in which a small business concern or nonprofit organization qualifying as a small entity does not elect to retain title to an invention made by its employee under a Federal funding agreement, and the Federal agency allows the inventor to retain title to the federally funded invention. In that case, a government use license (equivalent to that specified in 35 U.S.C. 202(c)(4)) is an obligation arising from the employee's retention of rights under 35 U.S.C. 202(d). The second exception is also expanded to address situations in which there is a Federal employee co-inventor. Further, this rulemaking adds a third exception to cover a government use license arising from an obligation under a CRADA with a Federal agency pursuant to 15 U.S.C. 3710a(b). Regardless of whether any of the aforementioned exceptions apply, no refund is available for any patent fee paid by the Government. In addition, patent applications filed and prosecuted at Government expense will not be entitled to the small entity discount. Finally, the qualifications for the micro entity patent fee discount are clarified.

The rule changes are designed to encourage persons, small businesses, and nonprofit organizations to collaborate with the Federal Government by providing an opportunity to qualify for the small entity patent fees discount for inventions made during the course of federally funded or federally supported research. Thus, this rule allows more entities to qualify for the small entity fee discount; these entities may qualify for a 50% reduction in fees, resulting in a substantial cost savings to them. Although the cost savings may be substantial, this rule is not expected to impact a large number of small entities. We estimate the number of small entities impacted by this rule to be in the range of 750 to 1,000, based on the number of active CRADAs reported for FY 2015 and its projected growth.

These changes are procedural and are not expected to have a direct economic impact on small entities. For the reasons described above, this rule is not expected to 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 rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866 (Jan. 30, 2017).

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 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

H. 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).

I. 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).

J. 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).

K. 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).

L. 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 rulemaking 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).

M. Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking 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.*

N. National Environmental Policy Act of 1969: 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.*

O. National Technology Transfer and Advancement Act of 1995: 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.

P. Paperwork Reduction Act of 1995: The Paperwork Reduction Act of 1995 (44 U.S.C. 3501) requires that the Office consider the impact of paperwork and other information collection burdens imposed on the public. This rulemaking does not involve any new information collection requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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 has a valid OMB control number.

List of Subjects in 37 CFR Part 1

Administrative practice and procedure, Biologics, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, 37 CFR part 1 is amended as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

■ 1. The authority citation for 37 CFR part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

■ 2. Section 1.27 is amended by revising paragraph (a)(4) to read as follows:

§ 1.27 Definition of small entities and establishing status as a small entity to permit payment of small entity fees; when a determination of entitlement to small entity status and notification of loss of entitlement to small entity status are required; fraud on the Office.

(a) * * *

(4) *Federal Government Use License Exceptions.* In a patent application filed, prosecuted, and if patented, maintained at no expense to the Government, with the exception of any expense taken to deliver the application and fees to the Office on behalf of the applicant:

(i) For persons under paragraph (a)(1) of this section, claiming small entity status is not prohibited by:

(A) A use license to the Government resulting from a rights determination under Executive Order 10096 made in accordance with § 501.6 of this title;

(B) A use license to the Government resulting from Federal agency action pursuant to 15 U.S.C. 3710d(a) allowing the Federal employee-inventor to obtain or retain title to the invention; or

(C) A use license to a Federal agency resulting from retention of rights under 35 U.S.C. 202(d) by an inventor employed by a small business concern or nonprofit organization contractor, provided the license is equivalent to the license under 35 U.S.C. 202(c)(4) the Federal agency would have received had the contractor elected to retain title, and all the conditions applicable under § 401.9 of this title to an employee/inventor are met.

(ii) For small business concerns and nonprofit organizations under paragraphs (a)(2) and (3) of this section, a use license to a Federal agency resulting from a funding agreement with that agency pursuant to 35 U.S.C. 202(c)(4) does not preclude claiming small entity status, provided that:

(A) The subject invention was made solely by employees of the small business concern or nonprofit organization; or

(B) In the case of a Federal employee co-inventor, the Federal agency employing such co-inventor took action pursuant to 35 U.S.C. 202(e)(1) to exclusively license or assign whatever rights currently held or that it may acquire in the subject invention to the small business concern or nonprofit organization, subject to the license under 35 U.S.C. 202(c)(4).

(iii) For small business concerns and nonprofit organizations under paragraphs (a)(2) and (3) of this section that have collaborated with a Federal agency laboratory pursuant to a cooperative research and development agreement (CRADA) under 15 U.S.C. 3710a(a)(1), claiming small entity status is not prohibited by a use license to the Government pursuant to:

(A) 15 U.S.C. 3710a(b)(2) that results from retaining title to an invention made solely by the employee of the small business concern or nonprofit organization; or

(B) 15 U.S.C. 3710a(b)(3)(D), provided the laboratory has waived in whole any right of ownership the Government may have to the subject invention made by the small business concern or nonprofit organization, or has exclusively licensed whatever ownership rights the Government may acquire in the subject invention to the small business concern or nonprofit organization.

(iv) Regardless of whether an exception under this paragraph (a)(4) applies, no refund under § 1.28(a) is available for any patent fee paid by the Government.

* * * * *

■ 3. Section 1.29 is amended by revising paragraphs (a)(1) and (d)(1) to read as follows:

§ 1.29 Micro entity status.

(a) * * *

(1) The applicant qualifies as a small entity as defined in § 1.27 without relying on a government use license exception under § 1.27(a)(4);

* * * * *

(d) * * *

(1) The applicant qualifies as a small entity as defined in § 1.27 without relying on a government use license exception under § 1.27(a)(4); and

* * * * *

Andrei Iancu,

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

[FR Doc. 2020–27049 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No. PTO–P–2019–0011]

RIN 0651–AD34

Rules of Practice To Allocate the Burden of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board

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 in *inter partes* review (IPR), post-grant review (PGR), and the transitional program for covered business method patents (CBM) (collectively post-grant trial) proceedings before the Patent Trial and Appeal Board (PTAB or Board) to allocate the burdens of persuasion in relation to motions to amend and the patentability of substitute claims proposed therein. In light of Federal Circuit case law, and to better ensure the predictability and certainty of post-grant trial proceedings before the Board, the Office revises the rules of practice governing motions to amend, to expressly assign to the petitioner the burden of showing the unpatentability of substitute claims proposed in a motion to amend. In addition, the Office revises the rules to expressly assign to the patent owner the burden of showing that a motion to amend complies with certain statutory and regulatory requirements for such a motion. Notwithstanding the adversarial nature

of the proceedings and the burdens described above, however, the Office further revises its rules to expressly provide that the Board itself may, in the interests of justice, exercise its discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record in the proceeding. The Office anticipates the Board will exercise its discretion in the interests of justice only in rare circumstances. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion in such circumstances, the parties will have an opportunity to respond.

DATES:

Effective date: The changes in this final rule are effective January 20, 2021.

Applicability date: This final rule applies to all motions to amend filed in an IPR, PGR, or CBM proceeding on or after January 20, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher L. Crumbley, Lead Administrative Patent Judge, or Susan L. C. Mitchell, Lead Administrative Patent Judge, by telephone at 571–272–9797.

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose: This final rule amends the rules of practice for IPR, PGR, and CBM proceedings that implement provisions of the Leahy-Smith America Invents Act, Public Law 112–29, 125 Stat. 284 (2011) (AIA) providing for post-grant trials before the Office.[1]

Pursuant to the AIA, during the course of an IPR, PGR, or CBM proceeding, a patent owner may file a motion to amend the patent by canceling any challenged patent claim or by proposing a reasonable number of substitute claims for each challenged claim. 35 U.S.C. 316(d)(1), 326(d)(1).

Previously, relying on a general rule that a movant bears the burden of proof with respect to motions before the Board (37 CFR 42.20(c)), the Office placed the burden of showing the patentability of proposed substitute claims on the patent owner moving to amend a patent in a trial proceeding. On October 4, 2017, the United States Court of Appeals for the Federal Circuit issued an *en banc* decision in *Aqua Prods., Inc.* v. *Matal,* 872 F.3d 1290 (Fed. Cir. 2017) (en banc) (*Aqua Products*), in which a majority of the judges concluded that the Office had not adopted a rule allocating the burden of persuasion with respect to the patentability of proposed substitute claims and that, in the absence of any rulemaking, the burden of proving the unpatentability of the proposed substitute claims could not be placed on the patent owner.

In light of *Aqua Products,* as well as public comments provided in response to a request for comments (*see* 83 FR 54319), the Office issued a notice of proposed rulemaking, which proposed specific rules allocating the burdens of persuasion in relation to motions to amend (*see* 84 FR 56401). The proposed rule, as modified herein, is now made final.

The final rule assigns the burden of persuasion to the patent owner to show, by a preponderance of the evidence, that a motion to amend complies with certain statutory and regulatory requirements for a motion to amend (*i.e.,* 35 U.S.C. 316(d) or 326(d); 37 CFR 42.121(a)(2), (a)(3), (b)(1), (b)(2), or 42.221(a)(2), (a)(3), (b)(1), (b)(2)). The final rule also assigns the burden of persuasion to the petitioner to show, by a preponderance of the evidence, that any proposed substitute claims are unpatentable. The final rule further specifies, however, irrespective of those burdens and the adversarial nature of the proceeding, that the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend, but only for reasons supported by readily identifiable and persuasive evidence of record in the proceeding. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion in such circumstances, the parties will have an opportunity to respond.

The Office anticipates that the Board will exercise its discretion in the context of motions to amend only in rare circumstances. Specifically, the ''interests of justice'' in the final rule means that the Board will apply the same standards articulated in *Hunting Titan, Inc.* v. *DynaEnergetics Europe GmbH,* IPR2018–00600 (PTAB July 6, 2020) (Paper 67) (*Hunting Titan*). Thus, the phrase ''in the interests of justice'' in the final rule refers to situations in which the adversarial process fails to provide the Board with potential arguments relevant to granting or denying a motion to amend. *Id.* at 12–13, 25–26.

Such situations may include, for example, those in which the petitioner has ceased to participate in the proceeding or chooses not to oppose the motion to amend, or those in which certain evidence regarding unpatentability has not been raised by either party but is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings. *Id.* Similarly, such situations may also include those in which a patent owner does not expressly address or establish every statutory and regulatory requirement for a motion to amend in its briefing, but evidence of compliance with those requirements is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings.

Thus, the final rule clarifies the rules of practice for amending claims in an IPR, PGR, or CBM and is consistent with *Aqua Products* and also with current Board practice as described in the precedential Board decisions in *Hunting Titan* and *Lectrosonics, Inc.* v. *Zaxcom, Inc.,* IPR2018–01129 (PTAB Feb. 25, 2019) (Paper 15) (*Lectrosonics*). In response to comments seeking clarification, the final rule also provides additional details to the scope of ''readily identifiable and persuasive evidence of record'' to include only evidence that the Board may make of record, namely, evidence in a related proceeding before the Office (*i.e.,* in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent), or evidence that a district court can judicially notice under Federal Rule of Evidence 201. The final rule further expressly states that in instances where the Board exercises its discretion in the interests of justice, the Board will provide the parties an opportunity to respond before rendering a final decision on the motion to amend. As such, the final rule does not reflect a change from current practice.

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, and derivation

[1] Under Section 18 of the AIA, the transitional program for post-grant review of covered business method patents sunset on September 16, 2020. AIA § 18(a). Although the program has sunset, existing CBM proceedings, based on petitions filed before September 16, 2020, are still pending. For those pending CBM proceedings, the final rule applies to any motion to amend filed after the effective date.

proceedings pursuant to 35 U.S.C. 135, 316, and 326 and AIA sec. 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); 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 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* Office Patent Trial Practice Guide, 77 FR 48756 (Aug. 14, 2012); *see also* Office Patent Trial Practice Guide, August 2018 Update, 83 FR 39989 (Aug. 13, 2018); Office Patent Trial Practice Guide, July 2019 Update, 84 FR 33925 (July 16, 2019); Consolidated Trial Practice Guide, 84 FR 64280 (Nov. 21, 2019).

In prescribing these regulations, the Office considered ''the effect of any such regulation 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'' as required by statute. 35 U.S.C. 316(b), 326(b). The Office also considered the public comments carefully and responded to the comments in these final rules. Among the final rules, the Office promulgated § 42.20(c), which states that a ''moving party has the burden of proof to establish that it is entitled to the requested relief.'' 37 CFR 42.20(c).

Previously, the Board interpreted the burden of proof requirement of § 42.20(c) to apply to motions to amend filed pursuant to 35 U.S.C. 316 and 326, including the requirement to show that the proposed substitute claims were patentable over the prior art of record. *MasterImage 3D, Inc.* v. *RealD Inc.,* IPR2015–00040 (PTAB July 15, 2015) (Paper 42) (*MasterImage*). Under *MasterImage,* which was subsequently made precedential, the patent owner in a proceeding, as the moving party in a motion to amend, bore the burden of showing that the proposed substitute claims were patentable. *Id.*

On October 4, 2017, the Federal Circuit issued its *en banc* decision in *Aqua Products,* addressing the burden of persuasion regarding the patentability of substitute claims presented in a motion to amend. The lead opinion of the decision explains that, in the absence of rulemaking, the USPTO may not place the burden of persuasion on the patent owner to show that proposed substitute claims are patentable.

> The only legal conclusions that support and define the judgment of the court are: (1) The PTO has not adopted a rule placing the burden of persuasion with respect to the patentability of amended claims on the patent owner that is entitled to deference; and (2) in the absence of anything that might be entitled deference, the PTO may not place that burden on the patentee.

872 F.3d at 1327 (O'Malley, J.).

A separate opinion joined-in-part by a majority of the *en banc* court observed that ''it is well settled that regardless of which party bears the ultimate burden of *persuasion,* the movant bears a burden of *production*'' and that ''the Patent Office has adopted regulations that address what a patent owner must submit in moving to amend the patent.'' *Id.* at 1340–41 (Reyna, J., concurring in part) (citing 37 CFR 42.20(a), 42.22(a), 42.121(a)(2)(i)). The opinion explains that these regulations require a patent owner to ''assist[ ] the Board to perform its statutory obligation to 'issue a final written decision with respect to the patentability of . . . any new claim added under section 316(d).' '' *Id.* at 1341 (omission in original) (quoting 35 U.S.C. 318(a)).

In view of the Federal Circuit's decision in *Aqua Products,* on November 21, 2017, the Office issued formal guidance through a memorandum from the Chief Administrative Patent Judge, explaining that, in light of the *Aqua Products* decision, the Board would no longer place the burden of persuasion on a patent owner with respect to the patentability of any proposed substitute claims presented in a motion to amend. *See* Guidance on Motions to Amend in view of *Aqua Products, https://go.usa.gov/xQGAA* (Guidance Memo). The Guidance Memo also notes that a motion to amend must continue to satisfy the requirements of 37 CFR 42.121 or 42.221 (*e.g.,* provide a reasonable number of substitute claims and written description support in relation to each substitute claim), as applicable, that all parties continue to have a duty of candor under 37 CFR 42.11, and that the page limits, type, and timing of briefs remain unchanged. *Id.*

On December 22, 2017, the Federal Circuit issued a related decision in *Bosch Auto. Serv. Solutions, LLC* v. *Matal,* 878 F.3d 1027 (Fed. Cir. 2017) (*Bosch*). In that decision, because the petitioner had settled with the patent owner who had proposed substitute claims, the Federal Circuit remanded the case to the Board to evaluate the patentability of the proposed substitute claims. *Id.* (''[W]here the challenger ceases to participate in the IPR and the Board proceeds to final judgment, *it is the Board* that must justify any finding of unpatentability by reference to the evidence of record in the IPR.'') (emphasis in original) (quoting *Aqua Products,* 872 F.3d at 1311 (O'Malley, J.)).

In view of the decisions by the Federal Circuit regarding motion to amend practice and procedure in AIA trials, the Board de-designated as precedential *MasterImage,* as well as de-designated as informative a prior decision of the Board in *Idle Free Sys., Inc.* v. *Bergstrom, Inc.,* IPR2012–00027 (PTAB June 11, 2013) (Paper 26), decisions in which the Board panels stated that ''[t]he burden is not on the petitioner to show unpatentability, but on the patent owner to show patentable distinction over the prior art of record and also prior art known to the patent owner.'' *Id.* at 7; *see also MasterImage,* Paper 42 at 2 (quoting *Idle Free*). Concurrently, the Board designated an order issued in *Western Digital Corp.* v. *SPEX Techs., Inc.,* IPR2018–00082, –00084 (PTAB Apr. 25, 2018) (Paper 13) (*Western Digital*) as informative to provide an example of how panels can handle several aspects of the motion to amend practice under the *Aqua Products* and *Bosch* precedent. With respect to the burden of persuasion, the *Western Digital* order explained that under the current state of the law, ''the burden of persuasion will ordinarily lie with the petitioner to show that any proposed substitute claims are unpatentable'' and that the ''Board itself may justify any finding of unpatentability by reference to evidence of record in the proceeding.'' *Id.* at 4.

On March 7, 2018, the Board designated as precedential an order in *Lectrosonics* and de-designated *Western Digital.* The *Lectrosonics* order provides guidance regarding statutory and regulatory requirements for a motion to amend in light of Federal Circuit case law. For example, the *Lectrosonics* order notes that prior to considering the patentability of any substitute claims, the Board must first determine whether the patent owner has met the statutory and regulatory requirements set forth in 35 U.S.C. 316(d) and 37 CFR 42.121, such as the requirements that the motion proposes a reasonable number of substitute claims and that the amendments do not broaden the scope of the claims. *Lectrosonics,* Paper 15 at 4–5. The *Lectrosonics* order also sets out that ''the burden of persuasion

ordinarily will lie with the petitioner to show that any proposed substitute claims are unpatentable by a preponderance of the evidence.'' *Id.* at 4.

On October 29, 2018, the Office published a Request for Comments on Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board in the **Federal Register** (Request for Comments), seeking public comment on various aspects of the Board's amendment practice. 83 FR 54319. Among the questions on which the Board sought public input were the following, directed to the allocation of the burden of persuasion:

15. Should the Office engage in rulemaking to allocate the burden of persuasion regarding the patentability of proposed substitute claims in a motion to amend as set forth in the *Western Digital* order? What are the advantages or disadvantages of doing so?

16. If the Office continues to allocate the burden as set forth in the *Western Digital* order, under what circumstances should the Board itself be able to justify findings of unpatentability? Only if the petitioner withdraws from the proceeding? Or are there situations where the Board itself should be able to justify findings of unpatentability when the petitioner remains in the proceeding? What are the advantages or disadvantages?

Id. at 54325.[2]

In response to the October 2018 Request for Comments, the Office received 49 comments as of December 21, 2018 (the closing date for comments), from intellectual property organizations, trade organizations, other organizations, and individuals. *See https://go.usa.gov/xyeFy* (collected responses to Request for Comments).[3] [4] Approximately 25 of the commenters provided specific responses to Questions 15 and 16 of the Request for Comments. In response to Question 15, the majority of commenters were in favor of the Office engaging in rulemaking to allocate the burden of persuasion as set forth in *Western Digital* (as discussed in more detail below). Only three commenters believed rulemaking was unnecessary (either because the Board could simply continue to apply its own precedent or because the statute already allocates the burden of persuasion). A minority of commenters stated that the Office should engage in rulemaking but that the burden of persuasion should be placed on the patent owner.

Additionally, in response to Question 15, some commenters suggested that even if the Office promulgates rules to place the burden of persuasion on the petitioner on the issue of patentability of the proposed substitute claims, the patent owner continues to bear the burden to show that the motion to amend complies with the statutory requirements of 35 U.S.C. 316(d) or 326(d) (for example, that the amendment may not enlarge the scope of the claims), as well as the regulatory requirements of 37 CFR 42.121 or 42.221 (for example, that the motion set forth the support for the amendment in the original disclosure of the patent).

In response to Question 16, the majority of responsive comments stated that the Board should be able to justify findings of unpatentability in any circumstance, for example, even when the petitioner remains in the proceeding. Two commenters responded that the Board should never be able to assume the burden of persuasion on unpatentability itself, and three commenters believed that the Board should be permitted to justify findings of unpatentability of proposed substitute claims itself only in certain circumstances, for example, when a petitioner ceases to participate in a proceeding.

In light of the generally positive support for rulemaking to allocate the burden of persuasion as set forth in the *Western Digital* order (and subsequently made precedential in *Lectrosonics*), and in the interest of providing greater clarity, certainty, and predictability to parties participating in AIA trial proceedings before the Board, the Office issued a proposed rule allocating the burden of persuasion.

In the notice of proposed rulemaking issued on October 22, 2019, the Office sought comments on a specific proposed rule clarifying the burdens of persuasion in relation to motions to amend. *See* Rules of Practice To Allocate the Burden of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board, 84 FR 56401. The proposed rule allocated the burdens of persuasion regarding the patentability of proposed substitute claims as set forth in *Lectrosonics* and *Western Digital.* The proposed rule also stated that, irrespective of the burdens of persuasion, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend for any reason supported by the evidence of record. The Office invited the public to provide comments by December 23, 2019. As discussed in more detail below, the Office received a total of 18 comments in response. *See https://go.usa.gov/xGXCN* (collected responses to notice of proposed rulemaking).

On April 9, 2020, the Federal Circuit issued its opinion in *Nike, Inc.* v. *Adidas AG,* 955 F.3d 45 (Fed. Cir. 2020) (*Nike*). In that case, the Federal Circuit concluded that ''the Board should not be constrained to arguments and theories raised by the petitioner in its petition or opposition to the motion to amend. . . . Otherwise, were a petitioner not to oppose a motion to amend, the Patent Office would be left with no ability to examine the new claims.'' *Id.* at 51. As such, the Federal Circuit held that ''the Board may sua sponte identify a patentability issue for a proposed substitute claim based on the prior art of record.'' *Id.*

Also, on July 6, 2020, the Board's Precedential Opinion Panel (POP) issued a precedential decision in *Hunting Titan.* This decision addressed two questions: (1) Under what circumstances and at what time during an IPR may the Board raise a ground of unpatentability that a petitioner did not advance or insufficiently developed against substitute claims proposed in a motion to amend; and (2) whether the Board must provide the parties notice and an opportunity to respond to a ground of unpatentability it raises before making a final determination. *Hunting Titan,* Paper 67 at 3. In *Hunting Titan,* the POP determined that the Board may, in certain rare circumstances, raise a ground of unpatentability that a petitioner did not advance, or insufficiently developed, against substitute claims proposed in a motion to amend. *Id.* at 4. Those circumstances are typically limited to situations in which the adversarial

[2] The October 2018 Request for Comments was published before *Western Digital* was superseded by *Lectrosonics* and thus referred only to the *Western Digital* order. Both orders are identical in their discussion of the burden of persuasion. Therefore, Questions 15 and 16 of the Request for Comments, and the public comments provided thereto, were equally pertinent to the current Board precedent of *Lectrosonics.*

[3] The October 2018 Request for Comments also sought comments on a proposed amendment procedure in post-grant trial proceedings that included the Board providing preliminary non-binding guidance on the merits of a motion to amend, and an opportunity for a patent owner to revise its motion to amend thereafter. The Office addressed that portion of the Request for Comments separately in a Notice Regarding a New Pilot Program Concerning Motion To Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board. 84 FR 9497 (Mar. 15, 2019).

[4] In response to the October 2018 Request for Comments, the Office also received comments and questions relating to reissue or reexamination as an alternative vehicle for claim amendments. The Office addressed those comments and questions separately in a Notice Regarding Options for Amendments by Patent Owner Through Reissue or Reexamination During a Pending AIA Trial Proceeding. 84 FR 16654 (Apr. 22, 2019).

process fails to provide the Board with potential patentability arguments with respect to the proposed substitute claims. *Id.* at 25. Such situations may include, for example, those in which the petitioner has ceased to participate in the proceeding or chooses not to oppose the motion to amend, or those in which certain evidence of unpatentability is not raised by the petitioner but is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings. *Id.* at 12–13, 25–26.

The POP also determined that due process requires that a patent owner receive notice of how the prior art allegedly discloses the newly-added limitations of each proposed substitute claim, as well as any theory of unpatentability asserted against those claims, and the patent owner must have the opportunity to respond to those factual allegations and legal theories. *Id.* at 15. In addition, the POP cited two examples of adequate notice and opportunity to respond, namely, requesting supplemental briefing from the parties regarding the proposed ground for unpatentability or requesting that the parties be prepared to discuss the prior art in connection with the substitute claims at an oral hearing. *Id.* at 15–16 (citing *Nike,* 955 F.3d at 54).

The final rule adopts, with modifications, the proposed rule allocating the burden of persuasion on motions to amend. The final rule specifies that the burden of persuasion as to patentability of substitute claims proposed in a motion to amend is on the petitioner. In addition, the final rule specifies that the burden of persuasion is on the patent owner to show that the motion complies with the requirements of 35 U.S.C. 316(d) or 326(d) (requiring that a motion to amend propose a reasonable number of substitute claims, and that substitute claims do not enlarge scope of the original claims of the patent or introduce new matter), as well as 37 CFR 42.121(a)(2), (a)(3), (b)(1), and (b)(2), or 42.221(a)(2), (a)(3), (b)(1), and (b)(2) (indicating, for example, that a motion to amend must set forth written description support and support for the benefit of a filing date in relation to each substitute claim, and respond to grounds of unpatentability involved in the trial).

Notwithstanding the adversarial nature of the proceedings and irrespective of the burdens of persuasion discussed above, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend. But the Board will do so only in rare circumstances (as described below) and only for reasons supported by readily identifiable and persuasive evidence of record. Thus, in instances where a party has not met its burden in relation to a motion to amend or any substitute claims proposed therein, the Board may, in the interests of justice, reach a determination regarding patentability, or compliance with statutory and regulatory requirements, supported by readily identifiable and persuasive evidence made of record in the proceeding. In such instances where the Board exercises its discretion in the interests of justice, the Board will provide the parties with an opportunity to respond before rendering a final decision on the motion to amend.

In the vast majority of cases, the Board will consider only evidence a party introduces into the record of the proceeding. However, the Board may also consider readily identifiable and persuasive evidence already before the Office in a related proceeding (*i.e.,* in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent). *See MaxLinear, Inc.* v. *CF CRESPE LLC,* 880 F.3d 1373 (Fed. Cir. 2018) (stating that the Board must consider prior art raised in a related IPR in determining the patentability of dependent claims); *see also Emerson Elec. Co.* v. *SIPCO, LLC,* 745 F. App'x 369, 373–374 (Fed. Cir. 2018) (non-precedential) (directing the Board to explain its application of prior art cited in a related IPR). Likewise, the Board may consider evidence that a district court can judicially notice under Federal Rule of Evidence 201. *See* 37 CFR 42.62 (making the Federal Rules of Evidence applicable to AIA trial proceedings and noting that ''judicial notice'' as used in the Federal Rules of Evidence shall be construed as ''official notice''). This approach is consistent with the current practice of the Board, under which the Board may take official notice of facts in appropriate circumstances. *See, e.g., RPX Corp.* v. *Iridescent Networks, Inc.,* IPR2018–00254 (PTAB Dec. 10, 2018) (Paper 20) (taking official notice of how the URL of the internet Archive provides the date the website was captured); *Ericsson Inc.* v. *Intellectual Ventures I LLC,* IPR2014–00527, (PTAB May 18, 2015) (Paper 41) (taking official notice that members in the scientific and technical communities who both publish and engage in research rely on the information published on the copyright line of IEEE publications).

As used in the final rule, the ''interests of justice'' in the final rule means that, irrespective of the burdens of persuasion on the parties, the Board may exercise its discretion in rare circumstances where the adversarial process fails to provide the Board with potential arguments relevant to granting or denying a motion to amend. *Hunting Titan,* Paper 67 at 12–13, 25–26.

Such circumstances may include those in which a patent owner does not expressly address or establish every statutory and regulatory requirement for a motion to amend in its briefing, but evidence of compliance with those requirements is so readily identifiable and persuasive that the Board should address that evidence in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings. Thus, for example, the Board may, in the interests of justice, exercise its discretion to determine that a motion to amend complies with the statutory and regulatory requirements of 35 U.S.C. 316(d) or 326(d) and 37 CFR 42.121(a)(2), (a)(3), (b)(1), and (b)(2), or 42.221(a)(2), (a)(3), (b)(1), and (b)(2), even if a patent owner does not expressly address every requirement in its briefing. The Board will do so only when there is readily identifiable and persuasive evidence that the motion complies with the statutory and regulatory requirements, when addressing that evidence would be in the interests of supporting the integrity of the patent system, and only when the petitioner has been afforded the opportunity to respond to that evidence.

Such circumstances also may include those in which a petitioner has ceased to participate in the proceeding altogether (for example, as a result of settlement); those in which the petitioner remains in the proceeding but does not oppose the motion to amend, in whole or in part (for example, does not oppose some proposed substitute claims); or those in which the petitioner previously made an argument (for example, in opposition to a motion to amend) but then later ceases to participate (for example, does not oppose a revised motion to amend). The interests of justice may also support the Board exercising its discretion in the rare circumstances in which the petitioner continues participating in the proceeding, but fails to raise certain evidence of unpatentability that is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings. In most instances, in cases where the petitioner has participated fully and opposed the motion to amend, the

Office expects that there will be no need for the Board to independently justify a determination of unpatentability.

In sum, the Office expects that the Board will exercise its discretion in the interests of justice to reach a determination of patentability or unpatentability only in rare circumstances and only when the parties have been afforded notice and the opportunity to respond.

Discussion of Specific Rules

37 CFR part 42 is amended as follows:

Section 42.121: § 42.121 is amended by adding a new paragraph (d) to state that a patent owner bears the burden of persuasion to show that a motion to amend complies with certain statutory and regulatory requirements, but that the petitioner bears the burden of persuasion to show that any proposed substitute claims are unpatentable. The new paragraph (d) also states that in cases in which a party does not meet its burden, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion under this paragraph, the parties will have an opportunity to respond.

Section 42.221: § 42.221 is amended by adding a new paragraph (d) to state that a patent owner bears the burden of persuasion to show that a motion to amend complies with certain statutory and regulatory requirements, but that the petitioner bears the burden of persuasion to show that any proposed substitute claims are unpatentable. The new paragraph (d) also states that in cases in which a party does not meet its burden, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion under this paragraph, the parties will have an opportunity to respond.

Differences Between the Final Rule and the Proposed Rule

In response to comments seeking clarification, the final rule seeks to further clarify the circumstances in which the Board may exercise its discretion to grant or deny a motion to amend, irrespective of whether a party has met its burden on a particular issue and notwithstanding the adversarial nature of the proceeding. The final rule clarifies that the Board may exercise this discretion when it is in the interests of justice, and only for reasons supported by readily identifiable and persuasive evidence of record.

Additionally, in response to comments seeking clarification, the final rule provides additional details regarding the scope of evidence the Board may consider in deciding a motion to amend. The Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice.

Lastly, the final rule clarifies that where the Board exercises its discretion in appropriate circumstances, the parties will have an opportunity to respond. (§§ 42.121(d) and 42.221(d)).

Response to Comments

In response to the notice of proposed rulemaking pertaining to the burdens of persuasion in relation to motions to amend, the Office received a total of 18 written submissions of comments from intellectual property organizations, businesses, patent practitioners, and others. The comments provided support for, opposition to, and diverse recommendations on the proposed rule. The large majority of the comments were supportive of placing the burden of showing compliance with the statutory and regulatory requirements of a motion to amend on the patent owner, along the lines presented in the proposed rule. Comments on the question of whether the burden of showing unpatentability should be placed on the petitioner, as in the proposed rule, were mixed in their support and opposition. Similarly, the Office received mixed comments in support and opposition to the question of whether the Board, regardless of the respective burdens on the parties, could exercise its discretion to grant or deny a motion to amend. The Office appreciates the thoughtful comments and has considered and analyzed them thoroughly.

All the comments are posted on the PTAB website at *https://go.usa.gov/xGXrx.* The Office's responses address the comments that are directed to the proposed changes set forth in the notice of proposed rulemaking. Any comments directed to topics beyond the scope of the notice of proposed rulemaking will not be addressed at this time.

A. Burden on the Patent Owner

Comment 1: Of the comments addressing this aspect of the proposed rule, almost all supported allocating the burden of persuasion to the patent owner to show a motion to amend complies with statutory and regulatory requirements. Comments noted that the patent owner, as the party drafting the proposed substitute claims, is in the best position to explain how the proposed substitute claims comply with the statutory and regulatory requirements. For example, the comments pointed out that because the patent owner is the party amending a claim, the patent owner is in the best position to identify the subject matter disclosed in the challenged patent's specification that is being incorporated into the proposed substitute claim, thereby addressing the prohibition on new matter.

Response 1: The Office agrees with these comments. The statutory requirements of 35 U.S.C. 316(d) specify that the patent owner may file a motion to amend that ''propose[s] a reasonable number of substitute claims'' and, further, that amendments ''may not enlarge the scope of the claims or introduce new matter.'' Thus, the statute already places the burden on the patent owner to show that its motion to amend meets those requirements. The regulatory requirements set forth in section 42.121(a) or 42.221(a) of 37 CFR part 42 reflect those statutory requirements and further specify that a motion to amend must respond to a ground of unpatentability involved in the trial, include a claim listing clearly showing the amendments, and set forth support in the original patent disclosure for each claim added or amended, as well as support in an earlier-filed disclosure for each claim for which the patent owner seeks the benefit of the filing date of the earlier-filed disclosure. Because the patent owner is the party proposing amendments to the claims of its patent, it follows that the patent owner should be the party with the burden to show that the motion complies with these statutory and regulatory requirements. As commenters have noted, the patent owner necessarily incorporates subject matter from the challenged patent's specification into one or more proposed substitute claims and, thus, the patent owner is in the best position to identify where the specification supports such subject matter and how such subject matter does not enlarge the scope of the claims. Similarly, because the patent

owner is the party proposing the substitute claims, the patent owner is in a better position to explain why the number of substitute claims is reasonable, especially when the patent owner proposes more than one substitute claim for each challenged claim. Likewise, it makes sense for the patent owner to explain why the amendment responds to a ground of unpatentability involved in the trial, given that the patent owner proposes the substitute claims to overcome one or more asserted unpatentability grounds as to the original claims of the challenged patent.

Comment 2: A few comments supporting the requirement that the patent owner bears the burden to show a motion to amend complies with statutory and regulatory requirements expressed the view that the burden should be an initial burden of production, but that the burden of persuasion should lie with the petitioner. One comment stated that placing a burden of persuasion on the patent owner unduly limits the patent owner's ability to amend the claims. Another comment stated that allocating a burden of persuasion to the patent owner in a motion to amend is inconsistent with the Federal Circuit's guidance in *In re Magnum Oil Tools Int'l, Ltd.,* 829 F.3d 1364 (Fed. Cir. 2016) on shifting burdens in an AIA trial proceeding. The comment was further concerned that requiring the patent owner to maintain a burden of persuasion to show statutory and regulatory compliance may lead the Board to deny a motion to amend for procedural reasons unrelated to the substance of the proposed substitute claims.

Response 2: The Office appreciates these thoughtful comments. 35 U.S.C. 316(d) appears to specify a burden of persuasion on the patent owner, not merely a burden of production. For example, section 316(d) provides that the patent owner may ''[f]or each challenged claim, propose a reasonable number of substitute claims'' and that ''[a]n amendment . . . may not enlarge the scope of the claims or introduce new matter.'' 35 U.S.C. 316(d)(1)(B), (d)(3). The patent owner proposes an amendment; therefore, it would appear to be the patent owner's burden of persuasion to show that the amendment proposes a reasonable number of substitute claims, does not enlarge the scope of the claims, and does not introduce new matter. This is also consistent with the lead opinion of *Aqua Products,* which states that the ''patent owner must *satisfy* the Board that the statutory criteria in § 316(d)(1)(a)–(b) and § 316(d)(3) are met and that any reasonable procedural obligations imposed by the Director are satisfied before the amendment is entered into the IPR.'' 872 F.3d at 1306 (emphasis added). Because the statutory and regulatory requirements largely overlap, it also makes sense to place the burden of showing compliance with the regulatory requirements on the patent owner. It is unclear how placing this burden on the patent owner limits the patent owner's ability to amend claims.

Further, allocating this burden of persuasion to the patent owner is not inconsistent with *Magnum Oil Tools* because, in that case, the Federal Circuit addressed the burden of persuasion as to *patentability,* not the burden of persuasion as to statutory and regulatory requirements of a motion to amend. As noted above, the lead opinion in *Aqua Products* differentiated between meeting the requirements of a motion to amend and the burden of demonstrating the unpatentability of substitute claims. *Id. Magnum Oil Tools* addressed situations in which it was and was not appropriate to shift burdens of production. *See* 829 F.3d at 1375–76. The Federal Circuit explained that a shifting burden of production may be warranted in a situation in which a party asserts an affirmative defense for the first time (*e.g.,* an earlier priority date) after the party who carries the ultimate burden of persuasion challenges patentability. As further noted in *Magnum Oil Tools,* however, ''a burden-shifting framework . . . would introduce unnecessary confusion'' when a party bears the ultimate burden of persuasion on a particular issue. *Id.* at 1376. Here, because the statute already appears to place the ultimate burden of persuasion on the patent owner regarding the statutory and regulatory requirements, and the Board makes a determination after considering all evidence provided by both parties, a shifting burden of production is not appropriate. *Id.* (''Applying a burden-shifting framework here would introduce unnecessary confusion because the ultimate burden of persuasion of obviousness must remain on the patent challenger and 'a fact finder must consider *all* evidence of obviousness and nonobviousness before reaching a determination.' '') (citation omitted).

Finally, in March 2019, the Office issued a notice of a pilot program for motion to amend practice and procedures that allows a patent owner to request preliminary guidance from the Board on a motion to amend and to file a revised motion to amend (regardless of whether the patent owner requests preliminary guidance). *See* Notice Regarding a New Pilot Program Concerning Motion to Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 84 FR 9497 (Mar. 15, 2019) (pilot program). Under the pilot program, which applies to all AIA trial proceedings instituted on or after March 15, 2019, the patent owner is able to request preliminary non-binding guidance from the Board regarding the amendment's compliance with the statutory and regulatory requirements. *See id.* at 9497–98. The patent owner may address that preliminary guidance in responsive briefing or by providing new proposed substitute claims in a revised motion to amend. *Id.; see also id.* at 9499–9500 (setting forth options for preliminary guidance and a revised motion to amend in more detail). These aspects of the pilot program likewise support placing the burden of persuasion on the patent owner in relation to the statutory and regulatory requirements for a motion to amend.

Comment 3: A comment noted that previous Office guidance and Board decisions did not allocate the burden of persuasion to the patent owner and requested an explanation as to why the proposed rule allocates the burden of persuasion to the patent owner.

Response 3: As many commenters have requested and noted, clarifying the burdens in the amendment process is desired. Because 35 U.S.C. 316(d) appears to place the burden of persuasion on the patent owner to show statutory compliance, the Office takes this opportunity to bring clarity and predictability to the amendment process through rulemaking specifically assigning that burden.

B. Burden on the Petitioner

Comment 4: The Office received a mix of comments supporting or opposing the provision of the proposed rule placing the burden of persuasion on the petitioner to show that the substitute claims proposed in a motion to amend are unpatentable, with a slight majority of comments opposing placing the burden on the petitioner. Among the comments supporting the proposed rule, one noted that placing the burden of persuasion on the petitioner is consistent with 35 U.S.C. 282(a), which governs burdens of proof in patent infringement actions in federal court and states that ''[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.'' Another comment stated that allocating the burden of persuasion to the petitioner is consistent with the Federal Circuit

holding in *Aqua Products.* One comment, which neither agreed nor disagreed with the proposed rule, noted that the proposed rule is generally consistent with the allocation of burdens set forth in *Lectrosonics* and the Office's prior ''Guidance on Motions to Amend in view of *Aqua Products.*''

Response 4: The Office appreciates and has carefully considered the comments both supporting and opposing placing the burden on the petitioner to show that the proposed substitute claims are unpatentable. Regardless of whether the comments supported the proposed rule or not, commenters overwhelmingly agreed that notice-and-comment rulemaking to allocate the burdens was appreciated and that doing so improves clarity and consistency in AIA trials. Previously, the Office requested comments relating to the assignment of burdens in the October 29, 2018, Request for Comments (83 FR 54319). Among other questions, the Office asked whether it should engage in rulemaking to allocate the burden of persuasion regarding the patentability of proposed substitute claims in a motion to amend as set forth in the order issued in *Western Digital* (superseded by *Lectrosonics*), which allocates the burden of persuasion regarding the patentability of proposed substitute claims to the petitioner. *Id.* at 54325. Of the roughly 20 comments the Office received in 2018 in response to the Request for Comments, a clear majority of comments favored placing the burden to show that the proposed substitute claims are unpatentable on the petitioner, consistent with the rule the Office now adopts.

After carefully considering all relevant comments, the Office's efforts to provide predictability and clarity, the Federal Circuit's decision in *Aqua Products,* the Office's post-*Aqua Products* Guidance Memo, and the Board's experience administering AIA trials since the *Aqua Products* decision, the Office determines that the most balanced approach is to place the burden on the petitioner to show that the proposed substitute claims are unpatentable. Placing the burden of proving unpatentability on the challenger is consistent with other statutory approaches to patentability. As commenters have pointed out, under 35 U.S.C. 282, the ''burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.'' Although the decision in *Aqua Products* left unresolved the question of whether 35 U.S.C. 282 applies only to original claims or also proposed amended claims, placing the burden on the petitioner via this rule would resolve any ambiguity. Additionally, although patent examination differs from an AIA trial in many respects, it is worth noting that the Office, not the applicant, has the burden of showing unpatentability during examination. *See In re Oetiker,* 977 F.2d 1443, 1445 (Fed. Cir. 1992) (''[T]he examiner bears the initial burden . . . of presenting a prima facie case of unpatentability.''). Further, as multiple commenters have noted, placing the burden to show unpatentability on the petitioner maintains consistency with current Board practice described in the precedential Board decision *Lectrosonics* and the post-*Aqua Products* Guidance Memo. Changing the procedure the Board has been using since 2017 would be disruptive to procedures that the Board and parties have been following for several years. Moreover, the rule is consistent with the lead opinion in *Aqua Products,* which stated, ''we believe that Congress intended that the petitioner bear the burden of persuasion as to all claims in an IPR, whether original or amended.'' 872 F.3d at 1315 (O'Malley, J.). *Aqua Products* held that the Office had not adopted a rule placing the burden of persuasion with respect to the patentability of proposed substitute claims on any party. *See id.* at 1327. The Office responds to that holding and adopts this rule, placing the burden to show unpatentability of substitute claims on the petitioner.

Comment 5: Commenters opposing the proposed rule placing the burden on the petitioner to show that proposed substitute claims are unpatentable suggested that, instead, the patent owner should bear the burden of proving patentability. Comments stated that the patent owner, as the party drafting the substitute claims, is best positioned to explain how the proposed substitute claims are patentable over prior art and should provide a detailed explanation of how the substitute claims distinguish over the prior art of record and other prior art known to the patent owner. Comments also stated that placing the burden on the petitioner is inconsistent with the common practice that the moving party bears the burden of proof. Further, at least one comment stated that the Federal Circuit's *Aqua Products* decision does not prohibit the Office from placing the burden on the patent owner. That comment further noted that the Office has eliminated claim construction under the broadest reasonable interpretation, which is one of the safeguards *Aqua Products* identified as helping to prevent the Office from issuing untested claims.

Response 5: Currently, the Office believes that the fair approach is to place the burden on the petitioner to show that the proposed substitute claims are unpatentable, for the reasons discussed above. In presenting proposed substitute claims to the Board, the patent owner already has ''a duty of candor and good faith'' (37 CFR 42.11(a)), meaning that the patent owner must ''disclose to the Board information of which the patent owner is aware that is material to the patentability of the substitute claims.'' *Lectrosonics,* Paper 15 at 9–10.

In the Board's experience, requiring the patent owner to prove patentability of amended claims in AIA trials has led to confusion because it places duties on the patent owner that are inconsistent with those applied during examination. During examination, for example, although a patent applicant must comply with the duty of candor, there is no separate obligation to prove patentability over prior art ''known'' to the patent applicant, as the Board's prior approach to amended claims in AIA trials required. *MasterImage,* Paper 42 at 2–3 (citing *Idle Free,* Paper 26 at 7) (referring to ''prior art of record and also prior art known to the patent owner'' in relation to the patent owner's burden for motions to amend in AIA trials). Much like an examiner during patent examination, the petitioner typically conducts a prior art search before filing an AIA petition, and in most cases is well-positioned and incentivized to identify any patentability issues arising from the proposed amended claims.

Moreover, to the extent one opinion in *Aqua Products* identified the broadest reasonable interpretation standard as relevant to the review of proposed substitute claims, it did so in its analysis of ''untested'' claims. 872 F.3d at 1314–1315 (O'Malley, J.). Although the Board's claim construction standard has changed from the broadest reasonable interpretation to the standard used in district court proceedings, the statute and regulation governing amendments still require that the claim scope of any proposed amended claims be narrower and require written description support for the proposed amended claims. 35 U.S.C. 316(d)(3); 37 CFR 42.121(a)(2), (b). The same opinion in *Aqua Products* also identified the preponderance of evidence standard as relevant to the review of proposed substitute claims; that standard has not changed. 35 U.S.C. 316(e). In addition, any issued amended claims would be subject to intervening rights and various

other review mechanisms that remain open to challenge the amended claims (*e.g.,* subsequent IPRs, ex parte reexamination, and district court litigation). Furthermore, as explained elsewhere in this rulemaking, the rule allows the Board to exercise its discretion to reach a determination regarding patentability in instances in which the interests of justice warrant such a determination, including those in which the petitioner has ceased to participate in the proceeding altogether or remains in the proceeding but does not oppose a motion to amend. Thus, the rule further limits the likelihood of issuing amended claims that are ''untested.''

C. Board Discretion To Grant or Deny a Motion To Amend

Comment 6: Of the comments addressing the proposed rule providing that the Board may, in the interests of justice, grant or deny a motion to amend for any reason supported by the evidence of record, a majority supported the proposed rule. For example, one comment stated that the Board should not procedurally deny a motion to amend for failing to comply with the statutory or regulatory requirements if the lack of compliance can be cured by reference to the evidence of record. Similarly, a comment stated that if a petitioner does not oppose the proposed substitute claims, the Board should have the discretion to deny the motion to amend for any reason supported by the evidence of record rather than automatically adding the proposed substitute claims to the challenged patent.

Response 6: The Office agrees with these comments. Under the proposed rule, as modified in the final rule, the Board will have the discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record, when it is in the interests of justice. The Office anticipates that the Board will exercise this discretion only in rare circumstances, such as discussed in *Hunting Titan.*

As noted by the commenters, this discretion allows the Board to address situations in which it would be unjust to deny a motion to amend for a procedural defect, such as those in which a patent owner does not expressly address or establish every statutory and regulatory requirement in its briefing. Where there is readily identifiable and persuasive evidence that the motion complies with the statutory and regulatory requirements, the Board may determine that it is in the interests of justice to nevertheless grant the motion to amend.

The Office also agrees with the comments that the Board should have discretion to address the patentability of substitute claims under certain rare circumstances in which substitute claims might otherwise issue without any consideration of patentability by the Office, regardless of what is in the record before the Board. In this vein, the final rule permits the Board to address circumstances in which, as explained in *Hunting Titan,* the adversarial process has failed to provide the Board with potential arguments of patentability with respect to the proposed substitute claims. Such circumstances could include, for example, those in which the petitioner ceases to participate in the proceeding altogether (for example, as a result of settlement) or remains in the proceeding but does not oppose the motion to amend, in whole or in part (for example, does not oppose some proposed substitute claims), or those in which the petitioner previously made an argument (for example, in opposition to a motion to amend) but then later ceases to participate (for example, does not oppose a revised motion to amend). In such circumstances, the absence of two actively participating opposing parties (at least in relation to a motion to amend) signals a situation in which the adversarial process may have failed to provide the Board with potential arguments of patentability or unpatentability. In such a situation, the Board will, in the interests of justice, typically independently evaluate the patentability of the proposed substitute claims and exercise its discretion to grant or deny only for reasons supported by readily identifiable and persuasive evidence of record.

As a general matter in the vast majority of cases, the Board will consider only evidence a party introduces into the record of the proceeding. However, the Board may consider readily identifiable and persuasive evidence already before the Office (*i.e.,* in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent). Likewise, the Board may consider evidence that a district court can judicially notice under Federal Rule of Evidence 201. Thus, when referring to the interests of justice, the rule affords the Board the flexibility to address the rare circumstances in which certain evidence of unpatentability has not been raised by the petitioner but is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings, as explained in *Hunting Titan.*

As noted above, the Office expects that the Board will exercise its discretion in the interests of justice to reach a determination of unpatentability only in rare circumstances, and only where the patent owner has been afforded the opportunity to respond. In most instances, in cases where the petitioner has participated fully and opposed the motion to amend, the Office expects that the petitioner will bear the burden of persuasion, and there will be no need for the Board to independently justify a determination of unpatentability.

Comment 7: One commenter expressed general support for the proposed rule's codification of the Board's discretion to grant or deny a motion to amend and the application of the interests of justice standard to govern the exercise of that discretion. The commenter observed that the preamble of the Notice of Proposed Rulemaking identified three exemplary circumstances that may satisfy the interests of justice standard: (1) The petitioner has ceased to participate in the proceeding; (2) the petitioner remains in the proceeding but does not oppose the motion to amend; and (3) the petitioner opposes the motion to amend and has failed to meet the burden of persuasion, but there is easily identified and persuasive evidence of unpatentability in the record. The commenter suggested, however, that the final rule should provide further guidance on the contours of the Board's discretion under the interests of justice standard, preferably in the rules themselves. The commenter also requested that the final rule clarify the rare circumstances in which the Board will exercise its discretion.

Response 7: The Office appreciates these comments and has modified the final rule to more clearly specify the circumstances in which the Board will exercise its discretion to grant or deny a motion to amend. The final rule thus clarifies that such discretion may be used when it is in the interests of justice and when there is readily identifiable and persuasive evidence of record. The final rule language thus follows the formulation set forth in *Hunting Titan,* which focuses on situations in which the adversarial process has failed to provide the Board with potential arguments of patentability with respect to the proposed substitute claims. *Hunting Titan* provides express examples of such situations, including when the petitioner has ceased to

participate in the proceeding altogether or remains in the proceeding but does not oppose the motion to amend, or when certain evidence has not been raised by a party but is so readily identifiable and persuasive that the Board should take it up in the interest of supporting the integrity of the patent system, notwithstanding the adversarial nature of the proceedings. *Hunting Titan,* Paper 67 at 12–13, 25–26. The POP noted in *Hunting Titan* that these examples are not exhaustive, and that the Board will address any other fact-specific situations that satisfy the interests of justice standard as they arise. *Id.* at 12–13.

To the extent that the commenter requested that the final rule explicitly set forth all possible circumstances that may satisfy the interests of justice standard, the comment is not adopted. As modified, the final rule specifies that the Board may exercise its discretion only when its reasons are supported by readily identifiable and persuasive evidence of record. However, the Board may consider readily identifiable and persuasive evidence already before the Office (*i.e.,* in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent). Likewise, the Board may consider evidence that a district court can judicially notice under Federal Rule of Evidence 201. In such instances where the Board exercises its discretion in the interests of justice, the Board will provide the parties with an opportunity to respond before rendering a final decision on the motion to amend.

Regulatory language is not the appropriate vehicle for specifying the exact factual situations that will satisfy the interests of justice standard. Rather, as discussed above, the precedential *Hunting Titan* decision sets forth general categories of situations in which the standard may be satisfied. The decision also provides a specific example of a situation in which the standard is not met, namely the facts of the *Hunting Titan* case itself. The Office expects that future decisions of the Board applying the final rule will continue to provide the public with guideposts as to factual circumstances in which the interests of justice standard is either satisfied or not satisfied, and the Office may designate these decisions as informative or precedential, as appropriate.

Comment 8: Some comments supported the proposed rule providing for Board discretion to grant or deny a motion to amend but advocated that the Board's discretion to deny a motion to amend should be limited. For example, some comments stated that the Board should be limited to addressing grounds of unpatentability raised by the petitioner in opposition to the motion to amend. Two commenters expressed the view that, even in situations in which the petitioner does not oppose the motion to amend, the Board should be limited to addressing grounds of unpatentability raised by the petitioner against the original claims. Additionally, one comment stated that the scope of the Board's discretion should be limited to the new claim limitations proposed by the motion to amend.

Response 8: Although the Office appreciates the commenters' interest in further articulating the scope of the Board's discretion, the Office has, through the issuance of the precedential *Hunting Titan* decision, clarified the situations in which the Board may exercise its discretion. Therefore, the Office does not adopt the changes to the rules proposed by the comments. The proposed rule, as modified in the final rule, limits the Board's discretion to situations in which the interests of justice support the Board exercising that discretion. As set forth in the commentary to the proposed rule, and as further explained in *Hunting Titan,* the Office anticipates that this standard will be met only in ''rare circumstances'' and provides for certain exemplary situations that may justify an exercise of the Board's discretion. For example, the Board may exercise its discretion to grant a motion to amend only when supported by readily identifiable and persuasive evidence of record that the motion complies with the statutory and regulatory requirements. Alternatively, where there is readily identifiable and persuasive evidence in support of its decision, the Board may exercise its discretion to deny a motion to amend in situations in which the adversarial process fails to provide the Board with potential arguments of patentability with respect to the proposed substitute claims, such as when the petitioner has ceased to participate in the proceeding altogether (for example, as a result of settlement) or remains in the proceeding but does not oppose the motion to amend.

Under the proposed rule, as modified in the final rule, the Board may evaluate each motion to amend on a case-by-case basis to determine whether the facts of the case support the interests of justice standard.

Further limitations on the Board's discretion, such as those proposed by the commenters, that set bright-line prohibitions on certain exercises of the Board's discretion, are not adopted. For example, in cases in which the petitioner is not participating or does not oppose the motion to amend, limiting the Board to addressing only the grounds of unpatentability raised by a petitioner against the original claims may unduly limit the Board's ability to assess the patentability of the amended claims in situations where there is readily identifiable and persuasive evidence of unpatentability. *See Nike,* 955 F.3d at 51 (''[T]he Board should not be constrained to arguments and theories raised by the petitioner in its petition or opposition to the motion to amend. . . . Otherwise, were a petitioner not to oppose a motion to amend, the Patent Office would be left with no ability to examine the new claims.''). Such a limit would increase the risk of the Office issuing amended claims that are unpatentable over the existing record in the proceeding. In addition, an amended claim may add a limitation not present in the original claims and not addressed by a ground of unpatentability in the petition, but the limitation (and reason to combine limitations, as relevant) may be disclosed elsewhere in the record before the Board. In such circumstances, the Board may determine that the interests of justice warrant denying the motion to amend on a ground of unpatentability not articulated in the original petition. The Board, however, will not make such a determination without first ensuring that the parties have been given notice and an opportunity to respond to any new factual allegation or legal theory.

Nor does the Office adopt a recommendation that the Board's exercise of discretion in the interests of justice to deny a motion to amend should be restricted to new limitations added by the proposed amendment. Generally, the Office anticipates that this will usually be the case because the limitations of the original claims will have been addressed by the grounds of unpatentability raised in the petition, and the Board is more likely to exercise its discretion when assessing newly added limitations to substitute claims. That said, evaluating the patentability of a claim requires consideration of the claim ''as a whole.'' 35 U.S.C. 103 (''the claimed invention as a whole would have been obvious''); 84 FR at 55 (2019 Revised Patent Subject Matter Eligibility Guidance) (''consider the claim as a whole when evaluating whether the judicial exception is meaningfully limited by integration into a practical application of the exception''). Restricting the Board's ability to exercise its discretion to evaluate the

patentability of proposed substitute claims to only portions of the proposed claim is inconsistent with the holistic evaluation of the patentability of a claim.

Comment 9: A minority of commenters opposed the proposed rule providing that the Board may, in the interests of justice, grant or deny a motion to amend for any reason supported by the evidence of record. According to these commenters, the Board must independently assess the potential unpatentability of any proposed substitute claim and has no discretion to grant a motion to amend in the absence of its independent assessment of patentability. One commenter stated that the ''interests of justice'' standard of the proposed rule is too high and would unduly limit the Board's ability to address the patentability of proposed substitute claims. The commenter expressed the view that the Office should compel the Board to always independently confirm patentability before granting a motion to amend, regardless of what a petitioner argues and presents to the Board, rather than providing for Board discretion in the interests of justice.

Response 9: These comments are not adopted. Removing the Board's discretion to evaluate each proceeding on a case-by-case basis, and requiring the Board to independently examine the patentability of every proposed substitute claim regardless of whether or not (or how) the motion to amend is opposed by a petitioner, is not consistent with the nature of *inter partes* proceedings. AIA trials are, by their nature, adversarial. As stated in *Hunting Titan,* ''relying on the adversarial process to frame the issues for the Board properly places the incentives on the parties to identify the pertinent evidence and make the best arguments for their desired outcome.'' *Hunting Titan,* Paper 67 at 11. Thus, in most instances, the Board will ''rely on the incentives the adversarial system creates, and expect that the petitioner will usually have an incentive to set forth the reasons why the proposed substitute claims are unpatentable. In most circumstances, then, the Board need not raise its own arguments of unpatentability.'' *Id.* at 12. The Office believes, however, that taking into account rare instances that satisfy the interests of justice standard, as set forth above and in *Hunting Titan,* provides a safeguard against the Office issuing unpatentable claims when there is readily identifiable and persuasive evidence of unpatentability while also relying, in most instances, on the adversarial process to surface potential patentability challenges against a proposed substitute claim.

Comment 10: One commenter agreed with the proposed rule to the extent that the Board has discretion to deny a motion to amend when supported by the record, but disagreed that the Board should have discretion to grant a motion to amend. The commenter stated that discretion to deny a motion to amend is consistent with the Board's role to protect the public against overly broad patent claims, but that the Board should not be able to grant an unwarranted motion to amend.

Response 10: The Office agrees with the first part of the comment and believes that Board discretion to deny a motion to amend, regardless of the burdens on the parties, when in the interests of justice, is consistent with the goal of ensuring that claims issued by the Office have appropriate scope. The Office disagrees, however, that the Board should not have similar discretion to grant a motion to amend. Such discretion, when exercised in the interests of justice, protects against denial of a meritorious motion to amend that is supported by the evidence of record for purely procedural reasons, such as when a motion to amend sets forth the basis for concluding that a patent owner has carried its burden but, through inadvertence, fails to state that the motion meets a statutory or regulatory requirement.

D. Evidence of Record

Comment 11: The Office received several comments regarding the use of the term ''evidence of record'' in the proposed rule. Some commenters requested clarification of the rule and whether the Board would be permitted to introduce its own evidence into the record. Other commenters expressed the view that the Board should be permitted to supplement the record, if necessary, to support its determination whether to grant or deny the motion to amend. Other commenters stated that the evidence of record should be limited to evidence introduced by the parties.

Response 11: The Office appreciates and has carefully considered these thoughtful comments and has modified the rule to state that the Board has the discretion to, when in the interests of justice, grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record. The rule also has been modified to state that the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice.

In response to the comments seeking clarification as to the scope of the ''evidence of record,'' the final rule has been modified to provide additional details as to the scope of evidence upon which the Board may base its decision to grant or deny a motion to amend. The use of ''evidence of record'' in the rule as adopted signifies that the evidence on which the Board bases its determination on a motion to amend will be entered into the record of the proceeding. In the vast majority of cases, the parties will enter that evidence into the record of the proceeding. The final rule as modified, however, specifies that the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office (*i.e.,* in the prosecution history of the challenged patent or a related patent or application, or in the record of another proceeding before the Office challenging the same patent or a related patent). These rare situations, in which the Board may itself introduce evidence from the record of another proceeding before the Office, help ensure that the Office acts consistently and is cognizant of the complete record before the agency.

Likewise, in response to comments seeking clarification, the final rule as modified specifies that the Board may consider evidence that a district court can judicially notice under Federal Rule of Evidence 201. This provision is consistent with the Board's ability to, when appropriate (*e.g.,* when necessary to decide issues of claim construction), introduce and rely on well-known dictionaries or treatises, even when the parties have not raised such evidence, or to take official notice of facts as permitted by Federal Rule of Evidence 201. The Board's existing rules make the Federal Rules of Evidence applicable to AIA trial proceedings and explain that ''judicial notice'' as used in the Federal Rules of Evidence shall be construed in AIA trial proceedings as ''official notice.'' *See* 37 CFR 42.62. Thus, the final rule as modified reflects current Board practice and regulations, pursuant to which the Board may take official notice of facts in appropriate circumstances. *See, e.g., RPX Corp.* v. *Iridescent Networks, Inc.,* IPR2018–00254 (PTAB Dec. 10, 2018) (Paper 20) (taking official notice of how the URL of the internet Archive provides the date the website was captured); *Ericsson Inc.* v. *Intellectual Ventures I LLC,* IPR2014–00527, (PTAB May 18, 2015) (Paper 41) (taking official notice that members in the scientific and technical communities who both publish and engage in research rely on the

information published on the copyright line of IEEE publications).

Furthermore, as modified in the final rule, the Board will exercise its discretion only for reasons supported by evidence of record that is ''readily identifiable and persuasive.'' In the context of the final rules, ''readily identifiable and persuasive'' has the same meaning articulated in *Hunting Titan* and refers to evidence that is so clear from the record that failing to consider it, although it has not been raised by a party, would be inconsistent with the goal of supporting the integrity of the patent system. *Hunting Titan,* Paper 67 at 13.

Entry of the evidence into the record provides to the parties notice of all relevant evidence and the ability to respond to such evidence before the Board, and also permits appellate review of the Board's final decision should a dissatisfied party appeal. The rule's statement that the Board's decision shall be based on the ''evidence of record'' also signifies that the Board will consider the entirety of the record in the proceeding, including all papers and exhibits, when exercising its discretion to grant or deny a motion to amend. *See Aqua Products,* 872 F.3d at 1325 (''[A]n agency's refusal to consider evidence bearing on the issue before it is, by definition, arbitrary and capricious within the meaning of 5 U.S.C. 706, which governs review of agency adjudications. . . . That means that the agency must take account of all the evidence of record, including that which detracts from the conclusion the agency ultimately reaches.'') (O'Malley, J.) (internal citations omitted).

Comments that the ''evidence of record'' should be limited to evidence introduced by the parties and that the Board should not be permitted to introduce evidence itself are not adopted. Absent the rare circumstances described herein, the Board will not supplement the evidence of record with, for example, additional prior art references not introduced by a party. Further, the Board itself will not undertake its own search for prior art in light of a motion to amend. Prohibiting the Board from introducing its own evidence in any and all instances, however, may risk unduly restricting the Board's ability to fully evaluate the patentability of proposed substitute claims in light of readily identifiable and persuasive evidence known or available to the Office.

E. Opportunity To Respond

Comment 12: Although commenters generally appear to agree that the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend for any reason supported by the evidence of record, several commenters suggested that the rules should expressly provide that the parties have notice and an opportunity to respond to the Board's exercise of such discretion before any such decision is made final to ensure compliance with due process, the interests of justice standard, and the Administrative Procedure Act (APA). One commenter stated that in addition to providing notice to the parties concerning the Board's proposed exercise of discretion, the Board should give written notice of its initial determination to both parties as well as provide an opportunity for each party to respond in writing. One commenter also suggested that the lack of any express provisions concerning the parties' opportunity to be heard concerning any new ground or evidence upon which the Board relies provides insufficient guidelines for any reviewing court to assess whether the Board's exercise of such discretion is an abuse of discretion.

Response 12: In the notice of proposed rulemaking concerning the allocation of the burden of persuasion on a motion to amend, the Office expressly acknowledged the requirement that any exercise of discretion to grant or deny a motion to amend would involve providing the parties with notice and an opportunity to be heard on those issues not previously addressed by the parties. For instance, if the Board, in the interests of justice, exercises its discretion to determine that a motion to amend complies with all statutory and regulatory requirements, it will do so only ''where the petitioner has been afforded the opportunity to respond to that evidence.'' 84 FR at 56404. Likewise, if the Board decides to exercise its discretion to deny a motion to amend, it will do so ''only where the patent owner has been afforded the opportunity to respond to that evidence and related grounds of unpatentability.'' *Id.* As the commenters have noted, and as the Federal Circuit recognized in *Nike,* such notice and opportunity to be heard by all involved parties is required by due process and expressly set forth in the APA. *See Nike,* 955 F.3d at 52 (''[T]he notice provisions of the APA and our case law require that the Board provide notice of its intent to rely on [newly raised references] and an opportunity for the parties to respond before issuing a final decision relying on [those references].''). This requirement was also recently reaffirmed in the Board's precedential *Hunting Titan* decision. *Hunting Titan,* Paper 67 at 14–15. *Hunting Titan* also cited two examples of adequate notice and opportunity to respond, namely, the Board requesting supplemental briefing from the parties regarding the proposed ground of unpatentability or requesting that the parties be prepared to discuss the prior art in connection with the substitute claims at an oral hearing. *Id.* at 15–16 (citing *Nike,* 955 F.3d at 55). In order to provide further clarity and in response to public comments seeking an express regulatory provision providing for an opportunity to be heard, the final rule as modified expressly provides that, where the Board exercises its discretion to grant or deny a motion to amend, the parties will have an opportunity to respond.

Rulemaking Considerations

A. Regulatory Flexibility Act: For the reasons provided herein, the Senior Counsel for Regulatory and Legislative Affairs, Office of General Law, United States Patent and Trademark Office, has certified to the Chief Counsel for Advocacy of the Small Business Administration that changes set forth in this rulemaking would not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The changes in this rulemaking are intended to set forth expressly the respective burdens of persuasion on the parties regarding a motion to amend in an AIA proceeding. These changes are consistent with relevant precedential decisions of the Board and Federal Circuit, and as such, do not reflect a change from current practice. The changes do not create additional procedures or requirements or impose any additional compliance measures on any party, nor do these changes cause any party to incur additional cost. Therefore, any requirements resulting from these changes are of minimal or no additional burden to those practicing before the Board.

B. 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).

C. 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 rules; (2) tailored the rules 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.

D. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs): This rule is not an Executive Order 13771 (Jan. 30, 2017) regulatory action because it is not significant under Executive Order 12866.

E. 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).

F. Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because it 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).

G. 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).

H. 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).

I. 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).

J. 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 United States Patent and Trademark Office 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 rulemaking 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).

K. Unfunded Mandates Reform Act of 1995: The changes set forth in this rulemaking 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.*

L. National Environmental Policy Act of 1969: 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.*

M. National Technology Transfer and Advancement Act of 1995: 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.

N. Paperwork Reduction Act of 1995: 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 rulemaking does not involve an information collection requirement that is subject to review by the Office of Management and Budget (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.

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.

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

■ 1. The authority citation for 37 CFR part 42 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 6, 21, 23, 41, 135, 311, 312, 316, and 321–326; Pub. L. 112–29, 125 Stat. 284; and Pub. L. 112–274, 126 Stat. 2456.

■ 2. Amend § 42.121 by adding paragraph (d) to read as follows:

§ 42.121 Amendment of the patent.

* * * * *

(d) *Burden of Persuasion.* On a motion to amend:

(1) A patent owner bears the burden of persuasion to show, by a preponderance of the evidence, that the motion to amend complies with the requirements of paragraphs (1) and (3) of 35 U.S.C. 316(d), as well as paragraphs (a)(2), (a)(3), (b)(1), and (b)(2) of this section;

(2) A petitioner bears the burden of persuasion to show, by a preponderance of the evidence, that any proposed substitute claims are unpatentable; and

(3) Irrespective of paragraphs (d)(1) and (2) of this section, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion under this paragraph, the parties will have an opportunity to respond.

■ 3. Amend § 42.221 by adding paragraph (d) to read as follows:

§ 42.221 Amendment of the patent.

* * * * *

(d) *Burden of Persuasion.* On a motion to amend:

(1) A patent owner bears the burden of persuasion to show, by a preponderance of the evidence, that the motion to amend complies with the requirements of paragraphs (1) and (3) of 35 U.S.C. 326(d), as well as

paragraphs (a)(2), (a)(3), (b)(1), and (b)(2) of this section;

(2) A petitioner bears the burden of persuasion to show, by a preponderance of the evidence, that any proposed substitute claims are unpatentable; and

(3) Irrespective of paragraphs (d)(1) and (2) of this section, the Board may, in the interests of justice, exercise its discretion to grant or deny a motion to amend only for reasons supported by readily identifiable and persuasive evidence of record. In doing so, the Board may make of record only readily identifiable and persuasive evidence in a related proceeding before the Office or evidence that a district court can judicially notice. Where the Board exercises its discretion under this paragraph, the parties will have an opportunity to respond.

Andrei Iancu,

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

[FR Doc. 2020–28159 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2015–0804; FRL–10017–97–OW]

RIN 2040–AG00

Withdrawal of Certain Federal Water Quality Criteria Applicable to Maine

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The United States Environmental Protection Agency (EPA or Agency) is taking final action to amend the Federal regulations to withdraw human health criteria (HHC) for toxic pollutants applicable to waters in the State of Maine. EPA is taking this action because Maine adopted, and EPA approved, HHC that the Agency determined are protective of the designated uses for these waters. This final rule amends the Federal regulations to withdraw certain HHC applicable to Maine that the Agency had promulgated, as described in the September 3, 2020 proposed rule. The withdrawal of these certain federally promulgated HHC will enable Maine to implement its EPA-approved HHC, submitted on April 24, 2020, and approved on June 23, 2020, as applicable criteria for Clean Water Act (CWA or the Act) purposes.

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

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2015–0804. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information for which disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Brundage, Office of Water, Standards and Health Protection Division (4305T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–1265; email address: *brundage.jennifer@epa.gov* or visit *https://www.epa.gov/wqs-tech/federal-water-quality-standards-applicable-maine.*

SUPPLEMENTARY INFORMATION: This final rule is organized as follows:

I. General Information
  A. Does this action apply to me?
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  A. What are the applicable Federal statutory and regulatory requirements?
  B. What are the applicable Federal water quality criteria that EPA is withdrawing?
  C. Comments on the Proposed Rulemaking
  D. Effective Date of Withdrawal
III. Statutory and Executive Order Reviews
  A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
  B. Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs)
  C. Paperwork Reduction Act
  D. Regulatory Flexibility Act
  E. Unfunded Mandates Reform Act
  F. Executive Order 13132 (Federalism)
  G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
  H. Executive Order 13045 (Protection of Children From Environmental Health and Safety Risks)
  I. Executive Order 13211 (Actions That Significantly Affect Energy Supply, Distribution, or Use)
  J. National Technology Transfer and Advancement Act of 1995
  K. Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)
  L. Congressional Review Act

I. General Information

A. Does this action apply to me?

The State of Maine, as well as entities that discharge pollutants to waters of the United States under the State of Maine's jurisdiction, such as industrial facilities, stormwater and combined sewer overflow (CSO) management districts, or publicly owned treatment works (POTWs), may be interested in this final rule because it withdraws Federal water quality standards (WQS) promulgated by EPA to allow the State of Maine's WQS to become the applicable WQS for CWA purposes. Entities discharging in Maine's waters and citizens concerned with water quality in Maine, including members of the federally recognized Indian tribes, may be interested in this final rule. If you have questions regarding the applicability of this action to a particular entity, consult the person identified in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Background

A. What are the applicable Federal statutory and regulatory requirements?

Consistent with the CWA, EPA's WQS program assigns to states and authorized tribes the primary authority for adopting WQS.[1] After states adopt WQS, they must be submitted to EPA for review and action in accordance with the CWA. The Act authorizes EPA to promulgate Federal WQS following EPA's disapproval of state WQS or an Administrator's determination that new or revised WQS are ''necessary to meet the requirements of the Act.'' [2]

B. What are the applicable Federal water quality criteria that EPA is withdrawing?

On December 19, 2016, EPA promulgated Federal HHC for 96 toxic pollutants for waters in Indian lands in Maine based on the Agency's 2015 disapproval of corresponding State-established HHC and an Administrator's determination that new or revised WQS were necessary to meet the requirements of the Act. 81 FR 92466 (December 19, 2016). EPA also promulgated a phenol criterion to protect human health from consumption of water plus organisms for waters outside of Indian lands in Maine after disapproving the State's phenol criterion in 2015 because it contained a mathematical error.

EPA's 2015 disapproval of the State's HHC for waters in Indian lands was based on its decision that they were inadequate to protect the sustenance

[1] 33 U.S.C. 1313(a), (c).

[2] 33 U.S.C. 1313(c)(4).

fishing designated uses that EPA interpreted and approved for waters in Indian lands in the same 2015 action. On May 27, 2020, after a thorough review of the applicable provisions of the CWA, implementing regulations and longstanding EPA guidance, EPA withdrew its 2015 interpretation and improper approvals of the alleged sustenance fishing designated uses and corresponding disapprovals of Maine's HHC that flowed from the flawed designated use determinations.[3] Also on that date, EPA approved Maine's general fishing designated use for waters in Indian lands without the interpretation that it means ''sustenance fishing.''[4]

On April 24, 2020, the Maine Department of Environmental Protection submitted new and revised WQS in accordance with CWA Section 303(c). The new and revised provisions included HHC. On June 23, 2020, EPA approved the State's new and revised HHC as consistent with the requirements of the CWA and applicable Federal regulations.[5] There are two sets of HHC in the State's newly approved criteria. One set protects the statewide general ''fishing'' designated use, and the other set protects the State's new ''sustenance fishing'' designated use subcategory that applies to specifically identified waters where sustenance fishing is or may be occurring. Between these two sets of HHC, all the waters covered by EPA's promulgated Federal HHC for toxic pollutants in 2016 are addressed. The new and revised HHC also address all the toxic pollutants for which EPA promulgated Federal HHC in 2016. All of EPA's prior decisions and action letters related to these Agency actions are available in docket ID EPA–HQ–OW–2015–0804 at *https://www.regulations.gov.*

As provided in 40 CFR 131.21(c), federally promulgated WQS that are more stringent than EPA-approved state WQS remain applicable for purposes of the CWA until EPA withdraws the Federal WQS. EPA's 2016 federally promulgated HHC are as stringent or more stringent than the State's newly approved HHC. Accordingly, EPA is amending the Federal regulations to withdraw those federally promulgated HHC for which the Agency has approved Maine's corresponding HHC.

EPA's withdrawal of federally promulgated HHC following approval of corresponding state HHC is consistent with the Federal and state roles contemplated by the CWA. Consistent with the cooperative federalism structure of the CWA, once EPA approves state WQS addressing the same pollutants for which EPA has promulgated Federal WQS, it is incumbent on EPA to withdraw the Federal WQS to enable EPA-approved state WQS to become the applicable WQS for CWA purposes. This final rule will allow Maine to implement its EPA-approved WQS. This final rule is consistent with EPA's withdrawal of other federally promulgated WQS following the Agency's approval of state-adopted WQS.[6]

This final rule amends Federal regulations to withdraw all Federal HHC for waters in Indian lands and the phenol criterion for waters outside of Indian lands promulgated for Maine in December 2016 at 40 CFR 131.43. All other federally promulgated criteria at 40 CFR 131.43 remain in effect.

EPA did not make any changes in response to the comments received on the proposed rulemaking. EPA received eight unique comments on the proposed rulemaking. EPA also held two public, online hearings on the proposed rulemaking (September 30, 2020, and October 1, 2020). EPA received no comments during these hearings. Brief summaries of the comments and EPA's responses are provided in the next section. As noted previously, a full accounting of the comments and the Agency's responses can be found in the docket for this rulemaking.

C. Comments on the Proposed Rulemaking

i. Comments in Support of EPA's Proposal To Withdraw the Federal HHC

EPA received several comments in support of the proposal to withdraw the Federal HHC. EPA appreciates the comments in support of this action. Several of these commenters also urged EPA to withdraw other federally promulgated WQS, specifically relating to mixing zones and aquatic life criteria for certain waters, which are not related to the HHC for toxic pollutants that are the subject of this rulemaking. EPA's proposal solicited comments only on withdrawing the Federal HHC for toxic pollutants and these comments are outside the scope of this proceeding.

ii. Comments in Opposition to EPA's Proposal To Withdraw the Federal HHC

EPA received two comments in opposition to EPA's proposal to withdraw the Federal HHC. Both comments object to the proposal based on the stringency, scope, and enforceability of the HHC that would remain in place after the withdrawal, *i.e.,* the State of Maine's federally approved HHC. The protectiveness of the State's federally approved HHC, however, is outside the scope of this rulemaking. EPA's June 23, 2020, approval of the State's HHC was a separate, final agency action. EPA's rationale for this approval is provided in detail in the attachment to the approval letter. More information on EPA's action to approve Maine's HHC can be accessed at *https://www.epa.gov/sites/production/files/2020-06/documents/hhc_approval_decision_final.pdf.*

Given that EPA approved state HHC that correspond to the federally approved HHC, the Agency is thus withdrawing its Federal criteria so that the state criteria are the applicable WQS for CWA purposes. *See* 40 CFR 131.21(c).

D. Effective Date of Withdrawal

Section 553(d)(3) of the Administrative Procedure Act (APA), 5 U.S.C. 553(d), provides that final rules shall not become effective until 30 days after publication in the **Federal Register** ''except . . . as otherwise provided by the agency for good cause.'' The purpose of this provision is to ''give affected parties a reasonable time to adjust their behavior before the final rule takes effect.'' *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996); see also *United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). Thus, in determining whether good cause exists to waive the 30-day delay, an agency should ''balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling.'' *Gavrilovic,* 551 F.2d at 1105. In this case, EPA has determined that there

[3] Letter from Dennis Deziel, Regional Administrator, EPA Region 1, to Gerald D. Reid, Commissioner, Maine Department of Environmental Protection, ''Re: Withdrawal of Certain of EPA's February 2, 2015 Decisions Concerning Water Quality Standards for Waters in Indian Lands'' (May 27, 2020).

[4] In 2019, Maine adopted, and EPA approved, a sustenance fishing designated use (SFDU) subcategory of its general fishing designated use for certain identified waters where sustenance fishing or increased fish consumption is or may be occurring.

[5] Letter from Ken Moraff, Water Division Director, EPA Region 1, to Gerald D. Reid, Commissioner, Maine Department of Environmental Protection, ''Re: Review and Action on Maine Water Quality Standards, 06–096 Chapter 584'' (June 23, 2020).

[6] See *e.g., Withdrawal of Certain Federal Water Quality Criteria Applicable to California: Lead, Chlorodibromomethane, and Dichlorobromomethane,* 83 FR 52163 (October 16, 2018); *Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal,* 79 FR 57447 (September 25, 2014); *Withdrawal of Certain Federal Water Quality Criteria Applicable to California, New Jersey and Puerto Rico,* 78 FR 20252 (April 4, 2013).

is good cause for waiving the 30-day delayed effective date because the final rule does not impose any new requirement on any affected entity, rather it withdraws Federal WQS applicable to waters in the State of Maine, thus allowing Maine's WQS to take effect for CWA purposes. Because by itself this final rule does not impose new requirements on affected entities, it is not necessary to provide affected entities time to adjust to this final rule. Having this withdrawal take effect upon publication in the **Federal Register** will help provide immediate clarity for the State of Maine as it proceeds with creating its latest list of impaired of waters under CWA Section 303(d), as well as in issuing NPDES permits, developing TMDLs, and issuing water quality certifications under CWA Section 401. For these reasons, the Agency finds that good cause exists under APA Section 553(d)(3) to make this rule withdrawing Federal WQS in Maine effective immediately upon publication.

III. Statutory and Executive Order Reviews

Additional information about these statutes and Executive orders can be found at *http://www2.epa.gov/laws-regulations/laws-and-executive-orders.*

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

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

B. Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs)

This action is a deregulatory action under Executive Order 13771.

C. Paperwork Reduction Act

This action does not impose any new information-collection burden under the Paperwork Reduction Act because it is administratively withdrawing Federal requirements that are no longer needed in Maine. It does not include any information collection, reporting, or recordkeeping requirements. The OMB has previously approved the information collection requirements contained in the existing regulations 40 CFR part 131 and has assigned OMB control number 2040–0049.

D. Regulatory Flexibility Act

The Agency certifies that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act. This action will not impose any requirements on small entities.

E. Unfunded Mandates Reform Act

This action does not contain Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. As this action withdraws certain federally promulgated criteria, the action imposes no enforceable duty on any state, local, or tribal governments, or the private sector.

F. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. This rule imposes no regulatory requirements or costs on any state or local governments. Thus, Executive Order 13132 does not apply to this action.

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

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. In the State of Maine, there are four federally recognized Indian tribes represented by five tribal governments. As a result of the unique jurisdictional provisions of the Maine Indian Claims Settlement Act, the State has jurisdiction for setting WQS for all waters in Indian lands in Maine. This rule will have no effect on that jurisdictional arrangement. This final rule affects federally recognized Indian tribes in Maine because it changes the WQS applicable to all waters in Indian lands.

EPA initiated consultation with federally recognized tribal officials under EPA's Policy on Consultation and Coordination with Indian tribes early in the process of developing this rule to allow meaningful and timely input into its development. A summary of that consultation is provided in ''Summary of Tribal Consultations Regarding Water Quality Standards Decisions on Remand Applicable to Waters in Indian Lands within Maine,'' which is available in the docket for this rulemaking.

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

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the Agency has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in Section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk that may disproportionately affect children.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act of 1995

This final rule does not involve technical standards.

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

The human health or environmental risk addressed by this action will not have disproportionately high and adverse human health or environmental effects on minority, low income or indigenous populations. EPA has previously determined that Maine's state-adopted and EPA-approved criteria are protective of human health.

L. Congressional Review Act

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

List of Subjects in 40 CFR Part 131

Environmental protection, Indians-lands, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 131 as follows:

PART 131—WATER QUALITY STANDARDS

■ 1. The authority citation for part 131 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

Subpart D—Federally Promulgated Water Quality Standards

§ 131.43 [Amended]

■ 2. Amend § 131.43 by removing paragraphs (a) and (j) and redesignating paragraphs (b) through (i) as paragraphs (a) through (h).

[FR Doc. 2020–26998 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2019–0233; FRL–10017–30]

2,4-D; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of 2,4-D in or on intermediate wheatgrass bran, forage, grain, and straw and sesame seed. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 21, 2020. Objections and requests for hearings must be received on or before February 19, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0233, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805.

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

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

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2019–0233 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 19, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2019–0233, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of September 30, 2020 (85 FR 61681) (FRL–10014–74), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions (an amended PP 9E8745 and PP 0E8848) by IR–4, IR–4 Project Headquarters, Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. This September 30, 2020 Notice supersedes the previous document the Agency published notifying the public of the filing of the IR–4 petition PP9E8745 in the **Federal Register** of August 30, 2019 (84 FR 45702) (FRL–9998–15).

The petitions requested that 40 CFR part 180 be amended by establishing tolerances for residues of 2,4-D in or on the raw agricultural commodities wheatgrass, intermediate, bran at 4 parts per million (ppm); wheatgrass, intermediate, grain at 2 ppm; wheatgrass, intermediate, straw at 50 ppm, and wheatgrass, intermediate, forage at 25 ppm (PP 9E8745) and sesame, seed at 0.05 ppm (PP 0E8848). That document referenced summaries of the petitions prepared by Nufarm and PBI Gordon, the registrants, which are

available in the docket, *http://www.regulations.gov.* There was one comment received in response to the notice of filing and it was in support of the petition. Although the petitioner requested a tolerance for wheatgrass, intermediate, forage at 25 ppm, the available data indicate that a tolerance of 30 ppm is appropriate; therefore, EPA is establishing that tolerance at 30 ppm. The remaining tolerances are being established as requested.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for 2,4-D including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with 2,4-D follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The toxicity profile of 2,4-D shows that the principal toxic effects are changes in the kidney, thyroid, liver, adrenal, eye, and ovaries/testes in the rat following exposure to 2,4-D via the oral route at dose levels above the threshold of saturation of renal clearance; below that level, the kidneys rapidly excrete the chemical before it has any toxic effects on the body. No systemic toxicity was observed in rabbits following repeated exposure via the dermal route at dose levels up to the limit dose. Neurotoxicity was observed in the acute neurotoxicity study in rats at the high dose. In an extended 1-generation reproductive toxicity study in rats, reproductive toxicity, developmental neurotoxicity, and immunotoxicity were not observed, and the thyroid effects observed at dose levels up to/approaching renal saturation were considered treatment-related, although not adverse. Maternal and developmental toxicities were observed only at high dose levels exceeding the threshold of saturation of renal clearance. Regarding carcinogenicity, available data showed no statistically significant tumor response in rats and mice. Moreover, EPA's literature review found that, overall, there was little substantive evidence to suggest a clear associative or causal relationship between exposure to 2,4-D and cancer.

Specific information on the studies received and the nature of the adverse effects caused by 2,4-D as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''2,4-D. Second Revision: Human Health Risk Assessment for Registration Review'' (hereinafter ''2,4-D Human Health Risk Assessment for Registration Review'') in docket ID number EPA–HQ–OPP–2019–0233.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/assessing-human-health-risk-pesticide.*

A summary of the toxicological endpoints for 2,4-D used for human risk assessment can be found in the 2,4-D Human Health Risk Assessment for Registration Review.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to 2,4-D, EPA considered exposure under the petitioned-for tolerances as well as all existing 2,4-D tolerances in 40 CFR 180.142. EPA assessed dietary exposures from 2,4-D in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for 2,4-D. In estimating acute dietary exposure, EPA used 2003–2008 food consumption information from the United States Department of Agriculture's (USDA's) National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). As to residue levels in food, EPA assumed tolerance-level residues, except for transgenic soybeans and cotton (for which a value higher than the tolerance was used to account for the 2,4-DCP metabolite), and 100 percent crop treated (PCT) for all commodities, as well as empirical and default processing factors.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment, EPA used the 2003–2008 food consumption data from the USDA's NHANES/WWEIA. As to residue levels in food, EPA assumed tolerance-level residues, except for transgenic soybeans and cotton (for which a value higher than the tolerance was used to account for the 2,4-DCP metabolite), and 100 percent crop treated (PCT) for all commodities, as well as empirical and default processing factors.

iii. *Cancer.* Based on the data summarized in the 2,4-D Human Health Risk Assessment for Registration Review in docket ID number EPA–HQ–OPP–2019–0233, EPA has concluded that 2,4-D is not expected to pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue or PCT information in the dietary assessment for 2,4-D. Tolerance-level residues (except for transgenic soybeans and cotton, for which a value higher than the tolerance was used to account for the 2,4-DCP metabolite) and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening-level water exposure models in the dietary exposure analysis and risk assessment for 2,4-D in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of 2,4-D. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/about-water-exposure-models-used-pesticide.*

Based on the Surface Water Concentration Calculator (SWCC), Pesticide Root Zone Model Ground Water (PRZM GW) model, and monitoring data, the estimated drinking water concentrations (EDWCs) of 2,4-D for acute exposures are estimated to be 298 parts per billion (ppb) for surface water and 14.89 ppb for ground water, and for chronic exposures are estimated to be 34.5 ppb for surface water and 14.89 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the acute dietary risk assessment, the water concentration value of 298 ppb was used to assess the contribution to drinking water. For the chronic dietary risk assessment, the water concentration of value 34.5 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

2,4-D is currently registered for the following uses that could result in residential exposures: Ornamental turf, including lawns, parks, sports fields, and golf courses, as well as aquatic uses. EPA assessed residential exposure using the following assumptions: There is no potential hazard via the dermal route for 2,4-D; therefore, the handler assessment included only the inhalation route of exposure. There are registered 2,4-D products for use in residential sites (*e.g.,* lawns and turf) that have been considered in the short-term residential handler assessment for 2,4-D. As the aquatic use product labels include PPE requirements, and state that coordination and approval of local and state authorities and/or permits may be required prior to application, those applications are assumed to be made only by occupational applicators.

There is potential for short-term post-application exposure for individuals as a result of being in an environment that has been previously treated with 2,4-D. The quantitative exposure/risk assessment for residential post-application exposures is based on the following scenarios:

- Incidental ingestion (*i.e.,* hand-to-mouth, object-to-mouth, soil ingestion exposure) from contact with treated turf (children 1 to less than 2 years old only),
- Episodic granular ingestion on treated turf (children 1 to less than 2 years old only), and
- Incidental ingestion of water during recreational swimming (both adults and children 3 to less than 6 years old).

The residential exposure scenario used in the adult and children 3 to less than 6 years aggregate assessments reflects short-term incidental oral exposure from post-application exposure swimmer scenario.

The residential exposure scenario used in the children 1 to less than 2 years old aggregate assessment reflects short-term hand-to-mouth exposures from post-application turf scenario (*i.e.,* post-application exposure to turf applications).

These scenarios are considered worst-case and are protective of all other exposure scenarios.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/standard-operating-procedures-residential-pesticide.*

4. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

2,4-D is a member of the alkylphenoxy herbicide class of pesticides. This class also includes MCPA, 2,4-DB, and 2,4-DP. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to 2,4-D and any other substances. For the purposes of this action, therefore, EPA has not assumed that 2,4-D has a common mechanism of toxicity with other substances.

For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www2.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* 2,4-D has been evaluated for potential developmental effects in the rat and rabbit. There is no evidence of increased susceptibility following *in utero* exposure to 2,4-D in the rabbit developmental toxicity study or following *in utero* and/or pre-/post-natal exposure in the rat extended 1-generation reproduction toxicity study. Maternal toxicity in the rabbit included decreased body weight gain, clinical signs of toxicity (decreased motor activity, ataxia, loss of righting reflex, extremities cold to the touch) and developmental toxicity includes abortions.

The rat developmental toxicity study and the rat 2-generation reproductive study indicate increased susceptibility

following *in utero* exposure to 2,4-D in the rat developmental toxicity study and/or pre-/post-natal exposure in the reproductive study. In the former, maternal toxicity included decreased body weight gains at the same dose level where developmental effects (occurrence of skeletal malformations) occurred; in the latter, maternal toxicity included decreased body weight gains at the same dose level where reduced viability of the F1 pups was observed. In both the rat developmental study and the rat 2-generation reproduction study, the toxicity was observed at dose levels that exceed renal saturation. Because the toxicity was observed at those levels, EPA expects that had an examination of the kidney been done on the maternal animals in these studies, kidney effects would have been revealed at doses lower than where the developmental effects had occurred; therefore, the study findings are not considered evidence of real susceptibility.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1x. That decision is based on the following findings:

i. The toxicity database for 2,4-D is complete.

ii. Evidence of neurotoxicity was observed in the acute neurotoxicity study in rats, as evidenced by an increase in the incidence of in-coordination and slight gait abnormalities (forepaw flexing or knuckling) during the Functional Operational Battery assessment at the high dose in both sexes. In the subchronic neurotoxicity study, relative forelimb grip strength was significantly increased in rats of both sexes at the high-dose level, although there was no treatment-related change in absolute grip strength. Clinical signs of neurotoxicity (decreased motor activity, ataxia, loss of righting reflex, extremities cold to the touch) were observed in maternal rabbits in the developmental toxicity study. Developmental neurotoxicity was not observed in the developmental neurotoxicity cohort of the Extended One Generation Reproductive Toxicity study in rats. Neuropathological effects were not observed in any study.

iii. There is evidence of increased susceptibility following *in utero* exposure to 2,4-D in the rat developmental toxicity study and following *in utero* and/or pre-/post-natal exposure in the rat 2-generation reproduction study at dose levels that exceed renal saturation. There is no evidence of increased susceptibility following *in utero* exposure to 2,4-D in the rabbit developmental toxicity study or following *in utero* and/or pre-/post-natal exposure in the rat extended 1-generation reproduction toxicity study. Despite this conclusion, there is no residual uncertainty concerning the potential susceptibility of infants and children to effects of 2,4-D necessitating the retention of the 10X FQPA safety factor. There are no data gaps in the toxicology database, and the available reliable data provide clearly established NOAELs and LOAELs for the population of concern and the points of departure (POD) that are protective of susceptibility. Consequently, there is no need to retain the 10X FQPA safety factor to protect infants and children.

iv. There are no residual uncertainties identified in the exposure databases. The dietary exposure estimates are unrefined and reflect primarily tolerance-level residues in food and 100 PCT. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to 2,4-D in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by 2,4-D.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to 2,4-D will occupy 23% of the aPAD for children 1–2 years old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to 2,4-D from food and water will utilize 20% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of 2,4-D is not expected.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

2,4-D is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to 2,4-D.

Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, water, and residential exposures result in aggregate MOEs of 2000 for adults and 280 for children. Because EPA's level of concern for 2,4-D is a MOE of 100 or below, these MOEs are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, 2,4-D is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for 2,4-D.

5. *Aggregate cancer risk for U.S. population.* As discussed above, EPA has concluded that 2,4-D will not pose a cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to 2,4-D residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate analytical methods are available for data collection and the enforcement of plant commodity tolerances. An adequate Gas Chromatography/Electron Capture

Detector (GC/ECD) enforcement method for plants (designated as EN–CAS Method No. ENC–2/93) was submitted, which has been independently validated and radiovalidated. An enforcement method was submitted for determination of 2,4-D in livestock commodities, which has been adequately radiovalidated. The methods have been submitted to FDA for inclusion in PAM II. The 10/1997 edition of FDA PAM Volume I, Appendix I indicates that 2,4-D is partially recovered (50–80%) using Multiresidue Methods Section 402 E1 and 402 E2.

For multiresidue method analysis, 2,4-D is documented to be well-recovered through the QuEChERS (Quick, Easy, Cheap, Effective, Rugged, and Safe) streamlined extraction method.

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

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The Codex has not established any MRLs for 2,4-D on intermediate wheatgrass raw agricultural commodities or sesame seed.

C. Response to Comments

There was one comment received in response to the notice of filing and it was in support of the petition.

V. Conclusion

Therefore, tolerances are established for residues of 2,4-D, in or on sesame, seed at 0.05 ppm; wheatgrass, intermediate, bran at 4 ppm; wheatgrass, intermediate, forage at 30 ppm; wheatgrass, intermediate, grain at 2 ppm; and wheatgrass, intermediate, straw at 50 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 4, 2020.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

■ 2. In § 180.142 amend paragraph (a) by designating the table and adding, in alphabetical order, in newly designated Table 1 to paragraph (a) the entries ''Sesame, seed''; ''Wheatgrass, intermediate, bran''; ''Wheatgrass, intermediate, forage''; ''Wheatgrass, intermediate, grain''; and ''Wheatgrass, intermediate, straw'' to read as follows:

§ 180.142 2,4-D; tolerances for residues.

(a) * * *

TABLE 1 TO PARAGRAPH (a)

Commodity	Parts per million
* * * * *	
Sesame, seed	0.05
* * * * *	
Wheatgrass, intermediate, bran	4
Wheatgrass, intermediate, forage	30
Wheatgrass, intermediate, grain	2

TABLE 1 TO PARAGRAPH (a)—Continued

Commodity	Parts per million
Wheatgrass, intermediate, straw	50

* * * * *

[FR Doc. 2020–28128 Filed 12–17–20; 11:15 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201214–0337]

RIN 0648–BJ98

Fisheries of the Northeastern United States; Golden Tilefish Fishery; Final 2021 and Projected 2022 Specifications and Emergency Action

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

ACTION: Final rule.

SUMMARY: NMFS announces final specifications for the 2021 commercial golden tilefish fishery and projected specifications for 2022. This action also implements temporary emergency measures for the golden tilefish fishery at the request of the Mid-Atlantic Fishery Management Council. This action establishes allowable harvest levels and other management measures to prevent overfishing while allowing optimum yield, consistent with the Magnuson-Stevens Fishery Conservation and Management Act and the Tilefish Fishery Management Plan. The emergency measures allow a limited one-time carryover of up to 5 percent of unharvested fishing quota from the 2020 fishing year into the 2021 fishing year.

DATES: This rule is effective December 21, 2020. Emergency action measures expire June 19, 2021. The 2021 specification measures expire November 1, 2021.

ADDRESSES: Copies of the Supplemental Information Report prepared for this action are available from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901. These documents are also accessible via the internet at *http://www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Douglas Potts, Fishery Policy Analyst, (978) 281–9341.

SUPPLEMENTARY INFORMATION:

Background

The Mid-Atlantic Fishery Management Council manages the golden tilefish fishery under the Tilefish Fishery Management Plan (FMP), which outlines the Council's process for establishing annual specifications. The FMP requires the Council to recommend acceptable biological catch (ABC), annual catch limit (ACL), annual catch target (ACT), total allowable landings (TAL), and other management measures, for up to 3 years at a time. The directed fishery is managed under an individual fishing quota (IFQ) program, with small amounts of non-IFQ catch allowed under an incidental permit. Detailed background information regarding the development of the 2021–2022 specifications for this fishery was provided in the specifications proposed rule (85 FR 72616; November 13, 2020). That information is not repeated here.

Specifications

The table below shows the 2021 and projected 2022 specifications including the ABC, ACL, ACT, and TAL for the commercial Mid-Atlantic golden tilefish fishery. NMFS will publish a notice in the **Federal Register** before the 2022 fishing year notifying the public of the final specifications.

TABLE 1—2021 AND PROJECTED 2022 GOLDEN TILEFISH SPECIFICATIONS

	2021		Projected 2022	
	million lb	mt	million lb	mt
ABC	1.636	742	1.636	742
ACL	1.636	742	1.636	742
IFQ ACT	1.554	705	1.554	705
Incidental ACT	0.082	37	0.082	37
IFQ TAL	1.554	705	1.554	705
Incidental TAL	0.070	32	0.070	32

Under the FMP, 95 percent of the ACL is allocated for the IFQ fishery, and the remaining 5 percent is allocated for the incidental fishery. This results in the ACT for each. The TAL for each of these sectors of the fishery is derived by deducting anticipated discards of tilefish from the ACT.

This action makes no changes to possession limits in the golden tilefish fishery. The incidental trip limit remains 500 lb (226.8 kg) (live weight), or 50 percent of the weight of all fish being landed, whichever is less, and the recreational catch limit remains eight fish per angler per trip.

Emergency Action

At its April 2020 meeting, the Council requested that NMFS take emergency action to allow a 5 percent carryover of unharvested IFQ quota from fishing year 2020 to 2021. The tilefish IFQ program does not normally allow any carryover of unharvested allocation from one fishing year into the next. Unforeseen changes in the market for seafood resulting from the COVID–19 pandemic, particularly the loss of restaurant sales due to local closure orders, have substantially reduced demand for golden tilefish. A review of golden tilefish IFQ landings from November 1, 2019, through June 30, 2020, shows that landings were approximately 18.5-percent below the same date in 2018 and 2019. Because of this unprecedented impact on the fishery, we are implementing this one-time carry over under our emergency rulemaking authority specified in section 305(c) of the Magnuson-Stevens Act.

Each IFQ quota shareholder will be able to carry over 2020 IFQ quota pounds that are not used to land tilefish before the end of the fishing year, up to a maximum amount of 5 percent of their initial 2020 IFQ quota pounds. Final IFQ accounting is normally completed in December or January, after all landings data has been submitted and undergone normal reviews for quality control and quality assurance. Following that accounting, IFQ quota

shareholders that land less than 95 percent of their initial 2020 quota pounds will receive the full 5-percent carryover. Those that land between 95 and 100 percent of their initial 2020 quota pounds will receive the amount they were under. Revised 2020 allocation permits indicating the amount of any carryover will be issued to each IFQ quota shareholder. Any increase in the 2021 IFQ TAL reflects 2020 IFQ TAL that was not harvested. Thus, total landings for 2020 and 2021 will remain at or below the combined IFQ TAL for the 2 years.

NMFS's policy guidelines for the use of emergency rules (62 FR 44421; August 21, 1997) specify the following three criteria that define what an emergency situation is, and justification for final rulemaking: (1) The emergency results from recent, unforeseen events or recently discovered circumstances; (2) the emergency presents serious conservation or management problems in the fishery; and (3) the emergency can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rulemaking process. NMFS's policy guidelines further provide that emergency action is justified for certain situations where emergency action would prevent significant direct economic loss, or to preserve a significant economic opportunity that otherwise might be foregone. NMFS has determined that allowing the carryover of unharvested tilefish IFQ quota pounds as described above meets the three criteria for emergency action for the reasons outlined below.

The emergency results from recent, unforeseen events or recently discovered circumstances. On March 13, 2020, a national emergency was declared in response to the global spread of a novel coronavirus (SARS-CoV–2), and the outbreaks of the disease caused by this virus, COVID–19. State governors across the Greater Atlantic region declared states of emergency and implemented health and travel restrictions in recognition of the growing impacts and risks of COVID–19. The tilefish industry began to experience impacts from the COVID–19 pandemic in March 2020. These impacts were unforeseen during the development of management measures for the 2020 fishing year that began on November 1, 2019.

The emergency presents serious conservation or management problems in the fishery. When state governors across the Greater Atlantic region declared states of emergency, it became exceedingly difficult for members of the tilefish industry to complete fishing trips and sell their catch to federally permitted tilefish dealers. Even after some tilefish dealer activity resumed, the ability of tilefish IFQ quota holders to harvest their quota remained very limited, and a number of fishermen were unable to harvest their full quota for the 2020 fishing year. This emergency action would help prevent additional economic losses to industry participants, shoreside businesses, and fishing communities, and help offset lost fishing opportunities during the 2020 fishing year.

Although the Council has the authority to develop a management action to authorize carryover, an emergency action can be developed and implemented by NMFS more swiftly than a Council action that is subject to requirements not applicable to the Secretary. If the normal Council process is used to implement carryover provisions, it would take substantially longer for those provisions to be implemented and could prevent vessels from harvesting carryover at an opportune time in the upcoming fishing year. It was not possible to implement these changes for the start of the 2021 fishing year through rulemaking following the normal Council process because of time required for the Council to develop a FMP amendment or framework adjustment. If implemented through emergency action, carryover allocation will be available to fishermen early in the tilefish fishing year, which allows maximum flexibility and ensures the intended benefits of this action are realized. Making carryover quota available for as much of the fishing year as possible is important to allow tilefish permit holders to plan to use additional quota when it is most beneficial to them. Section 305(c) of the Magnuson-Stevens Act specifies that emergency regulations may only remain in effect for 180 days from the date of publication and may be extended for one additional period of not more than 186 days.

Comments

The public comment period for the proposed rule ended on November 30, 2020. We received no relevant comments on the proposed rule.

Changes from Proposed to Final Rule

There are no changes from the proposed rule.

Classification

NMFS is issuing this rule pursuant to sections and 304(b) and 305(c) of the Magnuson Stevens Act, which provide specific authority and procedure for implementing this action. Section 304(b) authorizes NMFS to implement regulations implementing a fishery management plan or plan amendment. Section 305(c) authorizes NMFS to implement regulations at the request of the Council to address an emergency in the fishery. The NMFS Assistant Administrator has determined that this rule is consistent with the Tilefish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

The Assistant Administrator Fisheries, NOAA (AA) finds the need to implement these measures in a timely manner to implement the final harvest limits for the 2021 fishing year that started on November 1, 2020, and to implement emergency measures to allow the carryover of up to 5 percent of unharvested IFQ quota, constitutes good cause under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date and make the rule effective immediately upon publication in the **Federal Register**. The 2021 tilefish fishing year is already underway and delaying the effective date for this rule would undermine the intent of this rule. A full assessment of the potential impacts of the emergency measures in this action was not available until late October, delaying the publication of the proposed rule for this action.

The 30-day delay in implementation for this rule is also unnecessary because this rule contains no new measures (*e.g.,* requiring new nets or equipment) for which regulated entities need time to prepare or revise their current practices.

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

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

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: December 14, 2020.

Samuel D. Rauch, III,

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

[FR Doc. 2020–27852 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201214–0338; RTID 0648–XX006]

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass 2021 Specifications

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

ACTION: Final rule.

SUMMARY: NMFS announces 2021 specifications for the summer flounder, scup, and black sea fisheries. The implementing regulations for the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan require us to publish specifications for the upcoming fishing year for each of these species. This action is intended to inform the public of the specifications for the start of the 2021 fishing year for summer flounder, scup, and black sea bass.

DATES: This rule is effective January 1, 2021.

ADDRESSES: A Supplemental Information Report (SIR) was prepared for the 2021 summer flounder, scup, and black sea bass specifciations. Copies of the SIR are available on request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council, Suite 201, 800 North State Street, Dover, DE 19901. The SIR is also accessible via the internet at *http://www.mafmc.org/s/SF_2020-2021_specs_EA.pdf.*

FOR FURTHER INFORMATION CONTACT: Emily Keiley, Fishery Policy Analyst, (978) 281–9116.

SUPPLEMENTARY INFORMATION:

General Background

The Mid-Atlantic Fishery Management Council and the Atlantic States Marine Fisheries Commission cooperatively manage the summer flounder, scup, and black sea bass fisheries. The Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan (FMP) outlines the Council's process for establishing specifications. The FMP requires NMFS to set an acceptable biological catch (ABC), annual catch limit (ACL), annual catch targets (ACT), commercial quotas, recreational harvest limits (RHL), and other management measures, for 1 to 3 years at a time. Projected 2021 specifications for summer flounder (84 FR 54041; October 9, 2019) and scup and black sea bass (85 FR 29345; May 15, 2020) were previously announced. This action revises the 2021 ABC limits, as well as the recreational and commercial ACLs, ACTs, commercial quotas, and RHLs for all three species, consistent with the recommendations made by the Commission's Summer Flounder, Scup, and Black Sea Bass Board and the Council at their joint August 2020 meeting. These revisions are primarily based on recent changes to the Council's risk policy that we approved on December 15, 2020. The risk policy defines the acceptable risk of overfishing associated with an ABC. The revised risk policy allows for increased risk of overfishing under high stock biomass conditions compared to the previous risk policy. The change is greatest for stocks with biomass above the target level (B_{MSY}).

Final 2021 Specifications

Summer Flounder Specifications

For summer flounder, applying the revised risk policy, keeping all other relevant factors the same as previously adopted, results in an increase in the 2021 ABC from 25.03 million lb (11,354 mt) to 27.11 million lb (12,297 mt). This represents an 8-percent increase in the ABC and an increase in the probability of overfishing from 34 to 39 percent. Given the high biomass (healthy stock status) of summer flounder, the revised risk policy allows for a slightly increased risk of overfishing, which balances fishery access with the prevention of overfishing. Section 5.1 of the Council's SIR provides information on how the revised ABC was calculated using the new risk policy. The resulting catch and landings limits are shown in Table 1.

TABLE 1—SUMMARY OF THE FINAL 2021 SUMMER FLOUNDER FISHERY SPECIFICATIONS

2021 Specifications	million lb	mt
OFL	31.67	14,367
ABC	27.11	12,297
Commercial ACL	14.63	6,635
Commercial ACT	14.63	6,635
Commercial Quota	12.49	5,663
Recreational ACL	12.48	5,662
Recreational ACT	12.48	5,662
Recreational Harvest Limit	8.32	3,776

We also recently approved (October 19, 2020) and implemented (December 14 2020, 85 FR 80661) Amendment 21 to the FMP. Amendment 21 implements a new state-by-state allocation formula for the commercial summer flounder fishery. The revised allocation formula was used to set the final 2021 summer flounder commercial state quotas. In addition to the revised allocation formula, the final state summer flounder quotas take into account any overages that occurred during the 2019 or current fishing year, through October 31, as described at 50 CFR 648.103(b)(2). The final 2021 state-by-state summer flounder quotas are provided in Table 2.

TABLE 2—FINAL 2021 SUMMER FLOUNDER STATE-BY-STATE QUOTAS

State	Percent share	Additional percent share of quota above 9.55 m lb (4,332 mt)	Initial allocation lb	Initial allocation kg	Preliminary 2020 overage	Final allocation lb	Final allocation kg
Maine	0.04756	0.333	14,342	6,501	.....	14,332	6,501
New Hampshire	0.00046	0.333	9,844	4,461	.....	9,834	4,461
Massachusetts	6.82046	12.375	1,015,179	460,477	.....	1,015,179	460,477
Rhode Island	15.68298	12.375	1,861,550	844,385	.....	1,861,550	844,385
Connecticut	2.25708	12.375	579,376	262,801	.....	579,376	262,801
New York	7.64699	12.375	1,094,113	496,281	.....	1,094,113	496,281
New Jersey	16.72499	12.375	1,961,062	889,523	.....	1,961,062	889,523
Delaware	0.01779	0.333	11,499	5,211	−52,307	−40,818	−18,515
Maryland	2.0391	12.375	558,559	253,358	.....	558,559	253,358
Virginia	21.31676	12.375	2,399,576	1,088,429	.....	2,399,576	1,088,429
North Carolina	27.44584	12.375	2,984,903	1,353,929	.....	2,984,903	1,353,929

This action makes no changes to the current commercial management measures, including the minimum fish size (14 inches (36 cm), total length), gear requirements, and possession limits. No changes to 2021 recreational management measures (bag limits, size limits, and seasons) were considered as part of this action.

Scup Specifications

Application of the revised risk policy to the 2021 scup OFL, keeping all other relevant factors the same, results in the 2021 ABC increasing from 30.67 million lb (13,912 mt) to 34.81 million lb (15,790 mt). This represents a 13-percent increase in the ABC. Section 5.2 of the Council's SIR provides information on how the revised ABC was calculated using the new risk policy. The resulting catch and landings limits are shown in Table 3.

TABLE 3—SUMMARY OF THE FINAL 2021 SCUP FISHERY SPECIFICATIONS

2021 Specifications	million lb	mt
OFL	35.30	16,012
ABC	34.81	15,791
Commercial ACL	27.15	12,317
Commercial ACT	27.15	12,317
Commercial Quota	20.50	9,299
Recreational ACL	7.66	3,474
Recreational ACT	7.66	3,474
Recreational Harvest Limit	6.07	2,752

TABLE 4—COMMERCIAL SCUP QUOTA ALLOCATIONS FOR 2021 BY QUOTA PERIOD

Quota period	Percent share	lb	mt
Winter I	45.11	9,247,904	4,194.77
Summer	38.95	7,985,056	3,621.96
Winter II	15.94	3,267,825	1,482.26
Total	100.0	20,500,000	9,299.00

Note: Pounds are converted from metric tons and may not necessarily total due to rounding.

This action does not change the 2021 commercial management measures for scup, including the minimum fish size (9 inches (22.9 cm), total length), gear requirements, and quota period possession limits. Like summer flounder, changes to the recreational measures for 2021 were not considered in this action.

Black Sea Bass Specifications

Application of the revised risk policy to the 2021 black sea bass OFL, keeping all other relevant factors the same, results in the 2021 ABC increasing from 15.07 million lb (6,836 mt) to 17.45 million lb (7,915 mt), representing a 16-percent increase. As specified in the FMP, 49 percent of the ABC that is expected to be landed is allocated to the commercial fishery and 51 percent is allocated to the recreational fishery. Expected discards in each sector are added to these amounts to derive commercial and recreational ACLs. The Council and Board recommended revisions to the method for calculating expected discards for black sea bass. The revised method is based on the assumption that sector-specific discards, as a percentage of sector-specific catch, will be the same as the 2016–2018 average (*i.e.,* commercial dead discards would account for 36 percent of commercial catch and recreational dead discards would account for 20 percent of recreational catch). This allows commercial discards to scale up with the increase in the quota, consistent with past trends in the fishery. The previously used method for calculating expected discards under-predicted

actual discards in both sectors, contributing to commercial and recreational ACL overages in every year since 2015. The revised methodology reduces the likelihood of ACL overages. The resulting catch and landings limits are shown in Table 5. This action does not change the 2021 commercial management measures for black sea bass, including the commercial minimum fish size (11 inches (27.94 cm), total length) and gear requirements.

TABLE 5—SUMMARY OF THE FINAL 2021 BLACK SEA BASS SPECIFICATIONS

2021 Specifications	million lb	mt
OFL	17.68	8,021
ABC	17.45	7,916
Commercial ACL	9.52	4,320
Commercial ACT	9.52	4,320
Commercial Quota	6.09	2,764
Recreational ACL	7.93	3,596
Recreational ACT	7.93	3,596
Recreational Harvest Limit	6.34	2,877

This action revises the projected state-by-state February black sea bass recreational fishery harvest. No changes to the management measures for the February fishery are being proposed. The harvest projections are being updated to incorporate the revised Marine Recreational Information Program data, but the overall estimation method would remain unchanged (Table 6). States that choose to participate in this optional opening must use these revised values when developing state waters management measures for the rest of the year. The purpose is to ensure their participation in this optional opening does not increase their annual recreational black sea bass harvest in such a way as to result in an overage of the coastwide RHL. Changes to management measures for the overall recreational black sea bass fishery were not considered in this action.

TABLE 6—RECREACTIONAL BLACK SEA BASS FEBRUARY 2021 HARVEST ESTIMATES

State	Harvest estimates (lb)	Harvest estimates (mt)
Rhode Island	1,146	0.52
Connecticut	158	0.07
New York	41,871	18.99
New Jersey	405,913	184.12
Delaware	6,418	2.91
Maryland	2,227	1.01
Virginia	24,891	11.29
North Carolina	1,369	0.62
Total	483,993	219.54

Comments and Responses

We received two comments on the proposed rule. One comment was not relevant to the proposed specifications and is not discussed further. The second comment was from the State of New York and the New York State Department of Environmental Conservation (hereinafter referenced as ''New York''). New York's comment comprises a cover letter and ten attachments. The attachments were the comment letters and supporting documents that New York previously submitted in response to the proposed rule for the 2020–2021 Summer Flounder, Scup, Black Sea Bass, and Bluefish Specifications (84 FR 36046; July 26, 2019) and the proposed rule for Amendment 21 to the FMP (85 FR 48660; August 12, 2020). Similar to arguments made in ongoing and past litigation, New York contends that the revised allocations and resulting quotas are not in accordance with Magnuson-Stevens Act's National Standards 2, 4, 5, and 7. NMFS's responses to New York's previously submitted comments can be found in the final rules for those two actions (84 FR 54041; October 8, 2019, and 85 FR 80661; December 14, 2020) and are not repeated here.

In the proposed rule, we published initial 2021 summer flounder state quotas based on two scenarios. In the first scenario the distribution of state quota was based on the new allocation method we approved through Amendment 21 to the FMP. Although we approved Amendment 21 on October 19, 2020, when the specifications proposed rule was published, we did not know whether the final rule for Amendment 21, implementing the new allocation method, would be published and effective prior to the start of the 2021 fishing year. Due to the timing uncertainty, the proposed rule included a second scenario under which the commercial state summer flounder quota distribution would be based on the old allocation formula. In its comment letter, New York opposed ''the state-by-state allocations proposed under either scenario.''

The final rule for Amendment 21 published on December 14, 2020. Therefore the current regulations governing the FMP require that quota allocations be distributed based on the percentages outlined in Table 2. Any adjustments to these quota allocations that are currently part of the FMP must be developed and considered through an amendment to the FMP and are outside the scope of this specifications action.

Changes From the Proposed Rule

As described in the proposed rule, the summer flounder specifications in this final rule incorporate overage information to calculate the final state quotas.

Classification

Pursuant to section 304(b)(3) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the Summer Flounder, Scup, and Black Sea Bass FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

The Assistant Administrator for Fisheries finds that the need to implement these measures in a timely manner constitutes good cause, under the authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date of this action. This action implements 2021 specifications for the summer flounder, scup, and black sea bass fisheries. These specifications should be effective by the start of the fishing year on January 1, 2021, and must be published on or before December 31, 2020.

This rule is being issued at the earliest possible date. Preparation of the proposed rule was dependent on the Council's submission of the SIR. NMFS received the final version of the SIR on November 2, 2020. Preparation of the final rule is also dependent on the analysis of commercial summer flounder landings for the prior fishing year (2019) and the current fishing year through October 31, to determine whether any overages have occurred and adjustments are needed to the final state quotas. This process is codified in the summer flounder regulations, and, therefore, cannot be performed earlier. Annual publication of the summer flounder quotas prior to the start of the fishing year, by December 31, is required by Court Order in *North Carolina Fisheries Association* v. *Daley.*

The 30-day delay in implementation for this rule is also unnecessary because this rule contains no new measures (*e.g.,* requiring new nets or equipment) for which regulated entities need time to prepare or revise their current practices.

This final rule is exempt from review under Executive Order 12866.

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

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

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

Dated: December 14, 2020.

Samuel D. Rauch, III,

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

[FR Doc. 2020–27851 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 245
Monday, December 21, 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.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40, 50, 70, and 72

[NRC–2017–0021]

RIN 3150–AJ92

Alternatives to the Use of Credit Ratings

AGENCY: Nuclear Regulatory Commission.

ACTION: Advance notice of proposed rulemaking; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering an amendment to its regulations that would alter financial assurance mechanisms approved by the NRC for the decommissioning of nuclear power plants and other nuclear facilities. Specifically, this action would amend provisions for parent company and self company guarantees that require bond ratings issued by credit rating agencies. This action would implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which directed agencies to amend their regulations to remove any reference to or reliance on credit ratings. Applicants and licensees who are required to provide decommissioning financial assurance may be affected. The NRC is soliciting public comment on potential approaches for amending the regulations and invites stakeholders and interested persons to participate. The NRC plans to hold a public meeting during the comment period to facilitate stakeholder participation.

DATES: Submit comments by March 8, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received before this date.

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

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0021. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Gregory Trussell, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6244, email: *Gregory.Trussell@nrc.gov.*

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I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2017–0021 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2017–0021.
- *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, at 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.

B. Submitting Comments

Please include Docket ID NRC–2017–0021 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act or the Act) to ''promote the financial stability of the United States by improving accountability and transparency in the financial system.'' [1] In the Act, Congress found that ''ratings on structured financial products have proven to be inaccurate'' and that ''[t]his inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy.'' [2] In section 939A of the Act, Congress directed each Federal agency to ''review any regulation issued by such agency that requires the use of an

[1] Public Law 111–203, Preamble.
[2] Public Law 111–203, Sec. 931(5).

assessment of the credit-worthiness of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.'' [3] Section 939A further directed each such agency to ''modify any such regulations identified by the review . . . to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations.'' [4]

As directed by section 939A of the Dodd-Frank Act, the NRC has reviewed its regulations for any references to or requirements of reliance on credit ratings. Appendices A, C, and E to part 30 of title 10 of the *Code of Federal Regulations* (10 CFR) provide methods for licensees and applicants to demonstrate that a self-guarantee or parent company guarantee provides a reasonable assurance of adequate funding for decommissioning. Those appendices provide an option based in part on specified bond ratings from Moody's or Standard and Poor's credit rating agencies. Absent the use of credit ratings, current NRC financial test criteria located at 10 CFR part 30, appendices A, D, and E, for use of parent company guarantees and self-guarantees, rely in part on working capital liability-based test criteria. In accordance with the Dodd-Frank Act, the NRC is considering amending these appendices to remove reliance on credit rating criteria. Other regulations that cite or reference these appendices may also be affected by a proposed rule. The other potentially affected regulations include § 30.35(f)(2); § 40.36(e)(2); 10 CFR part 40, criterion 9 of appendix A; § 50.75(e)(1)(iii)(c); § 70.25(f)(2); and § 72.30(e)(2).

The NRC held a public meeting on October 30, 2019 (ADAMS Accession No. ML19276F107), where the NRC staff presented an analysis of the Dodd-Frank Act and its impact on the NRC regulations. The NRC staff also discussed the alternatives for implementing the requirements of the Dodd-Frank Act, the NRC staff's recommendation for a proposed rulemaking, and the rulemaking timeline for the proposed rule. The proposed rulemaking would have removed the provisions in Part 30 appendices A, C, and E providing the option to demonstrate the sufficiency of a guarantee based in part on a credit rating; thus, only the method based in part on financial ratios would have remained. Industry participants shared a view that the staff's initial rulemaking approach would have a substantial negative impact on the availability of parent company guarantees and self-guarantees (Public Meeting Summary, ADAMS Accession No. ML19322A692). Participants recommended that the NRC examine approaches taken by other Federal agencies for implementing the Dodd-Frank Act requirements, which could help identify alternative approaches for assessing a licensee's credit-worthiness. In evaluating potential approaches, the NRC determined that it would be beneficial to solicit early stakeholder views on the approaches being considered before developing the proposed rule.

III. Regulatory Objectives

Under current regulations, applicants and licensees must demonstrate reasonable assurance that funds will be available when needed for decommissioning in order to obtain and maintain a reactor license and certain materials licenses.[5] Such a demonstration may be made by prepayment of funds, payment of funds into an external sinking fund, use of a surety method, insurance, or other guarantee method including a letter of credit, a parent company guarantee, or a self-guarantee.[6] The only financial assurance mechanisms in NRC regulations that rely, in part, on credit ratings are parent company guarantees and self-guarantees. The NRC is considering amendments to current regulations that would remove reliance on and reference to credit rating criteria for these mechanisms.

IV. Specific Considerations

The NRC is seeking stakeholders' input on the following specific areas related to its regulations covering parent company guarantees and self-guarantees partially based on bond ratings issued by credit rating agencies. The NRC asks that commenters provide the bases for their comments (*i.e.,* the underlying rationale for the position stated in the comment) to enable the agency to have a complete understanding of the comments.

Absent the use of credit ratings, alternate NRC financial test criteria located at 10 CFR part 30, appendices A, D, and E rely in part on working capital liability-based test criteria, which certain licensees, including potentially credit-worthy power reactor licensees, may have difficulty meeting. The NRC is considering additional alternative approaches for determining the ability of a company or its parent to guarantee decommissioning funds based on an evaluation of a licensee's creditworthiness. The NRC is seeking input from the public on this matter to inform the development of a proposed rule. The NRC is particularly interested in comments and supporting rationale on the following:

(Question 1) Are there licensees that meet the current credit rating-based financial test for a guarantee that would not be able to meet the alternate working capital and liability-based financial tests currently presented in 10 CFR part 30 appendices? Would such licensees be able to meet the decommissioning funding assurance requirements using one or more other funding assurance methods allowed for by regulation (*i.e.,* prepayment, surety bond, insurance, external sinking fund)?

(Question 2) Modified or new financial metrics for assessing creditworthiness: Please provide your views on financial statement metrics or other quantifiable financial characteristics that could be reported by licensees to assess a licensee's creditworthiness and hence, its ability to use a parent company guarantee or self-guarantee mechanism for providing reasonable assurance that decommissioning funding will be available (see § 50.75, ''Reporting and recordkeeping for decommissioning planning''). Suggested metrics should differ from the current working capital and liability-based metrics currently presented in 10 CFR part 30 appendices cited in the Background to this notice and include pass or fail criteria limits.

(Question 3) Independent agency determination: Please provide your views on the NRC performing an independent, risk-informed, performance-based determination of a licensee's credit-worthiness. The NRC would seek to determine the licensee's risk of default based on its review of financial data while providing some degree of flexibility on the part of licensees as to the type of financial data submitted. This could include evaluation of financial data available from the licensee, open-sources, and from third parties, including credit ratings.

(Question 4) Should the NRC consider other alternative financial test criteria not presented above to assess an applicant's or licensee's use of a guarantee to provide reasonable

[3] Public Law 111–203, Sec. 939A(a)(1)–(2).

[4] Public Law 111–203, Sec. 939A(b).

[5] Section 182.a. of the Atomic Energy Act of 1954, as amended, provides, ''Each application for a license . . . shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant . . . as the Commission may deem appropriate for the license.''

[6] 10 CFR 30.35(f), 40.36(e), 50.75(e), 70.25(f), and 72.30(e).

assurance of funds for decommissioning? If yes, please provide details of the alternative criteria and the financial data needed for its use.

Commenters are encouraged to provide specific suggestions and support for them. Comments received in response to this request will be considered in the development of any subsequent proposed rule. The NRC will provide another opportunity for public comment on any subsequent proposed rule.

V. Public Meeting

During the comment period, the NRC will conduct a public meeting to discuss the rulemaking and answer questions. The NRC will publish a notice of the location, time, and agenda of the meeting on the NRC's public meeting website at least 10 calendar days before the meeting. Stakeholders should monitor the NRC's public meeting website for information about the public meeting at: *https://www.nrc.gov/pmns/mtg.* In addition, the meeting information will be posted on *https://www.regulations.gov/* under Docket ID NRC–2017–0021.

VI. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, ''Plain Language in Government Writing,'' published June 10, 1998 (63 FR 31885). The NRC requests comment on this document with respect to the clarity and effectiveness of the language used.

VII. Rulemaking Process

The NRC does not intend to provide a detailed response to individual comments submitted on this advance notice of proposed rulemaking; however, the NRC will evaluate all public input in the development of a proposed rule on financial assurance mechanisms approved by NRC for the decommissioning of nuclear power plants and other nuclear facilities. If NRC determines a need for supporting guidance, NRC will also issue the draft guidance for public comment.

Dated: December 14, 2020.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2020–27776 Filed 12–18–20; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[EERE–2019–BT–STD–0035]

RIN 1904–AE66

Energy Conservation Program: Energy Conservation Standards for Consumer Products; Early Assessment Review; Packaged Terminal Air Conditioners and Packaged Terminal Heat Pumps

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Request for information; Early Assessment Review.

SUMMARY: The U.S. Department of Energy (''DOE'') is initiating an early assessment review to determine whether any new or amended standards would satisfy the relevant requirements of EPCA for a new or amended energy conservation standard for Packaged Terminal Air Conditioners (''PTACs'') and Packaged Terminal Heat Pumps (''PTHPs). Specifically, through this request for information (''RFI''), DOE seeks data and information that could enable the agency to determine whether DOE should propose a ''no new standard'' determination because a more stringent standard: Would not result in a significant savings of energy; is not technologically feasible; is not economically justified; or any combination of foregoing. DOE welcomes written comments from the public on any subject within the scope of this document (including those topics not specifically raised in this RFI), as well as the submission of data and other relevant concerning this early assessment review.

DATES: Written comments and information will be accepted on or before March 8, 2021.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2019–BT–STD–0035, by any of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

2. *Email: PTACHP2019STD0035@ee.doe.gov.* Include the docket number EERE–2019–BT–STD–0035 in the subject line of the message.

3. *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

4. *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on this process, see section III of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *http://www.regulations.gov/#!docketDetail;D=EERE-2019-BT-STD-0035.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section III for information on how to submit comments through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Bryan Berringer, 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. Telephone: (202) 586–0371. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Amelia Whiting, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–2588. Email: *Amelia.Whiting@Hq.Doe.Gov.*

For further information on how to submit a comment or review other public comments and the docket contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

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III. Submission of Comments

I. Introduction

DOE established an early assessment review process to conduct a more focused analysis of a specific set of facts or circumstances that would allow DOE to determine, based on one or more statutory criteria, a new or amended energy conservation standard is not warranted. The purpose of this review is to limit the resources, from both DOE and stakeholders, committed to rulemakings that will not satisfy the requirements of EPCA that a new or amended energy conservation standard save a significant amount of energy, and be economically justified and technologically feasible. *See* 85 FR 8626, 8653, 8654 (Feb. 14, 2020).

As part of the early assessment, DOE publishes an RFI in the **Federal Register**, announcing that DOE is considering initiating a rulemaking proceeding and soliciting comments, data, and information on whether a new or amended energy conservation standard would save a significant amount of energy and be technologically feasible and economically justified. Based on the information received in response to the RFI and DOE's own analysis, DOE will determine whether to proceed with a rulemaking for a new or amended energy conservation standard.

If DOE makes an initial determination based upon available evidence that a new or amended energy conservation standard would not meet the applicable statutory criteria, DOE would engage in notice and comment rulemaking before issuing a final determination that new or amended energy conservation standards are not warranted. Conversely, if DOE makes an initial determination that a new or amended energy conservation standard would satisfy the applicable statutory criteria or DOE's analysis is inconclusive, DOE would undertake the preliminary stages of a rulemaking to issue a new or amended energy conservation standard. Beginning such a rulemaking, however, would not preclude DOE from later making a determination that a new or amended energy conservation standard cannot satisfy the requirements in EPCA, based upon the full suite of DOE's analyses. *See* 85 FR 8626, 8654 (Feb. 14, 2020).

A. Authority

The Energy Policy and Conservation Act (''EPCA''), as amended,[1] among other things authorizes 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 C[2] of EPCA, added by Public Law 95–619, Title IV, Section 441(a) (42 U.S.C. 6311–6317, as codified), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve energy efficiency. This equipment includes PTACs and PTHPs, the subject of this RFI. (42 U.S.C. 6311(1)(I)) EPCA prescribed initial standards for this equipment. (42 U.S.C. 6313(a)(3))

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. 6311), energy conservation standards (42 U.S.C. 6313), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), and the authority to require information and reports from manufacturers (42 U.S.C. 6316).

Federal energy efficiency requirements for covered equipment established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a); 42 U.S.C. 6316(b)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (42 U.S.C. 6316(b)(2)(D))

In EPCA, Congress initially set mandatory energy conservation standards for certain types of commercial heating, air-conditioning, and water-heating equipment. (42 U.S.C. 6313(a)) Specifically, the statute sets standards for small, large, and very large commercial package air conditioning and heating equipment, PTACs and PTHPs, warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks. *Id.* In doing so, EPCA established Federal energy conservation standards at levels that generally corresponded to the levels in American Society of Heating, Refrigerating and Air-Conditioning Engineers (''ASHRAE'') Standard 90.1, ''Energy Standard for Buildings Except Low-Rise Residential Buildings'', as in effect on October 24, 1992 (*i.e.,* ''ASHRAE Standard 90.1–1989''), for each type of covered equipment listed in 42 U.S.C. 6313(a).

In acknowledgement of technological changes that yield energy efficiency benefits, Congress directed DOE through EPCA to consider amending the existing Federal energy conservation standard for each type of equipment listed, each time ASHRAE amends Standard 90.1 with respect to such equipment. (42 U.S.C. 6313(a)(6)(A)) When triggered in this manner, DOE must undertake and publish an analysis of the energy savings potential of amended energy efficiency standards, and amend the Federal standards to establish a uniform national standard at the level specified in the amended ASHRAE Standard 90.1, unless DOE determines that there is clear and convincing evidence to support a determination that a more-stringent standard level as a national standard would produce significant additional energy savings and be technologically feasible and economically justified.[3] (42 U.S.C.

[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 C was redesignated Part A–1.

[3] In determining whether a more-stringent standard is economically justified, EPCA directs DOE to determine, after receiving views and comments from the public, whether the benefits of the proposed standard exceed the burdens of the proposed standard by, to the maximum extent practicable, considering the following:

(1) The economic impact of the standard on the manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the product compared to any increases in the initial cost or maintenance expense;

(3) The total projected amount of energy savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the products likely to result from the standard;

Continued

6313(a)(6)(A)(ii)) If DOE decides to adopt as a national standard the minimum efficiency levels specified in the amended ASHRAE Standard 90.1, DOE must establish such standard not later than 18 months after publication of the amended industry standard. (42 U.S.C. 6313(a)(6)(A)(ii)(I)) However, if DOE determines, supported by clear and convincing evidence, that a more-stringent uniform national standard would result in significant additional conservation of energy and is technologically feasible and economically justified, then DOE must establish such more-stringent uniform national standard not later than 30 months after publication of the amended ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(A)(ii)(II) and (B))

In those situations where ASHRAE has not acted to amend the levels in Standard 90.1 for the equipment types enumerated in the statute, EPCA provides for a 6-year-lookback to consider the potential for amending the uniform national standards. (42 U.S.C. 6313(a)(6)(C)) Specifically, pursuant to EPCA, DOE is required to conduct an evaluation of each class of covered equipment in ASHRAE Standard 90.1 ''every 6 years'' to determine whether the applicable energy conservation standards need to be amended. (42 U.S.C. 6313(a)(6)(C)(i)) DOE must publish either a NOPR to propose amended standards or a notice of determination that existing standards do not need to be amended. (42 U.S.C. 6313(a)(6)(C)) In making a determination, DOE must evaluate whether amended standards would result in significant additional conservation of energy and are technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(C)(i)(I); 42 U.S.C. 6313(a)(6)(A)) In proposing new standards under the 6-year review, DOE must undertake the same considerations as if it were adopting a standard that is more stringent than an amendment to ASHRAE Standard 90.1. (42 U.S.C. 6313(a)(6)(C)(i)(II)) This is a separate statutory review obligation, as differentiated from the obligation triggered by an ASHRAE Standard 90.1 amendment. While the statute continues to defer to ASHRAE's lead on covered equipment subject to Standard 90.1, it does allow for a comprehensive review of all such equipment and the potential for adopting more-stringent standards, where supported by the requisite clear and convincing evidence. That is, DOE interprets ASHRAE's not amending Standard 90.1 with respect to a product or equipment type as ASHRAE's determination that the standard applicable to that product or equipment type is already at an appropriate level of stringency, and DOE will not amend that standard unless there is clear and convincing evidence that a more stringent level is justified.

As a preliminary step in the process of reviewing the standards for PTACs and PTHPs, DOE is requesting data and information pursuant to the 6-year-lookback review. (42 U.S.C. 6313(a)(6)(C)) Such information will help DOE inform its decisions, consistent with its obligations under EPCA.

B. Rulemaking History

On July 21, 2015, DOE published amendments to the PTAC and PTHP standards in response to the 2013 update to ASHRAE Standard 90.1 (*i.e.,* ''ASHRAE Standard 90.1–2013''). 80 FR 43162 (''July 2015 Final Rule''). DOE determined that ASHRAE Standard 90.1–2013 amended the standards for three of the 12 PTAC and PTHP equipment classes: PTAC Standard Size <7,000 Btu/h, PTAC Standard Size ≥7,000 Btu/h and ≤15,000 Btu/h, and PTAC Standard Size >15,000 Btu/h. 80 FR 43162, 43163. DOE adopted the standard levels for the three equipment classes as updated by ASHRAE Standard 90.1. *Id.* Compliance with the amended standards was required as of January 1, 2017. *Id.* DOE did not amend the energy conservation standards for the remaining equipment classes which were already equivalent to the standards in ASHRAE Standard 90.1–2013. *Id.* DOE was unable to show with clear and convincing evidence that energy conservation standards at levels more stringent than the minimum levels specified in the ASHRAE Standard 90.1–2013 for any of the 12 equipment classes would be economically justified. *Id.* The current energy conservation standards are located in Title 10 Code of Federal Regulations (''CFR'') section 431.97, Table 8.

DOE's current test procedures for PTACs and PTHPs were established in a final rule on June 30, 2015. 80 FR 37136. The current test procedure for cooling mode testing incorporates by reference Air-Conditioning, Heating, and Refrigeration Institute (''AHRI'') Standard 310/380–2014, ''Standard for Packaged Terminal Air-Conditioners and Heat Pumps'' (''AHRI 310/380–2014''), with the following sections applicable to the DOE test procedure: Sections 3, 4.1, 4.2, 4.3, and 4.4. In addition to the specified provisions of AHRI 310/380–2014, the PTACs and PTHPs must be tested according to either American National Standards Institute (''ANSI'')/ASHRAE 16–1983 (RA 2014), ''Method of Testing for Rating Room Air Conditioners and Packaged Terminal Air Conditioners'' (''ANSI/ASHRAE 16–1983 (RA 2014)''), or ANSI/ASHRAE 37–2009, ''Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment'' (''ANSI/ASHRAE 37–2009''). The current test procedure for heating mode testing incorporates by reference AHRI Standard 310/380–2014, with the following sections applicable to the DOE test procedure: Sections 3, 4.1, 4.2 (except section 4.2.1.2(b)), 4.3, and 4.4; and ANSI/ASHRAE 58–1986 (RA 2014), ''Method of Testing for Rating Room Air-Conditioner and Packaged Terminal Air-Conditioner Heating Capacity'' (''ANSI/ASHRAE 58–1986 (RA 2014)''). (10 CFR 431.96(g)) The currently applicable DOE test procedures for PTACs and PTHPs appear at 10 CFR 431.96 in paragraph (g).

The current test procedure also requires that manufacturers adhere to additional provisions in paragraphs (c) and (e) of 10 CFR 431.96. (10 CFR 431.96(b)(1)) Paragraph (c) of 10 CFR 431.96 includes provisions for an optional compressor break-in period, while paragraph (e) of 10 CFR 431.96 clarifies what information sources can be used for unit set-up and provides specific set-up instructions for refrigerant parameters (*e.g.,* superheat) and air flow rate.

ASHRAE Standard 90.1 has been updated since the 2013 version, most recently with the release of the 2019 version (*i.e.,* ANSI/ASHRAE/IES Standard 90.1–2019, ''Energy Efficiency Standard for Buildings Except Low-Rise Residential Buildings'') on October 24, 2019. However, the standard levels for PTACs and PTHPs remain unchanged from the 2013 version.

II. Request for Information and Comments

DOE is publishing this RFI to collect data and information during the early assessment review to inform its decision, consistent with its obligations under EPCA, as to whether the Department should proceed with an energy conservation standards rulemaking. Accordingly, in the following sections, DOE has identified specific issues on which it seeks input to aid in its analysis of whether an amended standard for PTAC or PTHP

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy conservation; and

(7) Other factors the Secretary considers relevant. (42 U.S.C. 6313(a)(6)(B)(ii))

would not save a significant amount of energy or be technologically feasible or economically justified. In particular, DOE is interested in any information indicating that there has been sufficient technological or market changes since DOE last conducted an energy conservation standards rulemaking analysis for PTAC or PTHPs to suggest a more-stringent standard could satisfy these criteria. DOE also welcomes comment on other issues relevant to its early assessment that may not specifically identified in this document.

Pursuant to DOE's recently amended ''Process Rule'' (85 FR 8626; Feb. 14, 2020), DOE stated that as a first step in a proceeding to consider establishing or amending an energy conservation standard, such as the existing standards for PTACs and PTHP at issue in this document, DOE would publish a notice in the **Federal Register** announcing that DOE is considering initiation of a proceeding, and as part of that notice, DOE would request submission of related comments, including data and information showing whether any new or amended standard would satisfy the relevant requirements in EPCA for a new or amended energy conservation standard. Based on the information received in response to the notice and its own analysis, DOE would determine whether to proceed with a rulemaking for a new or amended standard, or issue a proposed determination that the standards do not need to be amended.

As discussed, DOE is required to conduct an evaluation of each class of covered equipment in ASHRAE Standard 90.1 every 6 years. (42 U.S.C. 6313(a)(6)(C)(i)) In making a determination of whether standards for such equipment need to be amended, DOE must follow specific statutory criteria. DOE must evaluate whether amended Federal standards would result in significant additional conservation of energy and are technologically feasible and economically justified. (42 U.S.C. 6313(a)(6)(C)(i)(I) (referencing 42 U.S.C. 6313(a)(6)(A)(ii)(II))) To determine whether a standard is economically justified, EPCA requires that DOE determine whether the benefits of the standard exceed its burdens by considering, to the greatest extent practicable, the following seven factors:

1. The economic impact of the standard on manufacturers and consumers of products subject to the standard;

2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products which are likely to result from the standard;

3. The total projected amount of energy savings likely to result directly from the standard;

4. Any lessening of the utility or the performance of the covered products likely to result from the standard;

5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

6. The need for national energy conservation; and

7. Other factors the Secretary of Energy considers relevant. (42 U.S.C. 6313(a)(6)(C)(i)(II), referencing 42 U.S.C. 6313(a)(6)(B)(ii))

DOE fulfills these and other applicable requirements by conducting a series of analyses throughout the rulemaking process. Table I.1 shows the individual analyses that are performed to satisfy each of the requirements within EPCA.

TABLE I.1 EPCA—REQUIREMENTS AND CORRESPONDING DOE ANALYSIS

EPCA requirement	Corresponding DOE analysis
Significant Energy Savings	• Shipments Analysis. • National Impact Analysis. • Energy and Water Use Determination.
Technological Feasibility	• Market and Technology Assessment. • Screening Analysis. • Engineering Analysis.
Economic Justification:	
1. Economic impact on manufacturers and consumers	• Manufacturer Impact Analysis. • Life-Cycle Cost and Payback Period Analysis. • Life-Cycle Cost Subgroup Analysis. • Shipments Analysis.
2. Lifetime operating cost savings compared to increased cost for the product.	• Markups for Product Price Determination. • Energy and Water Use Determination. • Life-Cycle Cost and Payback Period Analysis.
3. Total projected energy savings	• Shipments Analysis. • National Impact Analysis.
4. Impact on utility or performance	• Screening Analysis. • Engineering Analysis.
5. Impact of any lessening of competition	• Manufacturer Impact Analysis.
6. Need for national energy and water conservation	• Shipments Analysis. • National Impact Analysis.
7. Other factors the Secretary considers relevant	• Employment Impact Analysis. • Utility Impact Analysis. • Emissions Analysis. • Monetization of Emission Reductions Benefits. • Regulatory Impact Analysis.

As noted in Section I.A., DOE is publishing this early assessment review RFI to collect data and information that could enable the agency to determine whether DOE should propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing.

A. Equipment Covered by This Process

This RFI covers equipment that meets the definitions of PTACs and PTHPs, as codified at 10 CFR 431.92. The definitions for PTACs and PTHPs were established under EPCA and codified in

a test procedure final rule issued October 21, 2004. (42 U.S.C. 6311(10)); 69 FR 61962, 61970.

DOE defines ''packaged terminal air conditioners'' as a wall sleeve and a separate un-encased combination of heating and cooling assemblies specified by the builder and intended for mounting through the wall, and that is industrial equipment. It includes a prime source of refrigeration, separable outdoor louvers, forced ventilation, and heating availability by builder's choice of hot water, steam, or electricity. (10 CFR 431.92)

DOE defines ''packaged terminal heat pumps'' as a packaged terminal air conditioner that utilizes reverse cycle refrigeration as its prime heat source, that has a supplementary heat source available, with the choice of hot water, steam, or electric resistant heat, and that is industrial equipment. *Id.*

On October 7, 2008, DOE published a final rule amending the energy conservation standards for PTACs and PTHPs in which DOE divided equipment classes based on whether a PTAC or PTHP is a standard size or non-standard size. 73 FR 58772 (''October 2008 Final Rule'').

DOE defines ''standard size'' as a PTAC or PTHP with wall sleeve dimensions having an external wall opening of greater than or equal to 16 inches high or greater than or equal to 42 inches wide, and a cross-sectional area greater than or equal to 670 square inches. (10 CFR 431.92)

DOE defines ''non-standard size'' as a PTAC or PTHP with existing wall sleeve dimensions having an external wall opening of less than 16 inches high or less than 42 inches wide, and a cross-sectional area less than 670 square inches. *Id.*

Issue 1: DOE requests comment on whether the definitions for PTACs and PTHPs require any revisions—and if so, DOE requests information on why revisions are needed and how those definitions should be revised. DOE also requests feedback on whether the sub-category definitions currently in place for standard size and non-standard size are appropriate or whether further modifications are needed. If these sub-category definitions need modifying, DOE seeks specific input on how to define these terms and information to support any such changes.

Issue 2: DOE requests comment on whether additional equipment definitions are necessary to close any potential gaps in coverage between equipment types. DOE also seeks input on whether such equipment currently exist in the market or whether they are being planned for introduction. DOE also requests comment on opportunities to combine equipment classes that could reduce regulatory burden.

B. Market and Technology Assessment

The market and technology assessment that DOE routinely conducts when analyzing the impacts of a potential new or amended energy conservation standard provides information about the PTACs and PTHPs industry that will be used to determine whether DOE should propose a ''no new standard'' determination. DOE uses qualitative and quantitative information to characterize the structure of the industry and market. DOE identifies manufacturers, estimates market shares and trends, addresses regulatory and non-regulatory initiatives intended to improve energy efficiency or reduce energy consumption, and explores the potential for efficiency improvements in the design and manufacturing of PTACs and PTHPs. DOE also reviews product literature, industry publications, and company websites. Additionally, DOE considers conducting interviews with manufacturers to improve its assessment of the market and available technologies for PTACs and PTHPs.

1. Energy Efficiency Descriptor

For PTACs and PTHPs, DOE currently prescribes energy efficiency ratio (''EER'') as the cooling mode efficiency metric and coefficient of performance (''COP'') as the heating mode efficiency metric. (10 CFR 431.96) These energy efficiency descriptors are the same as those included in ASHRAE 90.1–2016 for PTACs and PTHPs. EER is the ratio of the produced cooling effect of the PTAC or PTHP to its net work input, expressed in Btu/watt-hour, and measured at standard rating conditions. COP is the ratio of the produced heating effect of the PTHP to its net work input, when both are expressed in identical units of measurement, and measured at standard rating conditions. DOE's test procedure for PTACs and PTHPs does not include a seasonal metric that includes part-load performance.

On December 8, 2020, DOE published an RFI (the ''December 2020 TP RFI'') to collect information and data to consider amendments to DOE's test procedure for PTACs and PTHPs. 85 FR 78967. As part of the December 2020 TP RFI, DOE requested comment on whether it should consider adopting for PTACs and PTHPs a cooling-mode metric that integrates part-load performance to better represent full-season efficiency. 85 FR 78967. In the December 2020 TP RFI, DOE discusses in detail three possible part-load efficiency metrics that are used for rating other categories of commercial package air conditioning and heating equipment:

- Integrated energy efficiency ratio (''IEER''), as described in section 6.2 of AHRI Standard 340/360 (I/P)-2019, ''2019 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment'',
- Seasonal energy efficiency ratio (''SEER''), as described in Appendix M to Subpart B of 10 CFR part 430, and
- Weighted-average combined energy efficiency ratio (''CEER''), as described in a Decision and Order granting a petition for waiver for certain room air conditioners. See 84 FR 20111, 20113 (May 8, 2019).

If DOE amends the PTAC and PTHP test procedure to incorporate a part-load metric, it would conduct any analysis for future standards rulemakings, if any, based on the amended test procedure.

2. Equipment Classes

For PTACs and PTHPs, the current energy conservation standards specified in 10 CFR 431.97(c) are based on 12 equipment classes determined according to the following: Whether the equipment is an air conditioner or a heat pump, whether the equipment is standard size or non-standard size, and cooling capacity in British thermal unit per hour (''Btu/h''). Table II.1 lists the current 12 equipment classes for PTACs and PTHPs outlined in Table 7 to 10 CFR 431.97.

TABLE II.1—CURRENT PTAC AND PTHP EQUIPMENT CLASSES

Equipment Class			
1	PTAC	Standard Size	<7,000 Btu/h.
2	PTAC	Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h.
3	PTAC	Standard Size	>15,000 Btu/h.
4	PTAC	Non-Standard Size	<7,000 Btu/h.
5	PTAC	Non-Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h.

TABLE II.1—CURRENT PTAC AND PTHP EQUIPMENT CLASSES—Continued

6	PTAC	Non-Standard Size	>15,000 Btu/h.
7	PTHP	Standard Size	<7,000 Btu/h.
8	PTHP	Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h.
9*	PTHP	Standard Size	>15,000 Btu/h.
10	PTHP	Non-Standard Size	<7,000 Btu/h.
11	PTHP	Non-Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h.
12	PTHP	Non-Standard Size	>15,000 Btu/h.

* Based on DOE's review of equipment currently available on the market, DOE did not identify any Standard Size PTHP models with a cooling capacity greater than 15,000 Btu/h.

Issue 3: DOE requests feedback on the current PTAC and PTHP equipment classes and whether changes to these individual equipment classes and their descriptions should be made or whether certain classes should be merged or separated. Specifically, DOE requests comment on opportunities to combine equipment classes that could reduce regulatory burden. DOE further requests feedback on whether combining certain classes could impact equipment utility by eliminating any performance-related features or impact the stringency of the current energy conservation standard for these equipment. DOE also requests comment on separating any of the existing equipment classes and whether it would impact equipment utility by eliminating any performance-related features or reduce any compliance burdens.

a. ''Make-Up Air'' PTACs and PTHPs

As part of the December 2020 TP RFI, DOE described ''make-up air'' PTACs and their additional function of dehumidification. 85 FR 78967. As discussed in section II.B.1, for PTACs and PTHPs, DOE currently specifies EER as the test metric for cooling efficiency. For PTHPs, DOE specifies COP as the test metric for heating efficiency. Neither the current test procedure, 10 CFR 431.96, nor the industry test procedure, AHRI Standard 310/380–2014, account for the energy associated with the conditioning of make-up air introduced by the unit.

If DOE amends the PTAC and PTHP test procedure to incorporate measurement of dehumidification energy for ''make-up air'' PTACs and PTHPs, a separate equipment class for this type of units may be warranted. DOE would conduct any analysis for future standards rulemakings, if any, based on the amended test procedure.

Issue 4: DOE requests comment on how a ''make-up air PTAC'' and a ''make-up air PTHP'' could be defined, and what characteristics could be used to distinguish make-up air PTACs and PTHPs from other PTACs and PTHPs. DOE requests information on the consumer utility provided by a PTAC or PTHP that provides make-up air. DOE also requests information and data on the associated energy use associated with the function of providing ''make-up air.'' DOE also requests comment on if the same capacity ranges used for non-''make-up air'' PTACs and PTHPs would be appropriate to use for equipment classes for possible ''make-up air'' PTAC and PTHP equipment classes (*i.e.,* <7,000 Btu/h, ≥7,000 Btu/h and ≤15,000 Btu/h, and >15,000 Btu/h). Finally, DOE requests comment on if there are both Standard Size and Non-Standard Size ''make-up air'' PTACs and PTHPs.

Issue 5: DOE seeks information regarding any other new product classes it should consider for inclusion in its analysis. Specifically, DOE requests information on the performance-related features that provide unique consumer utility and data detailing the corresponding impacts on energy use that would justify separate product classes (*i.e.,* explanation for why the presence of these performance-related features would increase energy consumption).

3. Review of Current Market

To inform its evaluation of PTACs and PTHPs, DOE initially reviewed data in the DOE Compliance Certification Database [4] (''CCMS database'') to characterize the distribution of efficiencies for PTAC and PTHP equipment currently available on the market, analyzing cooling and heating efficiency separately. DOE is making available for comment a document that provides the distributions of EER and COP for PTACs and PTHPs in the 11 equipment classes listed in Table II.1 for which DOE has identified models on the market [5] (see Docket No. EERE–2019–BT–STD–0035–0001).

Based on the data shown in the supplemental file DOE has made available for comment (see Docket No. EERE–2019–BT–STD–0035–0001), DOE requests feedback on whether using the current established energy conservation standards for PTACs and PTHPs are appropriate baseline efficiency levels for DOE to apply to each equipment class in evaluating whether to amend the current energy conservation standards for this equipment.

4. Technology Assessment

In analyzing information to determine whether DOE should propose a ''no new standards determination'' for existing PTAC and PTHPs standards, DOE uses information about existing and past technology options and prototype designs to help identify technologies that manufacturers could use to meet and/or exceed a given set of energy conservation standards under consideration. In consultation with interested parties, DOE intends to develop a list of technologies to consider in its analysis. That analysis will likely include a number of the technology options DOE previously analyzed during its most recent rulemaking for PTACs and PTHPs, technology options DOE identified but did not analyze, and newer technology options that DOE may also consider in a future PTAC and PTHP energy conservation standards rulemaking. Based on the technologies identified in the analysis for the July 2015 Final Rule and a preliminary survey of the current market, DOE has separately provided potential technology options in two categories: Technologies that may increase efficiency at both full-load and part-load conditions, listed in Table II.2; and technologies that may only increase efficiency at part-load conditions, listed in Table II.3.

[4] DOE's Compliance Certification Database can be found at *https://www.regulations.doe.gov/certification-data/products.html* (accessed September 26th, 2019).

[5] As noted in Table II.1, DOE did not identify any Standard Size PTHP models with a cooling capacity greater than 15,000 Btu/h.

TABLE II.2—TECHNOLOGY OPTIONS FOR PTACS AND PTHPS THAT MAY INCREASE EFFICIENCY AT BOTH FULL-LOAD AND PART-LOAD CONDITIONS

Technology options	Source
Heat Exchanger Improvements:	
Increased Heat Exchanger Area.	July 2015 Final Rule.
Indoor Blower and Outdoor Fan Improvements:	
Higher Efficiency Fan Motors.	July 2015 Final Rule.
Improved Air Flow and Fan Design.	July 2015 Final Rule.
More efficient fan geometries.	New Technology Option.
Compressor Improvements:	
Higher Efficiency Compressors.	July 2015 Final Rule.
Scroll Compressors.	Screened out of July 2015 Final Rule.
Other Improvements:	
Heat Pipes	Screened out of July 2015 Final Rule.
Alternative Refrigerants.	Screened out of July 2015 Final Rule.

TABLE II.3—TECHNOLOGY OPTIONS FOR PTACS AND PTHPS THAT MAY INCREASE EFFICIENCY AT ONLY PART-LOAD CONDITIONS

Technology options	Source
Indoor Blower and Outdoor Fan Improvements:	
Variable speed condenser fan/motor.	New Technology Option.
Variable speed indoor blower/motor.	New Technology Option.
Compressor Improvements:	
Variable Speed Compressors.	July 2015 Final Rule.*
Other Improvements:	
Electronic Expansion Valves (“EEV”).	New Technology Option.
Thermal Expansion Valves (“TEV”).	July 2015 Final Rule.*

* Identified technology not analyzed because no full-load benefit.

Issue 6: DOE seeks information on the technologies listed in Table II.2 regarding their applicability to the current market and how these technologies may impact the efficiency of PTACs and PTHPs as measured according to the DOE test procedure. DOE also seeks information on how those technologies identified in development of the July 2015 Final Rule may have changed since that time. Specifically, DOE seeks information on the range of efficiencies or performance characteristics that are currently available for each technology option.

Issue 7: DOE seeks comment on whether this new technology would affect a determination as to whether DOE could propose a ‘‘no new standard’’ determination because a more stringent standard: Would not result in a significant savings of energy; is not technologically feasible; is not economically justified; or any combination of the foregoing. Specifically, DOE seeks information on the new technologies listed in Table II.2 and Table II.3 of this RFI regarding their market adoption, costs, and any concerns with incorporating them into equipment (*e.g.,* impacts on consumer utility, potential safety concerns, manufacturing/production/implementation issues, etc.), particularly as to changes that may have occurred since the July 2015 Final Rule.

Issue 8: DOE seeks comment on other technology options that it should consider for inclusion in its analysis and if these technologies may impact equipment features or consumer utility.

As discussed in section II.B.1 of this RFI, DOE may consider adopting for PTACs and PTHPs a cooling-mode metric that integrates part-load performance.

TEVs and EEVs regulate the flow of liquid refrigerant entering the evaporator and can adapt to changes in operating conditions, such as variations in temperature, humidity, and compressor staging. As a result, TEVs and EEVs can control for optimum system operating parameters over a wide range of operating conditions and are a consideration in evaluating improved seasonal efficiency. Variable-speed compressors enable modulation of the refrigeration system cooling capacity, allowing the unit to match the cooling or heating load. This modulation can improve efficiency by reducing off-cycle losses and can improve heat exchanger effectiveness at part-load conditions by operating at a lower mass flow rate. Variable speed condenser fan motors and variable speed indoor blower motors would likewise not have a measured impact on energy consumption based on the current test procedure. These technologies allow for varying fan speed to reduce airflow rate at part-load operation, which is not accounted for under the current metric.

Issue 9: In the event DOE were to amend the metric for the PTAC and PTHP standards to account for part-load performance, DOE requests data on the market penetration and efficiency improvement associated with the technology options listed in Table II.3. In addition, DOE requests data on any other technology options not listed above that would improve the efficiency of equipment under part-load conditions.

C. Screening Analysis

The purpose of the screening analysis is to evaluate the technologies that improve equipment efficiency to determine which technologies will be eliminated from further consideration and which will be passed to the engineering analysis for further consideration. In this early assessment RFI, DOE seeks data and information with respect to technologies previously screened out or retained that could enable the agency to determine whether to propose a ‘‘no new standard’’ determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of the foregoing.

DOE determines whether to eliminate certain technology options from further consideration based on the following criteria:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial product or in working prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercial product and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on equipment utility or equipment availability.* If a technology is determined to have significant adverse impact on the utility of the equipment to significant subgroups of consumers, or result in the unavailability of any covered equipment type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as equipment generally available in the United States at the time, it will not be considered further.

(4) *Adverse impacts on health or safety.* If it is determined that a

technology will have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-Pathway Proprietary Technologies.* If a design option utilizes proprietary technology that represents a unique pathway to achieving a given efficiency level, that technology will not be considered further, due to the potential for monopolistic concerns. (10 CFR part 430, subpart C, appendix A, 6(c)(3) and 7(b))

Technology options identified in the technology assessment are evaluated against these criteria using DOE analyses and inputs from interested parties (*e.g.,* manufacturers, trade organizations, and energy efficiency advocates). Technologies that pass through the screening analysis are referred to as ''design options'' in the engineering analysis. Technology options that fail to meet one or more of the five criteria are eliminated from consideration.

Table II.4 summarizes the technology options that DOE screened out in the July 2015 Final Rule, and the applicable screening criteria.

TABLE II.4—PREVIOUSLY SCREENED OUT TECHNOLOGY OPTIONS FROM THE JULY 2015 FINAL RULE

Screened technology option	Technological feasibility	Screening Criteria (X = Basis for Screening Out)			
		Practicability to manufacture, install, and service	Adverse impact on equipment utility	Adverse impacts on health and safety	Unique-pathway proprietary technologies
Scroll Compressors	X				
Heat Pipes	X				
Alternative Refrigerants	X				

Issue 10: With respect to the screened out technology options listed in Table II.4 of this RFI, DOE seeks information on whether these options would, based on current and projected assessments regarding each of them, remain screened out under the four screening criteria described in this section. With respect to each of these technology options, what steps, if any, could be (or have already been) taken to facilitate the introduction of each option as a means to improve the energy performance of PTACs and PTHPs and the potential to impact consumer utility of the PTACs and PTHPs.

In development of the July 2015 Final Rule, DOE identified two technology options that were not included in the engineering analysis because efficiency benefits of the technologies were negligible:

- Re-Circuiting Heat Exchanger Coils and
- Rifled Interior Tube Walls.

80 FR 43162, 43172. In addition, DOE did not consider the following technology for the engineering analysis because there was not data available to evaluate the energy efficiency characteristics of the technology:

- Microchannel Heat Exchanger.

Id. Finally, DOE did not consider the following technologies for the engineering analysis because the test procedure and EER and COP metrics do not measure the energy impact of the technology:

- Complex Control Boards,
- Clutched Fan Motors,
- TEVs,
- Variable Speed Compressors,
- Corrosion Protection, and
- Hydrophobic Material Treatment of Heat Exchangers.

Id.

Issue 11: With respect to the additional technologies identified in development of the July 2015 Final Rule but not included in the engineering analysis, DOE seeks comment on its prior exclusion of these technologies and whether there have been changes that would warrant further consideration.

D. Engineering Analysis

The engineering analysis estimates the cost-efficiency relationship of equipment at different levels of increased energy efficiency (''efficiency levels''). This relationship serves as the basis for the cost-benefit calculations for consumers, manufacturers, and the Nation. In determining the cost-efficiency relationship, DOE estimates the increase in manufacturer production costs (''MPCs'') associated with increasing the efficiency of equipment above the baseline, up to the maximum technologically feasible (''max-tech'') efficiency level for each equipment class. In this early assessment review RFI, DOE seeks data and information with respect to these cost-benefit calculations that could enable the agency to determine whether to propose a ''no new standards'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing.

DOE historically has used the following three methodologies to generate incremental manufacturing costs and establish efficiency levels (''ELs'') for analysis: (1) The design-option approach, which provides the incremental costs of adding to a baseline model design options that will improve its efficiency; (2) the efficiency-level approach, which provides the relative costs of achieving increases in energy efficiency levels, without regard to the particular design options used to achieve such increases; and (3) the cost-assessment (or reverse engineering) approach, which provides ''bottom-up'' manufacturing cost assessments for achieving various levels of increased efficiency, based on detailed cost data for parts and material, labor, shipping/packaging, and investment for models that operate at particular efficiency levels.

1. Baseline Efficiency Levels

For each established equipment class, DOE selects a baseline model as a reference point against which any changes resulting from new or amended energy conservation standards can be measured. The baseline model in each equipment class represents the characteristics of common or typical equipment in that class. Typically, a baseline model is one that meets the current minimum energy conservation standards and provides basic consumer utility.

If it determines that a rulemaking is necessary, consistent with this analytical approach, DOE tentatively plans to consider the current minimum energy conservations standards [6] to

[6] The current standards for Standard Size PTACs at all cooling capacities are applicable to equipment manufactured on or after January 1, 2017. The current standards for Standard Size PTHPs at all cooling capacities are applicable to equipment manufactured on or after October 8, 2012. The

Continued

establish the baseline efficiency levels for each equipment class. As discussed in section II.B.1 of this document, the current standards for PTACs and PTHPs are based on the full-load metrics, EER and COP. The current standards for PTACs and PTHPs are found at 10 CFR 431.97 and are presented in Table II.5 of this document.

TABLE II.5—CURRENT PTAC AND PTHP ENERGY CONSERVATION STANDARD LEVELS

Equipment class				Minimum energy conservation standard level
1	PTAC	Standard Size	<7,000 Btu/h	EER = 11.9.
2	PTAC	Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h	EER = 14.0 − (0.3 × Cap [1]).
3	PTAC	Standard Size	>15,000 Btu/h	EER = 9.5.
4	PTAC	Non-Standard Size	<7,000 Btu/h	EER = 9.4.
5	PTAC	Non-Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h	EER = 10.9 − (0.213 × Cap [1]).
6	PTAC	Non-Standard Size	>15,000 Btu/h	EER = 7.7.
7	PTHP	Standard Size	<7,000 Btu/h	EER = 11.9. COP = 3.3.
8	PTHP	Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h	EER = 14.0 − (0.3 × Cap [1]). COP = 3.7 − (0.052 × Cap [1]).
9	PTHP [2]	Standard Size	>15,000 Btu/h	EER = 9.5. COP = 2.9.
10	PTHP	Non-Standard Size	<7,000 Btu/h	EER = 9.3. COP = 2.7.
11	PTHP	Non-Standard Size	≥7,000 Btu/h and ≤15,000 Btu/h	EER = 10.8 − (0.213 × Cap [1]). COP = 2.9 − (0.026 × Cap [1]).
12	PTHP	Non-Standard Size	>15,000 Btu/h	EER = 7.6. COP = 2.5.

[1] Cap means cooling capacity in thousand Btu/h.
[2] Based on DOE's review of equipment currently available on the market, DOE did not identify any Standard Size PTHP models with a cooling capacity greater than 15,000 Btu/h.

2. Maximum Available and Maximum Technologically Feasible Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also considers the max-tech efficiency level, which it defines as the level that represents the theoretical maximum possible efficiency if all available design options are incorporated in a model. In many cases, the max-tech efficiency level is not commercially available because it is not economically feasible.

For the July 2015 Final Rule, DOE determined the max-tech improvements in energy efficiency for PTACs and PTHPs in the engineering analysis using the design parameters that passed the screening analysis, a combination of the efficiency-level approach, and the reverse engineering approach. 80 FR 43162, 43173. In addition, DOE surveyed the rated efficiencies of PTACs listed in the AHRI Directory to determine that the maximum efficiency units extended up to 17.5 percent above the ANSI/ASHRAE Standard 90.1–2013 baseline. *Id.* at 80 FR 43175. In the July 2015 Final Rule DOE maintained the standard levels for non-standard size PTAC and PTHP equipment finding that because of the small and declining number of shipments in each of the non-standard size equipment classes, clear and convincing evidence was lacking to support more stringent standards. *Id.* at 80 FR 43167. DOE only analyzed the six standard size equipment classes for PTACs and PTHPs for the engineering analysis. *Id.* at 80 FR 43174. For additional details regarding the engineering analysis conducted for the July 2015 Final Rule see Chapter 5 of the July 2015 Final Rule Technical Support Document (''TSD'').[7]

Issue 12: DOE seeks comment on whether the technology improvements listed in Table II.2 and Table II.3 of this RFI are applicable to both standard size and non-standard size units and if they have similar impacts on efficiency.

Issue 13: DOE requests comment on whether it is necessary to individually analyze all or some of the available equipment classes.

Table II.6 shows the max-tech efficiency levels considered for the July 2015 Final Rule, which were assumed to be 16.2 percent above the baseline, and the maximum-available based on the current market for each equipment classes. To develop preliminary maximum-available linear equations for both standard size PTAC and standard size PTHP ≥7,000 Btu/h and ≤15,000 Btu/h, DOE created a linear fit between the two models in the CCMS Database that were the highest absolute value above the baseline.[8] This ensures that all models are either at or below this line.

TABLE II.6—MAX-TECH AND MAXIMUM-AVAILABLE EFFICIENCY LEVELS

Equipment class	Max-tech July 2015 Final Rule	Maximum-available current market
Standard Size PTAC <7,000 Btu/h	13.8 EER [a]	13.0 EER.
Standard Size PTAC ≥7,000 Btu/h and ≤15,000 Btu/h	EER = 16.3 − (0.354 × Cap [b])	EER = 15.8 − (0.308 × Cap [b]).[c]
Standard Size PTAC >15,000 Btu/h	11.0 EER	9.7 EER.
Standard Size PTHP <7,000 Btu/h	13.8 EER [a] 3.8 COP [a]	13.1 EER. 4.0 COP.

current standards for all Non-Standard Size PTACs and PTHPs are applicable to equipment manufactured on or after October 7, 2010.

[7] The July 2015 Final Rule TSD is available at: *https://www.regulations.gov/document?D=EERE-2012-BT-STD-0029-0040.*

[8] The preliminary maximum-available linear equations were calculated with the following models. For standard size PTACs ≥7,000 Btu/h and ≤15,000 Btu/h, these two models were rated at 9,700 Btu/h, 12.8 EER and 14,900 Btu/h, 11.2 EER. For standard size PTHPs ≥7,000 Btu/h and ≤15,000 Btu/h cooling efficiency, these two models were rated at 9,700 Btu/h, 12.8 EER and 14,900 Btu/h, 11.2 EER. For standard size PTHPs ≥7,000 Btu/h and ≤15,000 Btu/h heating efficiency, these two models were rated at 7,000 Btu/h, 4.0 COP and 8,500 Btu/h, 3.8 COP.

TABLE II.6—MAX-TECH AND MAXIMUM-AVAILABLE EFFICIENCY LEVELS—Continued

Equipment class	Max-tech July 2015 Final Rule	Maximum-available current market
Standard Size PTHP ≥7,000 Btu/h and ≤15,000 Btu/h	EER = 16.3 − (0.354 × Cap [b]) ..... COP = 4.3 − (0.073 × Cap [b])	EER = 15.8 − (0.308 × Cap [b]).[c] COP = 4.6 − (0.075 × Cap [b]).[c]
Standard Size PTHP >15,000 Btu/h [3]	11.0 EER ..... 3.2 COP.	N/A.[d]

a. Based on Max Tech equation shown in Table IV.4 of the July 2015 Final Rule at 7,000 Btu/h.
b. Cap means cooling capacity in thousand Btu/h.
c. Based on method of creating a linear fit between the two models in the CCMS Database that were the highest absolute value above the baseline.
d. Based on DOE's review of equipment currently available on the market, DOE did not identify any PTHP models with a cooling capacity greater than 15,000 Btu/h.

Issue 14: DOE seeks input on whether the maximum available efficiency levels are appropriate as the max-tech for potential consideration as possible energy conservation standards for the equipment at issue—and if not, what efficiency levels should be considered max-tech?

Issue 15: DOE seeks feedback on what design options would be incorporated at a max-tech efficiency level. As part of this request, DOE also seeks information as to whether there are limitations on the use of certain combinations of design options.

As discussed in section II.B.1 of this document, if DOE were to amend the PTAC and PTHP test procedure to incorporate a seasonal metric, it would conduct any analysis for future standards rulemaking based on the amended test procedure, including considering efficiency levels based on a seasonal metric.

Issue 16: DOE seeks data and information regarding incremental and maximum-available efficiency levels for each equipment class under seasonal energy efficiency metrics. In particular, DOE seeks energy use data for equipment operating at part-load capacities, for example, at the part-load test conditions specified in AHRI Standard 340/360 (I/P)–2019, 2019 Standard for Performance Rating of Commercial and Industrial Unitary Air-Conditioning and Heat Pump Equipment. In addition, DOE requests information on the technologies for improving part-load operation, including the order in which manufacturers would likely add such technologies.

3. Manufacturer Production Costs and Manufacturing Selling Price

As described at the beginning of this section, the main outputs of the engineering analysis are cost-efficiency relationships that describe the estimated increases in manufacturer production cost associated with higher-efficiency equipment for the analyzed equipment classes. For the July 2015 Final Rule, DOE identified the efficiency levels for the analysis based on the range of rated efficiencies of PTAC and PTHP equipment in the AHRI database. DOE selected PTAC and PTHP equipment that was representative of the market at different efficiency levels, then purchased, tested, and reverse engineered the selected equipment. DOE used the cost-assessment approach to determine the MPCs for PTAC and PTHP equipment across a range of efficiencies from the baseline to max-tech efficiency levels. 80 FR 43162, 43173 See chapter 5 of the July 2015 Final Rule TSD for additional detail.

Issue 17: DOE requests feedback on how manufacturers would incorporate the technology options listed in Table II.2 and Table II.3 of this RFI to increase energy efficiency in PTACs and PTHPs beyond the baseline. This includes information on the order in which manufacturers would incorporate the different technologies to incrementally improve the efficiencies of equipment.

Issue 18: DOE also seeks input on the increase in MPC associated with incorporating each particular design option. DOE also requests information on the investments necessary to incorporate specific design options, including, but not limited to, costs related to new or modified tooling (if any), materials, engineering and development efforts to implement each design option, and manufacturing/production impacts.

Issue 19: DOE requests comment on whether certain design options may not be applicable to (or may be incompatible with) specific equipment classes.

Issue 20: DOE requests information on how it could conduct the cost-efficiency analyses for PTHPs >15,000 Btu/h, for which there are no models on the market and for which DOE does not have data.

To account for manufacturers' non-production costs and profit margin, DOE applies a non-production cost multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. For the July 2015 Final Rule, DOE used a manufacturer markup of 1.27 for all PTACs and PTHPs. 80 FR 43162, 43177. See chapter 6 of the July 2015 Final Rule TSD for additional detail.

Issue 21: DOE requests feedback on whether manufacturer markup of 1.27 is appropriate for PTACs and PTHPs.

E. Distribution Channels

In this early assessment review RFI, DOE seeks information with respect to the distribution channels that could enable the department to determine whether to propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing. In generating end-user price inputs for the life-cycle cost (''LCC'') analysis and national impact analysis (''NIA''), DOE must identify distribution channels (*i.e.,* how the equipment are distributed from the manufacturer to the consumer), and estimate relative sales volumes through each channel. DOE identified four distribution channels for PTACs and PTHPs to describe how the equipment passes from the manufacturer to the consumer. 80 FR 43162, 43177–43178. The four distribution channels are listed below:

The first distribution channel is only used in the new construction market and it represents sales directly from a manufacturer to the end use customer through a national account.

Manufacturer → National Account → End user

The second distribution channel represents replacement markets, where a manufacturer sells to a wholesaler, who sells to a mechanical contractor, who in turn sells to the end user.

Manufacturer → Wholesaler → Mechanical Contractor → End user

The third distribution channel, which is used in both new construction and replacement markets, the manufacturer sells the equipment to a wholesaler, who in turn sells it to a mechanical contractor, who in turn sells it to a general contractor, who sells it to the end user.

Manufacturer → Wholesaler → Mechanical Contractor → General Contractor → End user

Finally, in the fourth distribution channel, which is also used in both the new construction and replacement markets, a manufacturer sells to a wholesaler, who in turn sells directly to the end user.

Manufacturer → Wholesaler → End User

Issue 22: DOE requests information on the existence of any distribution channels other than the four distribution channels identified in the July 2015 Final Rule that are used to distribute PTACs and PTHPs into the market. DOE also requests data on the fraction of PTAC and PTHP sales that go through each of the four identified distribution channels as well as the fraction of sales through any other identified channels.

F. Energy Use Analysis

In this early assessment review RFI, DOE seeks data and information with respect to energy use of PTACs and PTHPs that could enable the agency to determine whether to propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing.

As part of the rulemaking process, DOE conducts an energy use analysis to identify how equipment is used by consumers, and thereby determine the energy savings potential of energy efficiency improvements. In the July 2015 Final Rule, DOE developed estimates of the unit energy consumption (''UEC'') in kilowatt hours (''kWh'') by equipment type and EL. Energy savings from higher efficiency equipment was measured by comparing the UECs of higher ELs to the UEC of the ASHRAE baseline EL. 80 FR 43162, 43178–43179.

In the July 2015 Final Rule, DOE began with the UECs developed for PTACs and PTHPs in the October 2008 Final Rule. 73 FR 58772. DOE adjusted the base-year UEC to account for changes in climate between 2008 and 2013 using heating degree-days and cooling degree-days from a typical meteorological year (''TMY'') data set (referred to as TMY2) and an updated TMY3 data set. For each efficiency level that was previously analyzed in the October 2008 Final Rule, DOE used the TMY3-adjusted UEC value for that level. For efficiency levels that were not previously analyzed, DOE scaled the TMY3-adjusted cooling UECs based on interpolations between the EER values at different ELs and scaled the TMY3-adjusted heating UECs based on interpolations between the COP values at different ELs. 80 FR 43162, 43178–43179. Please refer to Chapter 7 of the July 2015 Final Rule TSD for more detail.

The UECs developed in the July 2015 Final Rule do not represent the energy use of make-up air units. DOE plans to use building loads from the small hotel commercial building prototypes and match those loads to performance data to properly account for the different operation of make-up air units and determine UECs to use for make-up air PTACs and PTHPs in the current energy use analysis.

Issue 23: DOE requests comment on the approach that was used to develop UECs in the energy use analysis for the July 2015 Final Rule, as well as any potential improvements in equipment that might impact UECs, or data indicating actual UECs for this equipment.

Issue 24: DOE requests comment on its approach to measure energy use of make-up air PTACs and PTHPs. Specifically, are these units used in any applications other than lodging? Also, are make-up air units primarily used in new construction or they also installed in replacement applications?

Issue 25: DOE requests performance data for make-up air PTACs and PTHPs.

G. Life-Cycle Cost and Payback Analysis

In this early assessment review RFI, DOE seeks data and information with respect to life-cycle cost and payback periods for PTACs and PTHPs that could enable the agency to determine whether to propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing.

DOE conducts the LCC and payback period (''PBP'') analysis to evaluate the economic effects of potential energy conservation standards for PTACs and PTHPs on individual customers. For any given efficiency level, DOE measures the PBP and the change in LCC relative to an estimated baseline level. The LCC is the total customer expense over the life of the equipment, consisting of purchase, installation, and operating costs (expenses for energy use, maintenance, and repair). Inputs to the calculation of total installed cost include the cost of the equipment—which includes MSPs, distribution channel markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, equipment lifetimes, discount rates, and the year that compliance with new and amended standards is required.

1. Repair and Maintenance Costs

In order to develop annual operating costs and savings for the LCC analysis, DOE estimates repair and maintenance costs over the lifetime of the PTACs and PTHPs. In the July 2015 Final Rule, DOE used typical PTAC and PTHP warranties to estimate repair costs. DOE used a report on component failure rates and standard warranty terms prepared by EER Consulting LLC along with RS Means [9] for the labor and materials repair cost of different components. Most PTACs and PTHPs come with a one-year warranty covering all repairs and a 5-year limited warranty which covers repairs of the refrigeration system (non-refrigeration repairs would be paid by the owner in the second through fifth year of ownership). After the fifth year of ownership, the owner bears the full cost of a repair. DOE determined the expected value of the total cost of a repair and annualized it to determine the annual repair cost. DOE scaled the typical repair costs by cooling capacity and manufacturer selling price to determine the repair costs for the equipment classes and efficiency levels considered in the July 2015 Final Rule. 80 FR 43162, 43180. More information on the development of repair costs can be found in Chapter 8 of the July 2015 Final Rule TSD.

The maintenance costs used in the July 2015 Final Rule were taken from the October 2008 Final Rule, where the annual maintenance cost for PTACs was $50. DOE adjusted this figure for inflation to arrive at an annual maintenance cost of $55.56. The annualized costs for PTHPs were derived from the annualized maintenance costs for PTACs based on RS Means [10] data for both PTACs and PTHPs. The percentage difference was applied to the PTAC maintenance costs to arrive at an annual maintenance cost of $62.62 for PTHPs. More information

[9] RS Means Company, Inc. ''RS Means Facilities Maintenance and Repair Cost Data,'' 2013.

[10] RS Means Company, Inc. RSMeans Online, (Last accessed March 26, 2013.) *http://www.rsmeansonline.com.*

on the development of maintenance costs can be found in Chapter 8 of the July 2015 Final Rule TSD.

Issue 26: DOE requests information and data on the frequency of repair and repair costs by equipment class for the technology options listed in Table II.2 and Table II.3 of this RFI. While DOE is interested in information regarding each of the listed technology options, DOE is also interested in whether, and at what point, consumers simply replace PTACs and PTHPs when they fail as opposed to repairing them.

Issue 27: DOE requests feedback and data on whether maintenance costs for any of the specific technology options listed in Table II.2 and Table II.3 of this RFI differ in comparison to the baseline maintenance costs. To the extent that these costs differ, DOE seeks supporting data and the reasons for those differences.

H. Shipments

In this early assessment review RFI, DOE seeks data and information with respect to PTACs and PTHPs shipments that could enable the agency to determine whether to propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of foregoing.

DOE develops shipments forecasts of PTACs and PTHPs to calculate the national impacts of potential amended energy conservation standards on energy consumption, net present value (''NPV''), and future manufacturer cash flows. DOE shipments projections are based on available historical data broken out by equipment class, capacity, and efficiency. Up-to-date sales estimates allow for a more accurate model that captures recent trends in the market.

In the July 2015 Final Rule, DOE relied on historical shipments data provided by AHRI from 1998–2012. The shipments were distributed among the six standard size equipment classes that were analyzed in the prior rulemaking based on the average shares of each class from 1998–2004. 80 FR 43162, 43182. DOE assumed that this shipments breakdown by equipment class would stay constant throughout the analysis period. For more detail on the shipments analysis, please refer to Chapter 9 of the July 2015 Final Rule TSD.

Issue 28: DOE requests the most recent annual sales data (*i.e.,* number of shipments) as well as historical annual sales data going back to 2015 for all equipment classes.

Issue 29: DOE requests the number of shipments by equipment class and efficiency level for the most recent year available. If disaggregated fractions of annual sales are not available at the equipment type class or efficiency level, DOE requests more aggregated fractions of annual sales at the category level.

Table II.7 shows the model counts by equipment class for PTACs and PTHPs along with the fraction of models by EER bin listed in the DOE CCMS database. In Issue 32, DOE requests that interested parties supplement this table with shipments data from 2015–2018. Interested parties are also encouraged to provide additional shipment data as may be relevant.

TABLE II.7—COUNT AND DISTRIBUTION OF PTAC AND PTHP MODELS BY EQUIPMENT CLASS

Product class	Cooling capacity (Btu/h)	CCMS model count	Fraction of models by EER bin [1] (percent)						
			7.1–8 EER	8.1–9.0 EER	9.1–10.0 EER	10.1–11.0 EER	11.1–12.0 EER	12.1–13.0 EER	>13.1 EER
Standard size PTAC	<7,000	56	N/A	N/A	N/A	N/A	64	9	27
	7,000 to 15,000	1,363	N/A	N/A	11	35	34	20	1
	>15,000	14	N/A	N/A	100	0	0	0	0
Standard size PTHP	<7,000	76	N/A	N/A	N/A	N/A	64	33	3
	7,000 to 15,000	1,009	N/A	N/A	8	35	36	21	0
	>15,000	0	0	0	0	0	0	0	0
Non-Standard size PTAC.	<7,000	12	N/A	N/A	0	0	100	0	0
	7,000 to 15,000	1,048	15	37	30	10	8	0	0
	>15,000	23	48	0	52	0	0	0	0
Non-Standard size PTHP.	<7,000	12	N/A	N/A	0	0	100	0	0
	7,000 to 15,000	884	19	42	36	1	1	0	0
	>15,000	12	0	0	100	0	0	0	0

[1] An N/A indicates that the EER bin is below the federal minimum for that equipment class.

Issue 30: If available, DOE requests shipment data covering the equipment classes and efficiency bins in Table II.7 of this RFI for each year going back to 2015.

Issue 31: DOE requests the number of shipments of make-up air PTACs and PTHPs in 2018 along with any future growth projections for make-up air units.

In the July 2015 Final Rule, DOE received comments that PTAC and PTHP lifetimes should be similar to the renovation cycles at hotels, which occur every 7 years on average. 80 FR 43162, 43180. DOE based equipment lifetime on a retirement function in the form of a Weibull probability distribution, with a mean of 7 years for lodging applications (70% of the market) and a mean of 10 years for all other applications. A Weibull distribution is a probability distribution function that is commonly used to measure failure rates. Its form is similar to an exponential distribution, which would model a fixed failure rate, except that it allows for a failure rate that changes over time. For more detail on the lifetime measurement, please refer to Chapter 8 of the July 2015 Final Rule TSD.

Issue 32: DOE requests comment on the average lifetime of 7 years for lodging applications and 10 years for all other applications. DOE also requests comment on the Weibull approach, along with any new data or information about the lifetimes of PTACs and PTHPs. DOE also requests input on whether equipment lifetimes vary by equipment class, by efficiency, or by end use.

I. Manufacturer Impact Analysis

In this early assessment review RFI, DOE seeks data and information with respect to manufacturer impacts that could enable the agency to determine whether to propose a ''no new standard'' determination because a more stringent standard: (1) Would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not

economically justified; or (4) any combination of foregoing.

The purpose of the manufacturer impact analysis (''MIA'') is to estimate the financial impact of amended energy conservation standards on manufacturers of PTACs and PTHPs, and to evaluate the potential impact of such standards on direct employment and manufacturing capacity. The MIA includes both quantitative and qualitative aspects. The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (''GRIM''), an industry cash-flow model adapted for each equipment in this analysis, with the key output of industry net present value (''INPV''). The qualitative part of the MIA addresses the potential impacts of energy conservation standards on manufacturing capacity and industry competition, as well as factors such as equipment characteristics, impacts on particular subgroups of firms, and important market and equipment trends.

As part of the MIA, DOE intends to analyze impacts of amended energy conservation standards on subgroups of manufacturers of covered equipment, including small business manufacturers. DOE uses the Small Business Administration's (''SBA'') small business size standards to determine whether manufacturers qualify as small businesses, which are listed by the applicable North American Industry Classification System (''NAICS'') code.[11] Manufacturing of consumer PTACs and PTHPs is classified under NAICS 335415, ''Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing,'' and the SBA sets a threshold of 1,250 employees or less for a domestic entity to be considered as a small business. This employee threshold includes all employees in a business' parent company and any other subsidiaries.

One aspect of assessing manufacturer burden involves examining the cumulative impact of multiple DOE standards and the product-specific regulatory actions of other Federal agencies that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

Issue 33: To the extent feasible, DOE seeks the names and contact information of any domestic or foreign-based manufacturers that distribute PTACs and PTHPs in the United States.

Issue 34: DOE identified small businesses as a subgroup of manufacturers that could be disproportionally impacted by amended energy conservation standards. DOE requests the names and contact information of small business manufacturers, as defined by the SBA's size threshold, of PTACs and PTHPs that distribute equipment in the United States. In addition, DOE requests comment on any other manufacturer subgroups that could be disproportionally impacted by amended energy conservation standards. DOE requests feedback on any potential approaches that could be considered to address impacts on manufacturers, including small businesses.

Issue 35: DOE requests information regarding the cumulative regulatory burden impacts on manufacturers of PTACs and PTHPs associated with (1) other DOE standards applying to different equipment that these manufacturers may also make and (2) equipment-specific regulatory actions of other Federal agencies. DOE also requests comment on its methodology for computing cumulative regulatory burden and whether there are any flexibilities it can consider that would reduce this burden while remaining consistent with the requirements of EPCA.

J. Other Energy Conservation Standards Topics

1. Market Failures

In the field of economics, a market failure is a situation in which the market outcome does not maximize societal welfare. Such an outcome would result in unrealized potential welfare. DOE welcomes comment on any aspect of market failures, especially those in the context of amended energy conservation standards for PTACs and PTHPs.

2. Network Mode/''Smart'' Technology

DOE published an RFI on the emerging smart technology appliance and equipment market. 83 FR 46886 (Sept. 17, 2018) (''2018 RFI''). In the 2018 RFI, DOE sought information to better understand market trends and issues in the emerging market for appliances and commercial equipment that incorporate smart technology. DOE's intent in issuing the 2018 RFI was to ensure that DOE did not inadvertently impede such innovation in fulfilling its statutory obligations in setting efficiency standards for covered products and equipment. As part of this early assessment review, DOE seeks comments, data and information on the issues presented in the 2018 RFI as they may be applicable to energy conservation standards for PTACs and PTHPs.

3. Other Issues

Additionally, DOE welcomes comments on other issues relevant to the conduct of this early assessment review that may not specifically be identified in this document. In particular, DOE notes that under Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' Executive Branch agencies such as DOE are directed to manage the costs associated with the imposition of expenditures required to comply with Federal regulations. See 82 FR 9339 (Feb. 3, 2017). Pursuant to that Executive Order, DOE encourages the public to provide input on measures DOE could take to lower the cost of its energy conservation standards rulemakings, recordkeeping and reporting requirements, and compliance and certification requirements applicable to PTACs and PTHPs while remaining consistent with the requirements of EPCA.

III. Submission of Comments

DOE invites all interested parties to submit in writing by the date specified previously in the **DATES** section of this document, comments and information on matters addressed in this document and on other matters relevant to DOE's consideration of amended energy conservations standards for PTACs and PTHPs. After the close of the comment period, DOE will review the public comments received and may begin collecting data and conducting the analyses discussed in this document.

Submitting comments via http://www.regulations.gov. The *http://www.regulations.gov* web page requires you to provide your name and contact information. Your contact information

[11] Available online at *https://www.sba.gov/document/support--table-size-standards.*

will be viewable to DOE Building Technologies Office staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *http://www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (''faxes'') will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. Submit these documents via email to *PTACHP2019STD0035@ee.doe.gov* or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

DOE considers public participation to be a very important part of the process for developing energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Interactions with and between members of the public provide a balanced discussion of the issues and assist DOE in the rulemaking process. Anyone who wishes to be added to the DOE mailing list to receive future notices and information about this process or would like to request a public meeting should contact Appliance and Equipment Standards Program staff at (202) 287–1445 or via email at *ApplianceStandardsQuestions@ee.doe.gov.*

Signing Authority

This document of the Department of Energy was signed on December 8, 2020, by Daniel R Simmons, Assistant Secretary for the Office of 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 9, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–27456 Filed 12–18–20; 8:45 am]

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FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1282

RIN 2590–AB12

Enterprise Housing Goals

AGENCY: Federal Housing Finance Agency.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Housing Finance Agency (FHFA) is publishing an Advance Notice of Proposed Rulemaking (ANPR) requesting public comment on a variety of questions related to potential changes to the regulation establishing housing goals for Fannie Mae and Freddie Mac (Enterprises). FHFA will consider public comments received on these questions in order to inform rulemaking that is planned for 2021 to establish single-family and multifamily housing goals benchmark levels for 2022 and

beyond, and to make other changes to the Enterprise housing goals regulation, as appropriate.

DATES: Comments must be received on or before February 28, 2021.

ADDRESSES: You may submit your comments on the ANPR, identified by regulatory information number (RIN) 2590–AB12, by any one of the following methods:

- *Agency website: https://www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AB12.
- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB12, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AB12, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

FOR FURTHER INFORMATION CONTACT: Ted Wartell, Associate Director, Office of Housing & Community Investment, Division of Housing Mission and Goals, at (202) 649–3157, *Ted.Wartell@fhfa.gov;* Padmasini Raman, Supervisory Policy Analyst, Office of Housing & Community Investment, Division of Housing Mission and Goals, at (202) 649–3633, *Padmasini.Raman@fhfa.gov;* or Kevin Sheehan, Associate General Counsel, Office of General Counsel, (202) 649–3086, *Kevin.Sheehan@fhfa.gov.* These are not toll-free numbers. The mailing address is: Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. The telephone number for the Telecommunications Device for the Deaf is (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Comments

FHFA invites comments on all aspects of this ANPR. Copies of all comments will be posted without change, including any personal information you provide such as your name, address, email address, and telephone number, on the FHFA website at *https://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public through the electronic rulemaking docket for this ANPR, also located on the FHFA website.

II. Advance Notice of Proposed Rulemaking

This ANPR seeks public comments on a variety of questions related to potential changes to the Enterprise housing goals regulation.[1] FHFA plans to issue a proposed rule in 2021 that would establish new benchmark levels for the Enterprise housing goals for 2022 and beyond, as well as make other changes to the regulation as appropriate. Based on the comments received in response to this ANPR, FHFA may propose revisions to the Enterprise housing goals regulation for comment in the proposed rule planned for 2021 or in a later rulemaking. FHFA invites comments on the specific questions set forth in this ANPR, and on any other issues that commenters think should be addressed as part of the rulemaking that will establish the housing goals benchmark levels for 2022 and beyond.

Question 1: Are there categories of loans that should be excluded from receiving housing goals credit under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (Safety and Soundness Act) provisions on ''unacceptable business and lending practices?''

The Safety and Soundness Act requires FHFA to exclude ''segments of the market determined to be unacceptable or contrary to good lending practices, inconsistent with safety and soundness, or unauthorized for purchase by the enterprises'' from consideration in setting the single-family housing goals.[2] FHFA may not give credit toward achievement of the housing goals for mortgages that are ''determined to be unacceptable or contrary to good lending practices, inconsistent with safety and soundness, or unauthorized for purchase by the enterprises.''[3]

The current exclusions under the Enterprise housing goals regulation generally focus on types of loans or other product characteristics, rather than loans that are unacceptable or contrary to good lending practices. However, FHFA may also make exclusions based on factors considered in underwriting loans. For single-family loan purchases, the Enterprises use their own automated underwriting systems to evaluate whether a loan is eligible for purchase based on factors including, but not limited to, a borrower's creditworthiness. These automated underwriting systems assess a borrower's ability to make his or her mortgage payments over a two- or three-year time period following origination. The Enterprises establish a cut-off threshold based on their credit risk appetite, and only those loans for which the borrowers' predicted risk is deemed below that threshold are eligible to be sold to the Enterprises. The Enterprises also price loans according to their pricing grids to partially account for the risk profile of a loan.

FHFA generally considers all conventional conforming first lien mortgages that are owner-occupied as potentially eligible for single-family housing goals credit, subject to certain exclusions. For instance, under the Safety and Soundness Act, investor loans are excluded, and under the Enterprise housing goals regulation, investor loans and second loans (*i.e.,* any subordinate lien mortgages) are excluded, from consideration for the single-family housing goals.[4] As another example, mortgages for secondary residences are excluded from consideration for the single-family housing goals.[5]

FHFA requests comment on whether there are other categories of loans that should be excluded from receiving housing goals credit under the statute's ''unacceptable business and lending practices'' provisions. For example, should FHFA consider factors to promote borrower sustainability? How would FHFA determine and measure sustainability? Should risk-layering be considered in a manner that is distinct from the eligibility requirements of the Enterprises?[6] What criteria should be used to identify such loans? What public policies should FHFA consider when assessing certain categories of loans? Are there other loan characteristics that could be, in some instances, not in the long-term interest

[1] 12 CFR part 1282.

[2] *See* 12 U.S.C. 4562(e)(1).

[3] *See* 12 U.S.C. 4562(i).

[4] *See* 12 U.S.C. 4562(a) and 12 CFR 1282.16(b)(10).

[5] *See* 12 CFR 1282.16(b)(8).

[6] Some examples of factors associated with higher risk include high debt-to-income ratio, high loan-to-value ratio, or low credit score, among others. ''Risk-layering'' refers to loans with more than one such factor.

of the borrower, even if they are not treated as abusive or unfair under existing consumer protection statutes?

Question 2: Are there ways to determine whether the low-income areas home purchase subgoal has resulted in the displacement of residents from certain communities, or to measure the extent of any such displacement? Should FHFA consider modifying the low-income areas home purchase subgoal to address such concerns? If so, how?

Concerns have been raised about gentrification in low-income areas and high-minority census tracts, and the potential displacement of long-time low-income residents from such areas and tracts. The current Enterprise housing goals regulation does not restrict the income of borrowers whose mortgages qualify for the low-income areas home purchase subgoal if the mortgages are on properties located in a low-income census tract. Under the regulation, the Enterprises can meet the low-income areas home purchase subgoal by acquiring home purchase mortgages that are either: (1) Originated for borrowers located in low-income census tracts (defined as census tracts with median income less than or equal to 80 percent of area median income (AMI)); or (2) originated for borrowers with incomes less than or equal to AMI who reside in minority census tracts (defined as census tracts with a minority population of at least 30 percent and a tract median income of less than 100 percent of AMI).[7] There are no borrower income requirements for criterion (1). While Enterprise mortgage acquisitions could qualify under either or both criteria, the share of the Enterprises' mortgage acquisitions satisfying criterion (1) has been consistently higher than the share of Enterprise mortgage acquisitions satisfying criterion (2) in recent years. For example, among the Enterprises' mortgage acquisitions in 2019, 15.0 percent of mortgages met only criterion (1), 10.2 percent met only criterion (2), and 6.4 percent met both criteria, as can be seen in Table 1 below. All of these shares have been increasing steadily since 2010.

Table 1: Composition of Low-Income Areas Home Purchase Subgoal

Distribution of Borrowers By Census Tract Location: HMDA Home Purchases

	Grand Total	(A) L I	L I, not H M	H M and L I	H M, not L I	(B) H M
Year	**Low-Income Area Subgoal**	**All Low-Income Areas**	**Low-Income Areas that are not High Minority Areas**	**High Minority Areas that are also Low-Income Areas**	**High Minority Areas that are not Low-Income Areas**	**All High-Minority Areas**
2010	12.1%	9.2%	5.6%	3.6%	2.9%	6.5%
2011	11.4%	8.8%	5.5%	3.3%	2.6%	5.9%
2012	13.5%	10.3%	6.0%	4.3%	3.2%	7.5%
2013	14.1%	10.9%	6.6%	4.3%	3.1%	7.4%
2014	15.0%	12.0%	7.5%	4.6%	3.0%	7.5%
2015	15.1%	12.2%	7.6%	4.6%	2.9%	7.5%
2016	15.9%	12.9%	8.1%	4.8%	2.9%	7.7%
2017	17.0%	14.0%	8.7%	5.3%	3.1%	8.3%
2018	17.9%	14.7%	9.1%	5.5%	3.3%	8.8%
2019	18.1%	14.7%	9.0%	5.7%	3.4%	9.1%

Distribution of Borrowers By Census Tract Location: Enterprise Home Purchases

	Grand Total	(A) L I	L I, not H M	H M and L I	H M, not L I	(B) H M
Year	**Low-Income Area Subgoal**	**All Low-Income Areas**	**Low-Income Areas that are not High Minority Areas**	**High Minority Areas that are also Low-Income Areas**	**High Minority Areas that are not Low-Income Areas**	**All High-Minority Areas**
2010	11.6%	8.7%	5.2%	3.5%	2.9%	6.4%
2011	10.7%	8.1%	5.1%	3.1%	2.6%	5.7%
2012	12.6%	9.3%	5.4%	3.9%	3.3%	7.2%
2013	13.4%	10.2%	6.2%	4.0%	3.2%	7.2%
2014	14.7%	11.6%	7.0%	4.5%	3.2%	7.7%
2015	15.1%	12.1%	7.4%	4.6%	3.0%	7.7%
2016	16.0%	12.8%	7.9%	4.9%	3.1%	8.0%
2017	17.5%	14.1%	8.5%	5.6%	3.4%	9.0%
2018	18.9%	15.1%	8.8%	6.3%	3.8%	10.1%
2019	18.8%	15.0%	8.7%	6.4%	3.8%	10.2%

Source: FHFA's tabulation of Home Mortgage Disclosure Act (HMDA) and Enterprises' data. Conventional conforming single-family owner-occupied 1st lien non-Home Ownership and Equity Protection Act (HOEPA) originations.

[7] *See* 12 CFR 1281.1 and 1282.12(f).

FHFA's analysis of Home Mortgage Disclosure Act (HMDA) data in Table 2 shows that both low-income areas and high-minority areas have increasing shares of borrowers with incomes at or above 100 percent of AMI, although loans to borrowers with incomes over 100 percent of AMI do not qualify for the minority areas component of the goal. For instance, the share of loans made to borrowers with incomes greater than 100 percent of AMI and residing in these low-income census tracts increased from 38.8 percent in 2010 to 44.2 percent in 2016, after dropping to 36.5 percent in 2012. This share has been relatively stable since then, with a 43.3 percent share in 2019. Nonetheless, borrowers with higher incomes have made up an increasing share of the mortgage market in low-income areas.

A similar trend exists among borrowers residing in high minority census tracts, with the share of higher income borrowers increasing from 42.5 percent in 2010 to 50 percent in 2016. That share declined to 47.8 percent in 2019 after hovering around 49 percent in 2018 and 2019.

Table 2: Borrower Income Relative to AMI (HMDA)

Borrowers Residing in Low-Income Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	17.8%	17.7%	19.0%	15.4%	14.1%	14.1%	12.3%	13.0%	12.6%	12.9%
Borrower Income > 50% and ≤ 80% AMI	28.0%	26.6%	29.3%	28.4%	27.9%	27.9%	27.4%	27.8%	26.7%	28.1%
Borrower Income > 80% and ≤ 100% AMI	14.3%	13.9%	13.9%	14.7%	14.9%	14.9%	15.3%	15.2%	14.5%	14.4%
Borrower Income > 100% and ≤ 120% AMI	10.1%	10.0%	10.0%	10.8%	11.3%	11.3%	11.8%	11.6%	11.0%	10.9%
Borrower Income > 120% AMI	28.7%	30.5%	26.5%	29.3%	30.9%	30.8%	32.4%	31.4%	33.6%	32.4%
Income Missing	1.0%	1.4%	1.3%	1.3%	0.9%	1.0%	0.9%	0.9%	1.5%	1.2%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Borrowers Residing in High-Minority Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	14.9%	15.0%	14.6%	11.3%	10.1%	10.3%	9.4%	9.9%	9.9%	10.0%
Borrower Income > 50% and ≤ 80% AMI	27.1%	26.4%	26.8%	24.9%	24.4%	24.7%	24.6%	25.2%	24.4%	26.0%
Borrower Income > 80% and ≤ 100% AMI	14.6%	14.3%	14.1%	14.7%	14.8%	14.9%	15.2%	15.3%	14.9%	15.0%
Borrower Income > 100% and ≤ 120% AMI	10.9%	10.6%	11.0%	11.7%	12.0%	12.2%	12.4%	12.2%	11.8%	11.7%
Borrower Income > 120% AMI	31.6%	32.4%	32.3%	36.0%	37.8%	37.0%	37.6%	36.5%	37.5%	36.1%
Income Missing	1.0%	1.3%	1.3%	1.4%	0.9%	1.0%	0.8%	0.9%	1.5%	1.2%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Definitions:

Low-income census tracts = Census tracts with median income ≤ 80% Area Median Income (AMI)

High-minority census tracts = Census tracts where (i) tract median income ≤ 100% Area Median Income (AMI); and (ii) minorities comprise at least 30 pecent of the tract population.

Source: FHFA's tabulation of HMDA data.

Table 3 shows that the share of loans made to borrowers with incomes greater than 100 percent of AMI and residing in low-income census tracts increased from 40.7 percent in 2010 to 42.8 percent in 2016. However, that share has declined since then, dropping to a low of 37 percent in 2019. This trend is similar among borrowers residing in high minority census tracts, with the share of higher income borrowers increasing from 45.4 percent in 2010 to 48.5 percent in 2016, after dropping to a low of 42.8 percent in 2012. This share has since declined to 42.8 percent in 2019.

Table 3: Borrower Income Relative to AMI (Enterprise Loans Only)

Borrowers Residing in Low-Income Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	16.7%	16.3%	18.2%	14.5%	13.4%	13.4%	13.1%	13.9%	15.2%	15.3%
Borrower Income > 50% and ≤ 80% AMI	27.7%	26.3%	28.6%	28.2%	28.4%	28.4%	28.5%	29.5%	31.4%	31.8%
Borrower Income > 80% and ≤ 100% AMI	14.8%	14.4%	14.6%	15.3%	15.5%	15.6%	15.6%	15.7%	16.0%	16.0%
Borrower Income > 100% and ≤ 120% AMI	10.8%	10.9%	10.8%	11.5%	11.7%	11.8%	11.9%	11.8%	11.3%	11.3%
Borrower Income > 120% AMI	29.9%	32.0%	27.7%	30.5%	31.0%	30.7%	30.9%	29.2%	26.1%	25.7%
Income Missing	0.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
Borrowers Residing in High-Minority Census Tracts										
	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Borrower Income ≤ 50% AMI	13.3%	12.9%	15.2%	11.5%	10.3%	10.3%	10.0%	10.5%	11.3%	11.5%
Borrower Income > 50% and ≤ 80% AMI	26.1%	24.9%	27.0%	26.1%	25.7%	25.5%	25.8%	26.9%	28.5%	29.1%
Borrower Income > 80% and ≤ 100% AMI	15.1%	14.7%	14.9%	15.5%	15.7%	15.9%	15.7%	16.0%	16.6%	16.6%
Borrower Income > 100% and ≤ 120% AMI	11.6%	11.4%	11.5%	12.4%	12.6%	12.8%	12.6%	12.6%	12.4%	12.3%
Borrower Income > 120% AMI	33.8%	36.2%	31.3%	34.6%	35.7%	35.5%	35.9%	34.1%	31.2%	30.5%
Income Missing	0.2%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

Definitions:

Low-income census tracts = Census tracts with median income ≤ 80% Area Median Income (AMI)

High-minority census tracts = Census tracts where (i) tract median income ≤ 100% Area Median Income (AMI); and (ii) minorities comprise at least 30 pecent of the tract population.

Source: FHFA's tabulation of Enterprises' data.

The presence of higher-income borrowers in these areas may be a sign of improved economic indicators for the community, but there is some concern that such a trend as seen particularly in the HMDA data analysis could also be accompanied by the displacement of lower income households. Change in the mix of renters to owner-occupied households often precedes and accompanies these trends. FHFA is aware that this particular subgoal may encourage the Enterprises to focus on purchasing loans for higher-income households in low-income and high-minority areas, and FHFA is also aware of concerns about the impact of rising housing costs on current residents in low-income or higher-minority areas. However, it is possible that higher-income households would have moved into these areas even in the absence of the subgoal. In recognition of these issues, FHFA has been very conservative in setting the benchmark levels for this subgoal.

Recently, in response to the issuance of FHFA's proposed rule for the 2021 Enterprise housing goals, FHFA received two comment letters from policy advocacy organizations that referenced concerns about displacement and gentrification related to this subgoal. The comment letters supported and encouraged FHFA's efforts to monitor and analyze trends regarding this subgoal. The comment letters also requested release of additional data on borrower incomes associated with goals-qualifying loans.

FHFA requests comment on how best to achieve the policy objectives of this subgoal. Should FHFA shift the focus of this subgoal to lower-income households? Should FHFA impose an AMI limit on borrowers for mortgages that qualify for the subgoal? Should FHFA set a limit on the number or share of mortgages for borrowers with incomes over 100 percent of AMI that count towards the subgoal?

Question 3: Should FHFA revise the low-income areas home purchase subgoal to consider loans on properties located in Opportunity Zones, and if so, how should such loans be treated?

Opportunity Zones were created by the 2017 Tax Cuts and Jobs Act, and are designed to spur economic development and job creation in distressed communities by providing tax benefits to investors who invest in these communities.[8] Investors may defer tax on eligible capital gains by making a qualifying investment (including real estate) in a Qualified Opportunity Fund (QOF). A QOF is an investment vehicle with at least 90 percent of its holdings in a Qualified Opportunity Zone (QOZ) property. QOZs are census tracts that meet certain poverty rate and median family income requirements and that have been designated as such by the U.S. Department of the Treasury, based on nominations from the Chief Executive Officers of each State. There are around 8,700 QOZ tracts, the majority of which are low-income tracts.

Because the Opportunity Zones program is new, its impact is still largely unknown. FHFA has noted that in 2019, over 17 percent of low-income area home purchase goal loans are in QOZs. Additionally, 12 percent of multifamily low-income goal units and 20 percent of small multifamily low-income goal units are in QOZs. To help track how QOF projects are achieving the program's intended goal of community revitalization, the U.S. Impact the U.S. Impact [MB1] Investing Alliance, the Beeck Center for Social Impact + Innovation at Georgetown University, and the Federal Reserve Bank of New York partnered to create the Opportunity Zones Reporting Framework, a tool that may be used to

[8] Public Law 115–97, section 13823, 131 Stat. 2054, 2183, codified at 26 U.S.C. 1400Z–1 and 1400Z–2 (Dec. 22, 2017). Note: Public Law 115–97 is commonly referred to as the ''Tax Cuts and Jobs Act,'' but that short title was omitted from the law as enacted.

assess the intended goal of community revitalization.[9]

FHFA requests comment on whether and how the objectives of the Opportunity Zones program would align with the purpose of the Enterprise low-income areas home purchase subgoal. Should FHFA consider giving credit under this subgoal for loans on properties located in Opportunity Zones? What criteria should FHFA use to focus on Opportunity Zones that would have the largest benefit to a community? If included in the subgoal, how can FHFA ensure that the loans on properties in Opportunity Zones benefit these communities? How can FHFA use this subgoal to target slow-growing communities that need these loans? Should FHFA require the use of the Opportunity Zone Reporting Framework for impact tracking? Are there other public policy considerations related to Opportunity Zones that FHFA should consider?

Question 4: Is there evidence that the Enterprise housing goals have helped expand low-income homeownership in the marketplace?

The Safety and Soundness Act directs FHFA to evaluate Enterprise support for low-income homeownership by measuring the low-income share of the mortgages that the Enterprises have acquired.[10]

FHFA requests comment on the factors it should consider in assessing the effectiveness of the Enterprises' activities in expanding low-income homeownership. In order to improve the housing goals, how should impacts be evaluated? What are the appropriate counterfactuals to consider? Is it possible to determine whether acquired mortgages that count toward achievement of the goals would have been originated in the absence of the housing goals? FHFA specifically requests comment on whether—and under the statute, how—other support activities undertaken by the Enterprises should be considered when FHFA reviews the Enterprises' performance on the single-family housing goals.

Mark A. Calabria,

Director, Federal Housing Finance Agency.

[FR Doc. 2020–28084 Filed 12–18–20; 8:45 am]

BILLING CODE 8070–01–P

[9] *See https://ozframework.org/about-index.*

[10] *See* 12 U.S.C. 4562(a)(1).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1138; Project Identifier MCAI–2020–01258–E]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Rolls-Royce Deutschland Ltd & Co KG (RRD) Trent 1000–A2, 1000–AE2, 1000–C2, 1000–CE2, 1000–D2, 1000–E2, 1000–G2, 1000–H2, 1000–J2, 1000–K2 and 1000–L2 model turbofan engines. This proposed AD was prompted by the manufacturer's analysis which determined that cracks may initiate in the front seal fins and cause cracks in the low-pressure turbine (LPT) disk. This proposed AD would require repetitive inspection of the seal fins and, depending on the results of the inspection, replacement of the LPT disk before further flight. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 4, 2021.

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

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

For service information identified in this NPRM, contact Rolls-Royce plc, P.O. Box 31, Derby, DE24 8BJ, United Kingdom, phone: +44 (0)1332 242424; website: *https://www.rolls-royce.com/contact-us.aspx.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1138; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; fax: (781) 238–7199; email: *kevin.m.clark@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1138; Project Identifier MCAI–2020–01258–E'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI

as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this final rule. Submissions containing CBI should be sent to Kevin Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The European Union Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA AD 2020–0195, dated September 8, 2020 (referred to after this as ''the MCAI''), to address the unsafe condition on these products. The MCAI states:

> Analysis of certain LP turbine discs in service has determined that, due to rubbing contact with interstage static seals, cracks may initiate in the front seal fins which could lead to cracks in the disc of the affected parts, as defined in this [EASA] AD.
>
> This condition, if not detected and corrected, could lead to crack propagation, possibly resulting in LP turbine disc failure and high-energy debris release, with consequent damage to, and reduced control of, the aeroplane.
>
> To address this potential unsafe condition, Rolls-Royce published the NMSB to provide inspection instructions.
>
> For the reason described above, this [EASA] AD requires repetitive ultra-high sensitivity fluorescent penetrant inspections of the seal fins of the affected parts and, depending on findings, replacement of affected parts.

You may obtain further information by examining the MCAI in the AD docket at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1138.

FAA's Determination

This product has been approved by EASA and is approved for operation in the United States. Pursuant to our bilateral agreement with the European Community, EASA has notified us of the unsafe condition described in the MCAI and service information referenced above. The FAA is issuing this NPRM because the agency evaluated all the relevant information provided by EASA and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Rolls-Royce Non-Modification Service Bulletin Trent 1000 72–AK416, dated June 29, 2020 (the NMSB). The NMSB provides instructions for inspecting the LPT stage 3 disk and the LPT stage 4 disk. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **ADDRESSES**.

Proposed AD Requirements in This NPRM

This proposed AD would require inspection of the seal fins of the LPT stage 3 disks and LPT stage 4 disks during each engine shop visit after the effective date of this AD and, depending on the results of the inspection, replacement of the LPT stage 3 or LPT stage 4 disk before further flight.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 26 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspect the LPT stage 3 disk and LPT stage 4 disk.	80 work-hours × $85 per hour = $6,800	$0	$6,800	$176,800

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace LPT stage 3 disk	0 work-hours × $85 per hour = $0	$336,158	$336,158
Replace LPT stage 4 disk	0 work-hours × $85 per hour = $0	406,345	406,345

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Rolls-Royce Deutschland Ltd & Co KG (Type Certificate previously held by Rolls-Royce plc): Docket No. FAA–2020–1138; Project Identifier MCAI–2020–01258–E.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by February 4, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Rolls-Royce Deutschland Ltd & Co KG (Type Certificate previously held by Rolls-Royce plc) (RRD) Trent 1000–A2, 1000–AE2, 1000–C2, 1000–CE2, 1000–D2, 1000–E2, 1000–G2, 1000–H2, 1000–J2, 1000–K2 and 1000–L2 model turbofan engines with a low-pressure turbine (LPT) stage 3 disk with part number (P/N) KH36323, or an LPT stage 4 disk with P/N KH33943, installed.

(d) Subject

Joint Aircraft System Component (JASC) Code 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by the manufacturer's analysis of certain LPT disks in service. The analysis determined that, due to rubbing contact with interstage static seals, cracks may initiate in the front seal fins, which could lead to cracks in the LPT stage 3 and stage 4 disks. The FAA is issuing this AD to prevent failure of the LPT disk. The unsafe condition, if not addressed, could result in uncontained LPT disk release, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) During each engine shop visit after the effective date of this AD, inspect the seal fins of the LPT stage 3 disk and the LPT stage 4 disk in accordance with the Accomplishment Instructions, paragraphs 3.B and 3.C, of the Rolls-Royce Alert Non-Modification Service Bulletin (NMSB) Trent 1000 72–AK416, Initial Issue, dated June 29, 2020.

(i) For an engine that is in an engine shop visit on the effective date of this AD, if the LPT stage 3 disk and LPT stage 4 disk are exposed, perform the inspection before the engine is returned to service.

(ii) [Reserved]

(2) If, during any inspection required by paragraph (g)(1) of this AD, any crack is detected, before further flight, remove the affected LPT disk and replace it with a part eligible for installation.

(h) Definitions

(1) For the purpose of this AD, an ''engine shop visit'' is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges, with the exception of the separation of engine flanges solely for the purpose of transporting the engine without subsequent maintenance.

(2) For the purpose of this AD, a ''part eligible for installation'' is an LPT stage 3 disk or LPT stage 4 disk with zero flight cycles since new, or an LPT stage 3 disk or LPT stage 4 disk that has passed the inspection required by paragraph (g)(1) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

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

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

(j) Related Information

(1) For more information about this AD, contact Kevin M. Clark, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7088; fax: (781) 238–7199; email: *kevin.m.clark@faa.gov.*

(2) Refer to European Union Aviation Safety Agency (EASA) AD 2020–0195, dated September 8, 2020, for more information. You may examine the EASA AD in the AD docket at *https://www.regulations.gov* by searching for and locating it in Docket No. FAA–2020–1138.

(3) For service information identified in this AD, contact Rolls-Royce plc, P.O. Box 31, Derby, DE24 8BJ, United Kingdom, phone: +44 (0)1332 242424; website: *https://www.rolls-royce.com/contact-us.aspx.* You may view this referenced service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call (781) 238–7759.

Issued on December 15, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28042 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1139; Product Identifier 2018–SW–056–AD]

RIN 2120–AA64

Airworthiness Directives; Leonardo S.p.a. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA is proposing to adopt a new airworthiness directive (AD) for certain serial-numbered Leonardo S.p.a. (Leonardo) Model A109S and AW109SP helicopters. This proposed AD would require installing a placard in the baggage compartment, revising the existing Rotorcraft Flight Manual (RFM) for your helicopter, and inspecting the installation of the terminal lugs. Depending on the outcome of the inspection, this proposed AD would require restoring the installation of the terminal lugs. This proposed AD would also require modifying the helicopter to shim the baggage fairing assy (fwd up) away from the circuit breaker panel and incorporating protective coverings. This proposed AD was prompted by reports of several occurrences of fire ignition and smoke in the baggage compartment. The actions of this proposed AD are intended to address an unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 4, 2021.

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

- *Federal eRulemaking Docket:* Go to *https://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket

Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

• *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1139; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD, any comments received, any service information that is incorporated by reference, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

For service information identified in this proposed rule, contact Leonardo S.p.a. Helicopters, Emanuele Bufano, Head of Airworthiness, Viale G.Agusta 520, 21017 C.Costa di Samarate (Va) Italy; telephone +39–0331–225074; fax +39–0331–229046; or at *https://www.leonardocompany.com/en/home.* You may view the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177.

FOR FURTHER INFORMATION CONTACT: Kristin Bradley, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *Kristin.Bradley@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1139; Product Identifier 2018–SW–056–AD'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regualtions.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information

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

Discussion

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA Emergency AD No. 2018–0120–E, dated May 29, 2018 (EASA AD 2018–0120–E), to correct an unsafe condition for Leonardo S.p.a. (formerly Finmeccanica S.p.A., AgustaWestland S.p.A., Agusta S.p.A.) Model A109S and AW109SP helicopters. EASA advises that an occurrence was reported on an AW109SP helicopter, experiencing fire ignition and smoke in the baggage compartment. The investigation determined the event was due to chafing of electrical wiring and further analysis indicated that due to similarity of design, this event could also occur on A109S helicopters. Accordingly, the EASA AD requires modification of the affected baggage fairing assembly (fwd up) part number (P/N) 109–0344–31–101 and temporarily amending the existing RFM and installing a placard prohibiting carrying any loads in the baggage compartment.

After EASA AD 2018–0120–E was issued, a second occurrence was reported of fire ignition and smoke in the baggage compartment, and as a precautionary measure Leonardo Helicopters issued a series of emergency alert service bulletins, providing instructions to prevent damage of electrical assemblies in the baggage compartment. Accordingly, EASA issued, EASA Emergency No. 2018–0149–E, dated July 13, 2018 (EASA AD 2018–0149–E), which retains the requirements of EASA AD 2018–0120–E, and also requires repetitive inspections of the baggage compartment electrical assemblies and depending on the inspection outcomes, repairing or replacing certain parts. Also, EASA AD 2018–0149–E expands the applicability to include three additional serial-numbered helicopters, and requires a modification, which acts as a terminating action for the repetitive inspections. EASA advises, that this condition, if not corrected, could lead to fire in the baggage compartment, resulting in loss of control of the helicopter.

FAA's Determination

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

Related Service Information Under 1 CFR Part 51

The FAA has reviewed Leonardo Helicopters Emergency Alert Service Bulletin (EASB) No. 109S–079, and Leonardo Helicopters EASB No. 109SP–120, each Revision A, and each dated June 4, 2018. This service information specifies instructions for manufacturing a placard for the baggage compartment door and also specifies instructions for modifying and inserting a specific cutout into the existing RFM. This service information also specifies instructions for removing the baggage fairing assembly (fwd up), and the rubber protections, inspecting the cable assemblies routing of both circuit breaker panels, and inspecting the installation of the terminal lugs.

The FAA also reviewed Leonardo Helicopters EASB No. 109SP–122, and Leonardo Helicopters EASB No. 109S–081, each dated July 5, 2018, which

specify procedures for modifying the helicopter by incorporating protective coverings.

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

Proposed AD Requirements

This proposed AD would require compliance with certain portions of the manufacturer's service bulletin as well as, before further flight, for certain serial-numbered helicopters, installing a placard and revising the existing RFM for your helicopter. This proposed AD would also require within 5 hours time-in-service (TIS), for certain model helicopters, inspecting the installation of the terminal lugs, shimming the installation of the baggage fairing assembly (fwd up), and installing a silicon rubber protection over the blind rivets of the hinge in accordance with certain applicable service information. This proposed AD would also require within 10 hours TIS and thereafter at intervals not to exceed 25 hours TIS until protective coverings are installed, removing the baggage fairing assembly (fwd up), removing the rubber protections, and inspecting the cable assembly routing of both circuit breaker panels for damage. Depending on the outcome of these inspections, this proposed AD would require repairing or replacing certain parts. This proposed AD would also require, within 200 hours TIS, modifying the helicopter to incorporate a certain protective coverings, which would provide a terminating action for the repetitive inspections.

Differences Between This AD and the EASA AD

The EASA AD uses compliance times in terms of calendar dates, whereas this proposed AD uses compliance times terms of in hours TIS.

Costs of Compliance

The FAA estimates that this AD would affect 15 helicopters of U.S. Registry. The FAA estimates that operators may incur the following costs in order to comply with this proposed AD. Labor costs are estimated at $85 per work-hour.

Installing a placard and revising the existing RFM for your helicopter would require about 1 work-hour for an estimated cost of $85 per helicopter and $1275 for the U.S. fleet.

Inspecting the installation of the terminal lugs, shimming the baggage fairing assembly (fwd up), and installing a silicon rubber protection over the blind rivets removing the rubber protections would require about 3 work-hours for an estimated cost of $255 per helicopter.

Removing the baggage fairing assembly (fwd up) and performing a repetitive inspection of the cable assemblies of both circuit breaker panels for damage would require about 2 work-hours for an estimated cost of $170 per helicopter per inspection cycle and $2,550 for the U.S. fleet per inspection cycle.

Repairing a cable assembly would require about 4 work-hours and parts would cost about $340 for an estimated cost of $680 per repair.

Modifying the helicopter by installing protective coverings would require about 4 work-hours and parts would cost about $20 for an estimated cost of $360 per helicopter and $5,400 for the U.S. fleet.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify this proposed regulation:

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

2. Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Leonardo S.p.a.: Docket No. FAA–2020–1139; Product Identifier 2018–SW–056–AD.

(a) Applicability

This airworthiness directive (AD) applies to Leonardo S.p.a. Model A109S helicopters, serial number (S/N) 22702, 22703, 22705, and 22706 and AW109SP helicopters with S/N up to 22386 inclusive, except S/N 22375 and S/N 22376, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as chafing of electrical wiring. This condition could result in fire ignition and smoke in the baggage compartment and subsequent loss of control of the helicopter.

(c) Effective Date

The FAA must receive comments by February 4, 2021.

(e) Compliance

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

(f) Required Actions

(1) For all helicopters, except Model A109S having S/N 22705 or S/N 22706 and Model AW109SP having S/N 22384, before further flight:

(i) Install a placard with the information in Figure 5 of Leonardo Helicopters Emergency Alert Service Bulletin (EASB) No. 109S–079 (EASB 109S–079), or Leonardo Helicopters EASB No. 109SP–120 (EASB 109SP–120), each Revision A, and each dated June 4, 2018, as applicable to your helicopter model, in the baggage compartment on the internal side of the baggage door D8.

(ii) Revise the existing Rotorcraft Flight Manual (RFM) for your helicopter by cutting along the dashed line of Figure 6 of EASB 109S–079 or EASB 109SP–120, as applicable to your model helicopter, and inserting the cutout to replace page 1–28 or 1–3, as

applicable to your model helicopter, of the existing RFM for your helicopter.

(2) For all helicopters, except Model A109S having S/N 22705 or S/N 22706 and Model AW109SP having S/N 22384, within 5 hours time-in-service (TIS):

(i)Visually inspect the installation of the terminal lugs to determine whether the installation is consistent with Figure 2 of EASB 109SP–120 or EASB 109S–079, as applicable to your model helicopter. If the installation is not consistent with Figure 2 of EASB 109SP–120 or EASB 109S–079, as applicable to your model helicopter, restore the installation to be consistent with Figure 2 of EASB 109SP–120 or EASB 109S–079, as applicable to your model helicopter.

(ii) Shim the installation of the baggage fairing assembly (fwd up) P/N 109–0344–31–101 to move it away from the circuit breaker panel, and install a silicon rubber protection over the blind rivets of the hinge in accordance with the Accomplishment Instructions, Part II, steps 3 through 8 of EASB 109S–079 or EASB 109SP–120, as applicable to your model helicopter.

(3) Performing the steps as described in paragraph (f)(2) of this AD allows the RFM revision described in paragraph (f)(1) of this AD to be removed from the existing RFM for your helicopter and the placard described in paragraph (f)(1) of this AD to be removed from the helicopter.

(4) For all helicopters, within 10 hours TIS and thereafter at intervals not to exceed 25 hours TIS, remove the baggage fairing assembly (fwd up) P/N 109–0344–31–101, remove the rubber protections P/N 109–0746–52–105 and P/N 109–0746–52–107, and inspect the cable assemblies routing of both circuit breaker panels for damage. For the purposes of this inspection, damage may be indicated by chafing. If there is any damage, repair or replace the cables in accordance with FAA accepted procedures and protect the cables by installing Nomex sleeve P/N EN6049–006.

(5) For all helicopters, within 200 hours TIS, modify the helicopter's baggage compartment by adding the protective coverings in accordance with the Accomplishment Instructions, Part II, steps 3 through 14 of Leonardo Helicopters EASB No. 109SP–122, dated July 5, 2018 or Leonardo Helicopters EASB No. 109S–081, dated July 5, 2018, as applicable to your model helicopter. Completion of this modification is a terminating action for the 25 hour TIS repetitive inspections of paragraph (f)(4) of this AD.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, may approve AMOCs for this AD. Send your proposal to: Kristi Bradley, Aerospace Engineer, General Aviation & Rotorcraft Section, International Validation Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-AVS-AIR-730-AMOC@faa.gov.*

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

(h) Additional Information

The subject of this AD is addressed in European Aviation Safety Agency (now European Union Aviation Safety Agency) (EASA) AD No. 2018–0149–E, dated July 13, 2018. You may view the EASA AD on the internet at *https://www.regulations.gov* in the AD Docket.

(i) Subject

Joint Aircraft Service Component (JASC) Code: 5397, Fuselage Wiring, Baggage Fairings Modification.

Issued on December 16, 2020.

Lance T. Gant,

Director,Compliance & Airworthiness Division,Aircraft Certification Service.

[FR Doc. 2020–28076 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1137; Project Identifier MCAI–2020–00816–T]

RIN 2120–AA64

Airworthiness Directives; MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain MHI RJ Aviation ULC Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2C11 (Regional Jet Series 550), and CL–600–2D24 (Regional Jet Series 900) airplanes. This proposed AD was prompted by a report that some piccolo ducts for the wing anti-ice system have bleed holes that do not conform to requirements. This proposed AD would require, depending on airplane configuration, inspection for the presence of affected wing anti-ice system piccolo ducts and corrective actions, or replacement of affected piccolo ducts with new piccolo ducts. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 4, 2021.

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

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

For service information identified in this NPRM, contact MHI RJ Aviation ULC, 12655 Henri-Fabre Blvd., Mirabel, Québec J7N 1E1 Canada; Widebody Customer Response Center North America toll-free telephone +1–844–272–2720 or direct-dial telephone +1–514–855–8500; fax +1–514–855–8501; email *thd.crj@mhirj.com;* internet *https://mhirj.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1137; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Siddeeq Bacchus, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7362; email *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1137; Project Identifier MCAI–2020–00816–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by

the closing date and may amend the proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposed AD.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Siddeeq Bacchus, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7362; email *9-avs-nyaco-cos@faa.gov.* Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2020–23, dated June 24, 2020 (referred to after this as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain MHI RJ Aviation ULC Model CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2C11 (Regional Jet Series 550), and CL–600–2D24 (Regional Jet Series 900) airplanes. You may examine the MCAI in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1137.

This proposed AD was prompted by a report that some piccolo ducts for the wing anti-ice system have bleed holes that do not conform to requirements (such as being undersized, un-burred, or in the wrong location). The FAA is proposing this AD to address non-conforming piccolo duct bleed holes, which could lead to degradation of the wing anti-ice protection of the leading edge of certain slats, and possibly result in airplane handling issues during critical phases of flight. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

Bombardier has issued Service Bulletin 670BA–30–025, dated December 17, 2019. This service information describes, for certain airplanes, procedures for replacement of affected piccolo ducts with new piccolo ducts. This service information also describes, for certain other airplanes, procedures for inspection for the presence of affected wing anti-icing system piccolo ducts, and depending on inspection results, replacement of affected piccolo ducts with new piccolo ducts or contacting the manufacturer for further instruction.

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

FAA's Determination

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

Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously.

Costs of Compliance

The FAA estimates that this proposed AD affects 21 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Up to 16 work-hours × $85 per hour = Up to $1,360	Up to $7,534	Up to $8,894	Up to $186,774.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

MHI RJ Aviation ULC (Type Certificate Previously Held by Bombardier, Inc.): Docket No. FAA–2020–1137; Project Identifier MCAI–2020–00816–T.

(a) Comments Due Date

The FAA must receive comments by February 4, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to MHI RJ Aviation ULC airplanes identified in paragraphs (c)(1) and (2) of this AD, certificated in any category.

(1) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702) and Model CL–600–2C11 (Regional Jet Series 550) airplanes having serial numbers (S/Ns) 10082, 10135, 10141, 10155, 10166, 10173, 10178, 10186, 10249, 10296, and 10327.

(2) Model CL–600–2D24 (Regional Jet Series 900) airplanes having S/Ns 15099, 15102, 15144, 15159, 15201, 15212, 15279, 15396, 15409 through 15413 inclusive, 15415, 15419 through 15427 inclusive, 15430, 15449, and 15453.

(d) Subject

Air Transport Association (ATA) of America Code 30, Ice and Rain Protection.

(e) Reason

This AD was prompted by a report that some piccolo ducts for the wing anti-ice system have bleed holes that do not conform to requirements (such as being undersized, un-burred, or in the wrong location). The FAA is issuing this AD to address non-conforming piccolo duct bleed holes, which could lead to degradation of the wing anti-ice protection of the leading edge of certain slats, and possibly result in airplane handling issues during critical phases of flight.

(f) Compliance

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

(g) Inspection and Corrective Action

Within 8,800 flight hours after the effective date of this AD, inspect for the presence of affected piccolo duct assemblies, as applicable, and replace each affected piccolo duct with a new piccolo duct, as applicable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 670BA–30–025, dated December 17, 2019.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or MHI RJ Aviation ULC's TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

(i) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian AD CF–2020–23, dated June 24, 2020, for related information. This MCAI may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1137.

(2) For more information about this AD, contact Siddeeq Bacchus, Aerospace Engineer, Mechanical Systems and Administrative Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516–228–7362; email *9-avs-nyaco-cos@faa.gov.*

(3) For service information identified in this AD, contact MHI RJ Aviation ULC, 12655 Henri-Fabre Blvd., Mirabel, Québec J7N 1E1 Canada; Widebody Customer Response Center North America toll-free telephone +1–844–272–2720 or direct-dial telephone +1–514–855–8500; fax +1–514–855–8501; email *thd.crj@mhirj.com;* internet *https://mhirj.com.* You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

Issued on December 15, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–27907 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1136; Project Identifier MCAI–2020–01301–R]

RIN 2120–AA64

Airworthiness Directives; Airbus Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus Helicopters Model AS332L, AS332L1, AS332C, and AS332C1 helicopters. This proposed AD was prompted by the failure of a second stage planet gear installed in the main gearbox (MGB). This proposed AD would require identifying the part number of each second stage planet gear assembly installed in the MGB, replacing an MGB having certain second stage planet gear assembly part numbers with a serviceable MGB, modifying the helicopter by installing a full flow magnetic plug (FFMP), repetitively inspecting the FFMP and the MGB bottom housing and conical housing for metal particles, analyzing any metal particles that are found, and applying corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by February 4, 2021.

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

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For material that will be incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. It is also available in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1136.

Examining the AD Docket

You may examine the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1136; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5538; email *mahmood.g.shah@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include ''Docket No. FAA–2020–1136; Project Identifier MCAI–2020–01301–R'' at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *http://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this proposal.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5538; email *mahmood.g.shah@faa.gov.* Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0022R1, dated September 18, 2020 (EASA AD 2020–0022R1) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for all Airbus Helicopters Model AS332L, AS332L1, AS332C, and AS332C1 helicopters. This proposed AD was prompted by the failure of a second stage planet gear installed in the MGB of an Airbus Helicopters Model EC225LP helicopter. Airbus Helicopters Model AS332L, AS332L1, AS332C, and AS332C1 helicopters have a similar design to the affected Model EC225LP helicopter, therefore, these models may be subject to the unsafe condition revealed on the Model EC225LP helicopter. The FAA is proposing this AD to address failure of a second stage planet gear installed in the MGB, which could result in failure of the MGB and subsequent loss of control of the helicopter. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0022R1 describes procedures for identifying the part number of each second stage planet gear assembly installed in the MGB, replacing a MGB having certain second stage plane gear assembly part numbers with a serviceable MGB, modifying the helicopter by installing an FFMP, repetitively inspecting the FFMP and the MGB bottom housing and conical housing for metal particles, analyzing any metal particles that are found, and applicable corrective actions. The corrective actions include replacing an affected MGB with a serviceable MGB.

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

FAA's Determination and Requirements of This Proposed AD

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

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in EASA AD 2020–0022R1, described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2020–0022R1 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2020–0022R1 in its entirety, through that incorporation, except for any differences

identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0022R1 that is required for compliance with EASA AD 2020–0022R1 will be available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1136 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this proposed AD affects 11 helicopters of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
8.50 work-hours × $85 per hour = $722.50	$17,625	$18,347.50	$201,822.50

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS

Labor cost	Parts cost	Cost per product
40.50 work-hour × $85 per hour = $3,442.50	$275,000 (overhauled part)	$278,442.50

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected operators. The FAA does not control warranty coverage for affected operators. As a result, the FAA has included all known costs in the cost estimate.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Airbus Helicopters: Docket No. FAA–2020–1136; Project Identifier MCAI–2020–01301–R.

(a) Comments Due Date

The FAA must receive comments by February 4, 2021.

(b) Affected Airworthiness Directives (ADs)

None.

(c) Applicability

This AD applies to all Airbus Helicopters Model AS332L, AS332L1, AS332C, and AS332C1 helicopters, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 6320, Main Rotor Gear Box.

(e) Reason

This AD was prompted by the failure of a second stage planet gear installed in the main gearbox (MGB). The FAA is issuing this AD to address failure of an MGB second stage planet gear, which could result in failure of the MGB and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in

accordance with, European Union Aviation Safety Agency (EASA) AD 2020–0022R1, dated September 18, 2020 (EASA AD 2020–0022R1).

(h) Exceptions to EASA AD 2020–0022R1

(1) Where EASA AD 2020–0022R1 refers to March 30, 2018 (the effective date of EASA AD 2018–0066, dated March 23, 2018) or February 21, 2020 (the effective date of EASA AD 2020–0022, dated February 21, 2020), this AD requires using the effective date of this AD.

(2) The ''Remarks'' section of EASA AD 2020–0022R1 does not apply to this AD.

(3) Where EASA AD 2020–0022R1 refers to flight hours (FH), this AD requires using hours time-in-service.

(4) Where the service information referred to in paragraphs (5) and (6) of EASA AD 2020–0022R1 specifies to perform a metallurgical analysis and contact the manufacturer if unsure about the characterization of the particles collected, this AD does not require contacting the manufacturer to determine the characterization of the particles collected.

(5) Although the service information referred to in paragraph (6) of EASA AD 2020–0022R1 specifies that if any 16NCD13 particles are found send a 1-liter sample of oil to the manufacturer, this AD does not require that action.

(6) Although the service information referenced in EASA AD 2020–0022R1 specifies to discard certain parts, this AD does not include that requirement.

(7) Although the service information referenced in EASA AD 2020–0022R1 specifies returning certain parts to the manufacturer, this AD does not require that action.

(8) Although the service information referenced in EASA AD 2020–0022R1 specifies to contact the manufacturer if certain specified criteria are exceeded, this AD does not include that requirement.

(9) Although the service information referenced in EASA AD 2020–0022R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(10) Although the service information referenced in EASA AD 2020–0022R1 specifies to watch a video for removing the grease from the FFMP, using a cleaning agent, and collecting particles, this AD does not include that requirement.

(11) Where EASA AD 2020–0022R1 requires actions after the last flight of the day or ''ALF,'' this AD requires those actions before the first flight of the day.

(i) Special Flight Permit

Special flight permits may be issued in accordance with 14 CFR 21.197 and 21.199 to operate the helicopter to a location where the helicopter can be modified (if the operator elects to do so), provided no passengers are onboard.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Strategic Policy Rotorcraft Section, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the Strategic Policy Rotorcraft Section, send it to: Manager, Strategic Policy Rotorcraft Section, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817–222–5110; email *9-ASW-FTW-AMOC-Requests@faa.gov.*

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

(k) Related Information

(1) For EASA AD 2020–0022R1, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.* You may view this material at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1136.

(2) For more information about this AD, contact Mahmood Shah, Aviation Safety Engineer, Fort Worth ACO Branch, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone 817 222 5538; email *mahmood.g.shah@faa.gov.*

Issued on December 15, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28026 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 169

[Docket No. FDA–2020–N–1807]

RIN 0910–AI16

French Dressing; Proposed Revocation of a Standard of Identity

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA or we) proposes to revoke the standard of identity for French dressing. This action, in part, responds to a citizen petition submitted by the Association for Dressings and Sauces (ADS). We tentatively conclude that this standard no longer promotes honesty and fair dealing in the interest of consumers. Revocation of the standard of identity for French dressing could provide greater flexibility in the product's manufacture, consistent with comparable, nonstandardized foods available in the marketplace.

DATES: Submit either electronic or written comments on the proposed rule by March 22, 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 March 22, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 22, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as

well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–1807 for ''French Dressing; Proposed Revocation of a Standard of Identity.'' 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.'' We will review this copy, including the claimed confidential information, in our 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:

Andrea Krause, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2371.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

A. Purpose of the Proposed Rule

This proposed rule, if finalized, would revoke the standard of identity for French dressing. This action, in part, responds to a citizen petition submitted by the Association for Dressings and Sauces (ADS) (petition). We tentatively conclude that the standard of identity for French dressing no longer promotes honesty and fair dealing in the interest of consumers and revoking the standard could provide greater flexibility in the product's manufacture, consistent with comparable, nonstandardized foods available in the marketplace.

B. Summary of the Major Provision of the Proposed Rule

This proposed rule, if finalized, would revoke the standard of identity for French dressing.

C. Legal Authority

We are issuing this proposed rule to revoke the standard of identity for French dressing consistent with our authority under of the Federal Food, Drug, and Cosmetic Act (FD&C Act), which directs the Secretary of Health and Human Services (Secretary) to issue regulations fixing and establishing for any food a reasonable definition and standard of identity, quality, or fill of container whenever, in the Secretary's judgment, such action will promote honesty and fair dealing in the interest of consumers.

D. Costs and Benefits

The proposed rule would affect manufacturers of dressings for salad, and would not require any of the affected firms within the industry to change their manufacturing practices. Our analysis of current food manufacturing practices and the petition to revoke the standard indicate that revoking the standard of identity could provide benefits in terms of additional flexibility and the opportunity for innovation to manufacturers. The potential for innovation is evidenced by the growing variety of dressings for salads on the market that are formulated to meet consumers' preferences and needs. Therefore, we tentatively conclude that the proposed rule to revoke the standard of identity for French dressing would, if finalized, provide social benefits at no cost to the respective industries.

II. Background

Section 401 of the FD&C Act (21 U.S.C. 341) directs the Secretary to issue regulations fixing and establishing for any food a reasonable definition and standard of identity, quality, or fill of container whenever, in the Secretary's judgment, such action will promote honesty and fair dealing in the interest of consumers. The purpose of these standards is to protect consumers against economic adulteration and reflect consumers' expectations about food.

In the **Federal Register** of August 12, 1950 (15 FR 5227), we established a standard of identity for French dressing. We later amended that standard of identity in the **Federal Register***s* of May 10, 1961 (26 FR 4012), February 12, 1964 (29 FR 2382), February 1, 1967 (32 FR 1127 at 1128), May 18, 1971 (36 FR 9010), and November 8, 1974 (39 FR 39554) to allow the use of certain ingredients in French dressing. We also re-designated the French dressing standard of identity as 21 CFR 169.115 (42 FR 14481, March 15, 1977).

We received a citizen petition from the ADS asking us, in part, to revoke the standard of identity for French dressing (Citizen Petition from the Association for Dressings and Sauces, dated January 13,1998, submitted to the Division of Dockets Management, Food and Drug Administration, Docket No. FDA–1998–P–0669 (''petition'')). We are issuing this proposed rule, in part, in response to the petitioner's request.

III. ADS Citizen Petition and Grounds

The petition asks us to revoke the standard of identity for French dressing (petition at page 1).

The petition states that there has been a proliferation of nonstandardized pourable dressings for salads with respect to flavors (Italian, Ranch, cheese, fruit, peppercorn, varied vinegars, and other flavoring concepts) and composition (including a wide range of reduced fat, ''light,'' and fat-free dressings) (petition at page 3). The French dressing standard of identity,

according to the petition, no longer serves as a benchmark for other dressings because of the wide variation in composition to meet consumer interests (id.). Instead, the petition claims that the standard of identity has become marginalized and restricts innovation (id.). Therefore, the petition states that the French dressing standard of identity no longer promotes honesty and fair dealing in the interest of consumers (id.).

IV. Description of the Proposed Rule

We have reviewed the petition and tentatively conclude that the standard of identity for French dressing no longer promotes honesty and fair dealing in the interest of consumers. Therefore, we propose to revoke the French dressing standard of identity at 21 CFR 169.115.

When the standard of identity was established in 1950, French dressing was one of three types of dressings we identified (15 FR 5227). We generally characterized the dressings as containing a fat ingredient, an acidifying ingredient, and seasoning ingredients. The French dressing standard allowed for certain flexibility in manufacturers' choice of oil, acidifying ingredients, and seasoning ingredients. Tomatoes or tomato-derived ingredients were among the seasoning ingredients permitted, but not required. Amendments to the standard since 1950 have permitted the use of additional ingredients, such as any safe and suitable color additives that impart the color traditionally expected (39 FR 39543 at 39554–39555).

Most, if not all, products currently sold under the name ''French dressing'' contain tomatoes or tomato-derived ingredients and have a characteristic red or reddish-orange color. They also tend to have a sweet taste. Consumers appear to expect these characteristics when purchasing products represented as French dressing. Thus, it appears that, since the establishment of the standard of identity, French dressing has become a narrower category of products than prescribed by the standard. These products maintain the above characteristics without a standard of identity specifically requiring them.

Additionally, French dressing products are manufactured and sold in lower-fat varieties that contain less than the minimum amount of vegetable oil (35% by weight) required by 21 CFR 169.115(a). We are unaware of any evidence that consumers are deceived or misled by the reduction in vegetable oil when these varieties are sold under names including terms such as ''fat free'' or ''low-fat.'' By contrast, these varieties appear to accommodate consumer preferences and dietary restrictions.

Therefore, after considering the petition and related information, we tentatively conclude that the standard of identity for French dressing no longer promotes honesty and fair dealing in the interest of consumers consistent with section 401 of the FD&C Act. We are interested in any information, including data and studies, on consumer expectations regarding French dressing and whether the specifications in § 169.115 are necessary to ensure that French dressing meets these expectations.

In addition, our proposal to revoke the standard of identity for French dressing is consistent with Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs'' (January 30, 2017), and Executive Order 13777, ''Enforcing the Regulatory Reform Agenda'' (February 24, 2017). Executive Order 13771 and Executive Order 13777, taken together, direct agencies to offset the number and cost of new regulations by identifying prior regulations that can be eliminated because, for example, they are outdated, unnecessary, or ineffective. The proposed revocation also is consistent with section 6 of Executive Order 13563, ''Improving Regulation and Regulatory Review'' (January 18, 2011), which requires agencies to periodically conduct retrospective analyses of existing regulations to identify those ''that might be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them'' accordingly.

V. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all 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, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' We believe that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because we have tentatively concluded, as set forth below, that this rule would not generate significant compliance costs, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $156 million, using the most current (2019) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

The proposed rule would affect manufacturers of dressings for salad. Our review of supermarket scanner data for the year 2018 shows that a total of 227 distinct pourable products sold as ''French dressing'' that year were manufactured by 53 firms. The proposed rule would not require any of the affected firms to change their manufacturing practices. Our analysis of current food manufacturing practices and the petition to revoke the standard indicate that revoking the standard of identity could provide benefits in terms of additional flexibility to the manufacturers of French dressing products. Revoking the standard of identity could provide an opportunity for innovation and the introduction of new French dressing products, providing benefits to both consumers and industry. Therefore, we tentatively conclude that the proposed rule, if finalized, would provide social benefits at little to no cost to the respective industries (Table 1).

TABLE 1—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered	
Benefits:							
Annualized Monetized $millions/year	$0	$0	$0	2018	7 3		
Annualized Quantified					7 3		
Qualitative							Benefits to manufacturers would be from additional flexibility, and the opportunity for innovation regarding, French dressing products.
Costs:							
Annualized Monetized $millions/year	0	0	0	2018	7 3		
Annualized Quantified					7 3		
Qualitative.							
Transfers:							
Federal Annualized Monetized $millions/year.					7 3		
From/To	From:			To:			
Other Annualized Monetized $millions/year					7 3		
From/To	From:			To:			
Effects:							
State, Local or Tribal Government:							
Small Business:							
Wages:							
Growth:							

In line with Executive Order 13771, in Table 2 we estimate present and annualized values of costs and cost savings over an infinite time horizon. Based on lack of costs, this proposed rule would be considered a deregulatory action under E.O. 13771.

TABLE 2—E.O. 13771 SUMMARY TABLE

[in $ millions 2016 dollars, over an infinite time horizon]

Item	Primary estimate (7%)	Lower estimate (7%)	Upper estimate (7%)
Present Value of Costs	$0	$0	$0
Present Value of Cost Savings	0	0	0
Present Value of Net Costs	0	0	0
Annualized Costs	0	0	0
Annualized Cost Savings	0	0	0
Annualized Net Costs	0	0	0

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 1) and at *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

VI. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

VII. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. We solicit comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

VIII. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or

on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

IX. Analysis of Environmental Impact

We have tentatively determined under 21 CFR part 25.32(a) that this action, if finalized, is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

X. Reference

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov.* FDA has verified the website address, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. French Dressing; Proposed Revocation of a Standard of Identity: Preliminary Regulatory Impact Analysis, Initial Regulatory Flexibility Analysis, Unfunded Mandates Reform Act Analysis, available at: *http://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

List of Subjects in 21 CFR Part 169

Food grades and standards.

Therefore, under the Federal Food, Drug, and Cosmetic Act, it is proposed that 21 CFR part 169 be amended as follows:

PART 169—FOOD DRESSINGS AND FLAVORINGS

■ 1. The authority citation for 21 CFR part 169 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 343, 348, 371, 379e.

§ 169.115 [Removed]

■ 2. Remove § 169.115.

Dated: December 2, 2020

Stephen M. Hahn,

Commissioner of Food and Drugs.

Dated: December 14, 2020

Alex M. Azar II,

Secretary,Department of Health and Human Services.

[FR Doc. 2020–27822 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1310

[Docket No. DEA–542]

Designation of 3,4-MDP-2-P Methyl Glycidate (PMK Glycidate), 3,4-MDP-2-P Methyl Glycidic Acid (PMK Glycidic Acid), and Alpha-Phenylacetoacetamide (APAA) as List I Chemicals

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration is proposing to designate 3,4-MDP-2-P methyl glycidate (PMK glycidate), including its optical and geometric isomers; 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid), including its salts, optical and geometric isomers, and salts of isomers; and *alpha*-phenylacetoacetamide (APAA), including its optical isomers, as list I chemicals under the Controlled Substances Act (CSA). PMK glycidate and PMK glycidic acid are used in and are important to the manufacture of the schedule I controlled substance 3,4-methylenedioxymethamphetamine (MDMA) and other ''ecstasy''-type substances. APAA is used in and is important to the manufacture of the schedule II controlled substances amphetamine and methamphetamine. If finalized, this action would subject handlers (manufacturers, distributors, importers, and exporters) of PMK glycidate, PMK glycidic acid, and APAA to the chemical regulatory provisions of the CSA and its implementing regulations. This action does not propose the establishment of a threshold for domestic and international transactions of these chemicals. As such, all transactions involving any of these chemicals, regardless of size, would be regulated. In addition, this action proposes that chemical mixtures containing any of these three chemicals would not be exempt from regulatory requirements at any concentration. Therefore, all transactions of chemical mixtures containing any quantity of PMK glycidate, PMK glycidic acid, or APAA would be regulated.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before February 19, 2021. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–542'' on all correspondence, including any attachments.

Electronic comments: The Drug Enforcement Administration (DEA) encourages all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Please go to *http://www.regulations.gov/* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *http://www.regulations.gov/.* If you have received a Comment Tracking Number, your comment has been successfully submitted and there is no need to resubmit the same comment.

Paper comments: Paper comments that duplicate the electronic submission are not necessary and are discouraged. Should you wish to mail a paper comment *in lieu of* an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Terrence L. Boos, Drug and Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3249.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record. They will, unless reasonable cause is given, be made available by the Drug Enforcement Administration (DEA) for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place

all of the personal identifying information you do not want publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment.

Comments containing personal identifying information and confidential business information identified as directed above will generally be made publicly available in redacted form. If a comment has so much confidential business information or personal identifying information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *http://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document and supplemental information to this proposed rule are available at *http://www.regulations.gov* for easy reference.

Legal Authority

The Controlled Substances Act (CSA) gives the Attorney General the authority to specify, by regulation, a chemical as a ''list I chemical;'' this term refers to a chemical that is used in manufacturing a controlled substance in violation of subchapter I (Control and Enforcement) of the CSA and is important to the manufacture of the controlled substance.[1] Pursuant to 28 CFR 0.100(b), the Attorney General has delegated his authority to so designate list I chemicals to the Administrator of DEA (Administrator). CSA regulations permit the Administrator to add a substance as a listed chemical by publishing a final rule in the **Federal Register** following the publication of a notice of proposed rulemaking that has provided at least 30 days for public comments.[2] The current list of all list I chemicals is available in 21 CFR 1310.02(a).

In addition, the United States is a Party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention), December 20, 1988, 1582 U.N.T.S. 95. Under Article 12 of the 1988 Convention, when the United States receives notification that a chemical has been added to Table I or Table II (tables annexed to such Convention), the United States must take measures it deems appropriate to monitor the manufacture and distribution of that chemical within the United States and to prevent its diversion, including measures related to international trade.

Background

With the growing problem of illicit drug production, the issue of precursor chemical control has gained global attention. International efforts to prevent the illicit production of controlled substances and international control of precursors have made significant progress with this problem. Article 12 of the 1988 Convention established International controls on precursors. This Convention established two categories of controlled illicit drug precursor substances: Table I and Table II.[3] Two international entities have played a crucial role in this effort: The United Nations Commission on Narcotic Drugs (CND) and the International Narcotics Control Board (INCB).

In response to domestic and international controls on precursors to the schedule I substance 3,4-methylenedioxymethamphetamine (MDMA), and schedule II substances amphetamine and methamphetamine, clandestine laboratory operators have continued to explore alternate methods to produce these illicit drugs, including the development of their own immediate precursors (''designer precursors'') and diversion of other precursors (pre-precursors) to produce these designer precursors. These clandestine laboratory operators often use 3,4-MDP-2-P methyl glycidate (PMK glycidate) and 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) as precursors to MDMA, and other ''ecstasy''-type substances, and *alpha*-phenylacetoacetamide (APAA) as a precursor to amphetamine and methamphetamine.

''Precursor chemicals'' are generally defined as chemical substances that become incorporated, at the molecular level, into a final product (including a controlled substance); it is a building block used to manufacture the final product/controlled substance. PMK glycidate and PMK glycidic acid are building blocks for the manufacture of the schedule I controlled substance MDMA, while APAA serves as a building block for the manufacture of the schedule II substance Phenyl-2-propanone (P2P), and subsequent final manufacture of the schedule II substances amphetamine and methamphetamine. All these chemicals meet the definition of list I chemicals since they are important to the manufacture of these controlled substances.

In a letter dated May 23, 2019, the Secretary-General of the United Nations, in accordance with Article 12, paragraph 6 of the 1988 Convention, informed the United States Secretary of State that the CND voted to place the chemicals PMK glycidate (and all stereoisomers), PMK glycidic acid (and all stereoisomers), and APAA (and all optical isomers) in Table I of the 1988 Convention (CND Decisions 62/10, 62/11, and 62/12, respectively) at its 62nd Session on March 19, 2019. As a Party to the 1988 Convention, the United States is obligated to control these substances pursuant to Article 12 of the 1988 Convention, as described in the above Legal Authority section. By designating PMK glycidate (and its optical and geometric isomers), PMK glycidic acid (and its salts, optical and geometric isomers, and salts of isomers), and APAA (and its optical isomers) as list I chemicals, the United States will fulfill its obligations under the 1988 Convention.[4]

PMK glycidate, PMK glycidic acid, and APAA are close chemical relatives of controlled list I precursor 3,4 methylenedioxyphenyl-2-propanone (3,4-MDP-2-P), and have been made specifically to circumvent existing precursor controls. DEA has not identified any known legitimate uses for these chemicals, other than possible research purposes. The first two substances, PMK glycidate and PMK glycidic acid, are closely related in chemical structure to precursors of MDMA (schedule I) and other ''ecstasy''-type substances in schedule I. APAA is a precursor of schedule II controlled substances amphetamine and methamphetamine. All three chemicals are used for the illicit manufacture of two precursors listed in Table I of the 1988 Convention (3,4-MDP-2-P and 1-phenyl-2-propanone (P-2-P)). For years, countries have reported the illicit trafficking and use of these chemicals in manufacturing controlled substances,

[1] 21 U.S.C. 802(34) and 871(b).

[2] 21 CFR 1310.02(c).

[3] Table I and Table II are amended from time to time in accordance with Article 12 of the 1988 Convention.

[4] With this scheduling action, if finalized, DEA would control the same set of chemicals specified by the CND. However, DEA uses more precise terms that relate to the specific chemical and variations that can actually exist.

with increasing frequency and amounts reported in recent years.[5]

In making its assessments pursuant to Article 12, paragraph 4, of the 1988 Convention, the CND found that there was no known legitimate manufacture of, and trade in, any of the three substances, and that their use was limited in small amounts to research, development, and laboratory analytical purposes. The inclusion of these substances in Table I would require Governments, as parties to the 1988 Convention, to establish pre-export notifications as a means of monitoring shipments entering their territories. Therefore, the CND voted to include PMK glycidate (all four stereoisomers), PMK glycidic acid (all four stereoisomers), and APAA (including its optical isomers) in Table I of the 1988 Convention.

Proposed Designation of PMK Glycidate, PMK Glycidic Acid, and APAA as List I Chemicals

For the reasons discussed above, the Acting Administrator of DEA finds that PMK glycidate, PMK glycidic acid, and APAA are used in the manufacture of a controlled substance in violation of the CSA, and are important to the manufacture of these controlled substances. Therefore, the Acting Administrator proposes the designation of PMK glycidate, PMK glycidic acid, and APAA as list I chemicals.

If finalized, handlers (manufacturers, distributors, importers, and exporters) of these chemicals would become subject to the chemical regulatory provisions of the CSA, including 21 CFR parts 1309, 1310, 1313, and 1316. Since even a small amount of these chemicals can potentially yield a significant amount of controlled substances, this action does not propose the establishment of a threshold for domestic, import, or export transactions in accordance with the provisions of 21 CFR 1310.04(g). Rather, DEA is proposing that all transactions, regardless of size, will be regulated transactions as defined in 21 CFR 1300.02(b). As such, if finalized, all PMK glycidate, PMK glycidic acid, and APAA transactions will be subject to recordkeeping, reporting, import and export controls, and other CSA chemical regulatory requirements. In addition, each regulated bulk manufacturer must submit manufacturing, inventory, and use data to DEA's Diversion Control Division, Drug and Chemical Evaluation section on an annual basis, in accordance with 21 CFR 1310.05(d).

Chemical Mixtures of PMK Glycidate, PMK Glycidic Acid or APAA

This rulemaking also proposes that chemical mixtures containing any of these three chemicals are subject to regulatory requirements at any concentration unless a manufacturer submits to DEA an application for exemption of a chemical mixture, DEA accepts the application for filing, and DEA exempts the chemical mixture in accordance with 21 CFR 1310.13 (Exemption of chemical mixtures; application). Since even a small amount of these three chemicals can potentially yield a significant amount of controlled substances, DEA believes that regulation of chemical mixtures containing any amount of these three chemicals is necessary to prevent their illicit extraction, isolation, and use. Therefore, all chemical mixtures containing any quantity of these three chemicals would be subject to CSA control. This rule proposes modification of the ''Table of Concentration Limits'' in 21 CFR 1310.12(c) to reflect the fact that chemical mixtures containing any amount of these three chemicals are subject to CSA chemical control provisions.

Application Process for Exemption of Chemical Mixtures

DEA has implemented an application process to exempt certain chemical mixtures from the requirements of the CSA and its implementing regulations.[6] Manufacturers may submit an application for exemption for those mixtures that do not meet the criteria set forth in 21 CFR 1310.12(d) for an automatic exemption. Pursuant to 21 CFR 1310.12(a), DEA may grant an exemption of a chemical mixture, by publishing a final rule in the **Federal Register**, if DEA determines that: (1) The mixture is formulated in such a way that it cannot be easily used in the illicit production of a controlled substance, and (2) the listed chemical or chemicals cannot be readily recovered.

Requirements for Handling List I Chemicals

If finalized as proposed, the designation of these three chemicals as list I chemicals will subject handlers (manufacturers, distributors, importers, and exporters) and proposed handlers to all of the regulatory controls and administrative, civil, and criminal actions applicable to the manufacture, distribution, importation, and exportation of a list I chemical. Upon publication of a final rule, persons potentially handling these three chemicals, including regulated chemical mixtures containing any of these three chemicals, would be required to comply with the following list I chemical regulations:

1. *Registration.* Any person who handles (manufactures, distributes, imports, or exports), or proposes to engage in such handling of, any of these three chemicals or a chemical mixture containing any of these three chemicals must obtain a registration pursuant to 21 U.S.C. 822, 823, 957, and 958. Regulations describing registration for list I chemical handlers are set forth in 21 CFR part 1309. DEA regulations require separate registrations for manufacturing, distributing, importing, and exporting of any of these three chemicals.[7] Further, a separate registration is required for each principal place of business at one general physical location where list I chemicals are manufactured, distributed, imported, or exported by a person.[8]

DEA notes that under the CSA, ''warehousemen'' are not required to register and may lawfully possess list I chemicals, if the possession of those chemicals is in the usual course of business or employment.[9] Under DEA implementing regulations, the warehouse in question must receive the list I chemical from a DEA registrant, shall only distribute the list I chemical back to the DEA registrant, and registered location from which it was received.[10] A warehouse that distributes list I chemicals to persons other than the registrant and registered location from which they were obtained is conducting distribution activities and is required to register as such.

Upon publication of a final rule, any person manufacturing, distributing, importing, or exporting any of these three chemicals or a chemical mixture containing any of these three chemicals will become subject to the registration requirement under the CSA. DEA recognizes, however, that it is not possible for persons subject to the registration requirement to immediately complete and submit an application for

[5] Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 2018 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (E/INCB/2018/4, Released March 5, 2019)

[6] 21 CFR 1310.13 specifies that this chemical mixture is a chemical mixture consisting of two or more chemical components, at least one of which is a list I or list II chemical..

[7] 21 CFR 1309.21.

[8] 21 CFR 1309.23(a). See also 21 U.S.C. 822(e)(1) with separate registration requirements pertaining to manufacturing or distributing a list I chemical.

[9] 21 U.S.C. 822(c)(2) and 21 U.S.C. 957(b)(1)(B).

[10] See 21 CFR 1309.23(b)(1).

registration and for DEA to immediately issue registrations for those activities. Therefore, to allow continued legitimate commerce in these three chemicals, DEA is proposing to establish in 21 CFR 1310.09 a temporary exemption from the registration requirement for persons desiring to engage in activities with any of these three chemicals, provided that DEA receives a properly completed application for registration on or before 30 days after publication of a final rule implementing regulations regarding these three chemicals. The temporary exemption for such persons will remain in effect until DEA takes final action on their application for registration or application for exemption of a chemical mixture.

The temporary exemption applies solely to the registration requirement; all other chemical control requirements, including recordkeeping and reporting, would become effective on the effective date of the final rule. Therefore, all transactions of these three chemicals and chemical mixtures containing any of these three chemicals will be regulated while an application for registration or exemption is pending. This is necessary because failing to regulate these transactions could result in increased diversion of chemicals desirable to drug traffickers.

Additionally, the temporary exemption does not suspend applicable federal criminal laws relating to these three chemicals, nor does it supersede State or local laws or regulations. All handlers of any of these three chemicals must comply with applicable State and local requirements in addition to the CSA regulatory controls.

2. *Records and Reports.* Every DEA registrant would be required to maintain records and submit reports to DEA with respect to these three chemicals pursuant to 21 U.S.C. 830(a) and (b)(1) and (2) and in accordance with 21 CFR 1310.04 and 1310.05. Pursuant to 21 CFR 1310.04(a), a record must be made and maintained for two years after the date of a transaction involving a listed chemical, provided the transaction is a regulated transaction.

Each regulated bulk manufacturer of a listed chemical is required to submit manufacturing, inventory, and use data on an annual basis.[11] Existing standard industry reports containing the required information will be acceptable, provided the information is separate or readily retrievable from the report.

The CSA and its implementing regulations require that each regulated person must report to DEA any regulated transaction involving an extraordinary quantity of a listed chemical, an uncommon method of payment or delivery, or any other circumstance that the regulated person believes may indicate that the listed chemical will be used in violation of subchapter I of the CSA. In addition, regulated persons must report any proposed regulated transaction with a person whose description or other identifying characteristics DEA has previously furnished to the regulated person, any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person, and any in-transit loss in which the regulated person is the supplier.[12]

3. *Importation and Exportation.* All importation and exportation of these three chemicals would need to be in compliance with 21 U.S.C. 957, 958, and 971 and in accordance with 21 CFR part 1313.

4. *Security.* All applicants and registrants would be required to provide effective controls against theft and diversion in accordance with 21 CFR 1309.71–1309.73.

5. *Administrative Inspection.* Places, including factories, warehouses, or other establishments and conveyances, where registrants or other regulated persons may lawfully hold, manufacture, distribute, or otherwise dispose of a list I chemical or where records relating to those activities are maintained, are controlled premises as defined in 21 U.S.C. 880(a) and 21 CFR 1316.02(c). The CSA allows for administrative inspections of these controlled premises as provided in 21 CFR part 1316, subpart A. 21 U.S.C. 88).

6. *Liability.* Any activity involving these three chemicals not authorized by, or in violation of, the CSA would be unlawful, and may subject the person to administrative, civil, and/or criminal action.

Regulatory Analyses

Executive Orders 12866, 13563, and 13771, Regulatory Planning and Review, Improving Regulation and Regulatory Review, and Reducing Regulation and Controlling Regulatory Costs

This proposed rule was developed in accordance with the principles of Executive Orders (E.O.) 12866, 13563, and 13771. E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). E.O. 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866. E.O. 12866 classifies a ''significant regulatory action,'' requiring review by the Office of Management and Budget (OMB), as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. DEA has determined that this proposed rule is not a ''significant regulatory action'' under E.O. 12866, section 3(f).

E.O. 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation.[13] In furtherance of this requirement, E.O. 13771 requires that the new incremental costs associated with new regulations, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.[14] According to guidance provided by OMB, the requirements of E.O. 13771 only apply to each new ''significant regulatory action that . . . imposes costs.''[15] This proposed rule is not expected to be an E.O. 13771 regulatory action because this proposed rule is not significant under E.O. 12866.

If finalized as proposed, PMK glycidate, PMK glycidic acid, and APAA will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importing, and exporting of list I chemicals. The first two chemicals, PMK glycidate and PMK glycidic acid, are closely related in chemical structure to precursors of MDMA and other ''ecstasy''-type substances, as discussed in the above background section. APAA is a

[11] 21 CFR 1310.05(d).

[12] 21 U.S.C. 830(b) and 21 CFR 1310.05(a) and (b).

[13] Sec. 2(a).

[14] Sec. 2(c).

[15] OMB Guidance Implementing Executive Order 13771 titled ''Reducing Regulation and Controlling Regulatory Costs'' (April 5, 2017).

precursor of amphetamine and methamphetamine. All three chemicals are highly suitable for the illicit manufacture of precursors listed in Table I of the 1988 Convention (3,4-methylenedioxyphenyl-2-propanone (3,4-MDP-2-P) and 1-phenyl-2-propanone (P-2-P)). As noted earlier, incidents of illicit manufacture and tracking of these three chemicals have been reported for many years to the INCB, with an increase in the frequency and amounts reported in recent years.

In making its assessment pursuant to Article 12, paragraph 4 of the 1988 Convention, the CND found that there was no known legitimate manufacture of and trade in any of the three chemicals and that their use was limited, in small amounts, to research, development, laboratory, and analytical purposes. DEA also searched information in the public domain for legitimate uses of these three chemicals, and likewise, did not identify any known legitimate use for any of these chemicals, other than possibly for research purposes. DEA evaluated the costs and benefits of this proposed action.

DEA cannot rule out the possibility that minimal quantities of PMK glycidate, PMK glycidic, or APAA are used for the manufacturing of legitimate pharmaceutical substances. DEA welcomes any public comment on these quantities and their economic significance.

Costs

As stated above, the only use for PMK glycidate and PMK glycidic acid is as intermediaries for the manufacturing of MDMA and other ''ecstasy''-type substances. Similarly, the only use for APAA is as a precursor for amphetamine and methamphetamine. Any manufacturer, distributor, importer, or exporter of any of these three chemicals for legitimate pharmaceutical commerce, if they exist at all, would incur costs if this proposed rule were finalized. The primary costs associated with this proposed rule are the annual registration fees ($3,047 for manufacturers and $1,523 for distributors, importers, and exporters). Additionally, any manufacturer that uses any of these three chemicals for legitimate pharmaceutical purposes is likely to already be registered with DEA and have all security and other handling processes in place, resulting in minimal cost.

DEA has identified ten domestic suppliers of one or more of these chemicals, PMK glycidate, PMK glycidic acid, and APAA; nine of these suppliers are not currently registered with DEA to handle list I chemicals. The amount of these three chemicals distributed by these suppliers is unknown. It is common for chemical distributors to have items on their catalog while not actually having any material level of sales. Based on the discussion above, DEA believes any quantity of sales from these distributors for legitimate pharmaceutical purposes is minimal. If this proposed rule is finalized, suppliers for the legitimate use of PMK glycidate, PMK glycidic acid, and APAA are expected to choose the least-cost option, and stop selling the minimal quantities, if any, of PMK glycidate, PMK glycidic acid, and APAA, rather than incur the registration cost. Therefore, DEA estimates that the cost of foregone sales is minimal; and thus, the cost of this proposed rule is minimal. DEA welcomes any public comment regarding this estimate.

This analysis excludes consideration of any economic impact to those businesses that facilitate the manufacturing and distribution of PMK glycidate, PMK glycidic acid, or APAA for the illicit production of amphetamine, methamphetamine, MDMA, or other ''ecstasy''-type substances.

Benefits

Controlling PMK glycidate, PMK glycidic acid, and APAA is expected to prevent, curtail, and limit the unlawful manufacture and distribution of amphetamine, methamphetamine, and MDMA and other ''ecstasy''-type substances. This action is also expected to assist in the prevention of possible theft or diversion of PMK glycidate, PMK glycidic acid, and APAA from any legitimate firms. DEA also believes control is necessary to prevent unscrupulous chemists from synthesizing PMK glycidate, PMK glycidic acid, and APAA and selling it (as an unregulated material) through the internet and other channels to individuals who may wish to acquire unregulated intermediary chemicals for the purpose of manufacturing illicit amphetamine, methamphetamine, or MDMA or other ''ecstasy''-type substances.

In summary, DEA conducted a qualitative analysis of costs and benefits. DEA believes this proposed action, if finalized, will minimize the diversion of PMK glycidate, PMK glycidic acid, and APAA. DEA believes the market for PMK glycidate, PMK glycidic acid, and APAA for the legitimate pharmaceutical purposes is minimal. Thus, any potential cost resulting from this regulation is minimal. Therefore, the estimated economic impact of this proposed rule is less than $100 million in any given year.

Executive Order 12988, Civil Justice Reform

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This proposed rulemaking does not have federalism implications warranting the application of E.O. 13132. The proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications warranting the application of E.O. 13175. It does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Regulatory Flexibility Act (RFA)

The Acting Administrator, in accordance with the RFA,[16] has reviewed this proposed rule, and by approving, it certifies that it will not have a significant economic impact on a substantial number of small entities. As discussed above, if finalized as proposed, PMK glycidate, PMK glycidic acid, and APAA will be subject to all of the regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, importation, and exportation of list I chemicals. PMK glycidate and PMK glycidic acid are closely related in chemical structure to precursors of MDMA and other ''ecstasy''-type substances. APAA is a precursor of amphetamine and methamphetamine. All three chemicals are highly suitable for the illicit manufacture of precursors listed in Table I of the 1988 Convention (3,4-methylenedioxyphenyl-2-propanone (3,4-MDP-2-P) and 1-phenyl-2-propanone (P-2-P)). DEA has not

[16] 5 U.S.C. 601–612.

identified any legitimate industrial use for PMK glycidate, PMK glycidic acid, or APAA, other than as intermediary chemicals in the production of amphetamine, methamphetamine, and MDMA or other ''ecstasy''-type substances. Therefore, DEA believes the vast majority, if not all, of PMK glycidate, PMK glycidic acid, and APAA is used for the illicit manufacturing of amphetamine, methamphetamine, and MDMA or other ''ecstasy''-type substances. The primary costs associated with this proposed rule are the annual registration fees ($3,047 for manufacturers and $1,523 for distributors, importers, and exporters). Additionally, any manufacturer that uses PMK glycidate, PMK glycidic acid, or APAA for legitimate pharmaceutical purposes is likely to be already registered with DEA and have all security and other handling processes in place, resulting in minimal cost.

DEA has identified ten domestic suppliers of one or more of the chemicals, PMK glycidate, PMK glycidic acid, and APAA; nine of these suppliers are currently not registered with DEA to handle list I chemicals. All nine non-registered domestic suppliers are affected, and all nine (94.5 percent, based on Small Business Administration size standard for chemical distributors and Statistics of U.S. Businesses data) are estimated to be small entities. The quantity of these three chemicals distributed by these suppliers is unknown. It is common for chemical distributors to have items on their catalog while not actually having any material level of sales. Based on the discussion above, DEA believes any quantity of sales from these distributors for legitimate pharmaceutical purposes is minimal. DEA estimates that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. DEA welcomes any public comment regarding this estimate.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. 1501 *et seq.,* DEA has determined and certifies that this proposed rule would not result in any Federal mandate 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 1 year . . . .'' Therefore, neither a Small Government Agency Plan nor any other action is required under the UMRA.

Paperwork Reduction Act

The proposed action does not impose a new collection of information requirement under the Paperwork Reduction Act, 44 U.S.C. 3501–3521. This proposed action would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. 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.

List of Subjects 21 CFR Part 1310

Drug traffic control, Exports, Imports, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth in the preamble, DEA proposes to amend 21 CFR part 1310 as follows:

PART 1310—RECORDS AND REPORTS OF LISTED CHEMICALS AND CERTAIN MACHINES; IMPORTATION AND EXPORTATION OF CERTAIN MACHINES

■ 1. The authority citation for part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 827(h), 830, 871(b), 890.

■ 2. In § 1310.02 add paragraphs (a)(34) through (36) to read as follows:

§ 1310.02 Substances covered.

* * * * *

(a) * * *

(34) 3,4-MDP-2-P methyl glycidate (PMK glycidate) and its optical and geometric isomers 8535

(35) 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) and its salts, optical and geometric isomers, and salts of isomers 8525

(36) *alpha*-phenylacetoacetamide (APAA) and its optical isomers 8515

■ 3. In § 1310.04:

■ a. Redesignate paragraphs (g)(1)(vii) through (xiii) as paragraphs (g)(1)(x) through (xvi), respectively;

■ b. Redesignate paragraphs (g)(1)(i) through (vi) as paragraphs (g)(1)(ii) through (vii), respectively; and

■ c. Add new paragraphs (g)(1)(i), (viii), and (ix).

The additions read as follows:

§ 1310.04 Maintenance of records.

* * * * *

(g) * * *

(1) * * *

(i) *alpha*-phenylacetoacetamide (APAA) and its optical isomers

* * * * *

(viii) 3,4-MDP-2-P methyl glycidate (PMK glycidate) and its optical and geometric isomers

(ix) 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) and its salts, optical and geometric isomers, and salts of isomers

* * * * *

■ 4. Amend § 1310.09 by adding paragraph (q) to read as follows:

§ 1310.09 Temporary exemption from registration.

* * * * *

(q)(1) Each person required under 21 U.S.C. 822 and 957 to obtain a registration to manufacture, distribute, import, or export regulated forms of 3,4-MDP-2-P methyl glycidate (PMK glycidate), 3,4-MDP-2-P methyl glycidate (PMK glycidate), and *alpha*-phenylacetoacetamide (APAA), including regulated chemical mixtures pursuant to § 1310.12, is temporarily exempted from the registration requirement, provided that DEA receives a properly completed application for registration or application for exemption for a chemical mixture containing regulated forms of 3,4-MDP-2-P methyl glycidate (PMK glycidate), 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid), or *alpha*-phenylacetoacetamide (APAA) pursuant to § 1310.13 on or before (30 days after publication of a rule implementing regulations regarding these three chemicals). The exemption will remain in effect for each person who has made such application until the Administration has approved or denied that application. This exemption applies only to registration; all other chemical control requirements set forth in the Act and parts 1309, 1310, 1313, and 1316 of this chapter remain in full force and effect.

(2) Any person who manufactures, distributes, imports or exports a chemical mixture containing regulated forms of 3,4-MDP-2-P methyl glycidate (PMK glycidate), 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid), or *alpha*-phenylacetoacetamide (APAA) whose application for exemption is subsequently denied by DEA must obtain a registration with DEA. A temporary exemption from the registration requirement will also be provided for those persons whose applications for exemption are denied, provided that DEA receives a properly completed application for registration on or before 30 days following the date of official DEA notification that the application for exemption has been denied. The temporary exemption for such persons will remain in effect until DEA takes final action on their registration application.

■ 5. Amend § 1310.12(c) by adding in alphabetical order entries for 3,4-MDP-

2-P methyl glycidate (PMK glycidate), 3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid), and *alpha*-phenylacetoacetamide (APAA) in the table ''Table of Concentration Limits'' to read as follows:

§ 1310.12 Exempt chemical mixtures.

* * * * *

(c) * * *

TABLE OF CONCENTRATION LIMITS

	DEA chemical code No.	Concentration	Special conditions
* * *		*	* * *
3,4-MDP-2-P methyl glycidate (PMK glycidate) and its optical and geometric isomers.	8535	Not exempt at any concentration.	Chemical mixtures containing any amount of this chemical are not exempt.
3,4-MDP-2-P methyl glycidic acid (PMK glycidic acid) and its salts, optical and geometric isomers, and salts of isomers.	8525	Not exempt at any concentration.	Chemical mixtures containing any amount of this chemical are not exempt.
alpha-phenylacetoacetamide (APAA) and its optical isomers.	8515	Not exempt at any concentration.	Chemical mixtures containing any amount of this chemical are not exempt.
* * *		*	* * *

* * * * *

Timothy J. Shea,

Acting Administrator.

[FR Doc. 2020–26813 Filed 12–18–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 882 and 1270

[Docket No. FDA–2020–N–1519]

RIN 0910–AI41

Revocation of the Regulations for Human Tissue Intended for Transplantation and Human Dura Mater

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is proposing to revoke the regulations for human tissue intended for transplantation and human dura mater recovered prior to May 25, 2005. The proposed revocation does not affect the regulations for human cells, tissues, and cellular and tissue-based products (HCT/Ps) recovered on or after May 25, 2005. FDA is proposing this action because these regulations are obsolete or no longer necessary to achieve public health goals. This action is part of FDA's implementation of Executive Orders 13771 and 13777. Under these Executive Orders, FDA is comprehensively reviewing existing regulations to identify opportunities for repeal, replacement, or modification that will result in meaningful burden reduction, while allowing the Agency to achieve our public health mission and fulfill statutory obligations.

DATES: Submit either electronic or written comments on the proposed rule by March 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 March 8, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 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–2020–N–1519 for ''Revocation of the Regulations for Human Tissue Intended for Transplantation.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' will be 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.gpo.gov/fdsys/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: Shruti Modi, 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.

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I. Executive Summary

A. Purpose of the Proposed Rule

FDA proposes to remove the regulations under part 1270 (21 CFR part 1270), ''Human Tissue Intended for Transplantation'' and § 882.5975 (21 CFR 882.5975), ''Human dura mater.'' These regulations apply to certain tissues recovered prior to May 25, 2005. The Agency does not believe there are currently any tissues intended for transplantation remaining in inventory that were recovered prior to this date and that would be subject to these regulations. Therefore, the regulations under this part are outdated and obsolete. All HCT/Ps recovered on or after May 25, 2005, are subject to the regulations under part 1271 (21 CFR part 1271), ''Human Cells, Tissues, and Cellular and Tissue-Based Products.''

B. Summary of the Major Provisions of the Proposed Rule

The proposed rule would remove part 1270 ''Human Tissue Intended for Transplantation,'' which applies to certain human tissue and to establishments or persons engaged in the recovery, screening, testing, processing, storage, or distribution of human tissue. It would also remove § 882.5975, ''Human dura mater,'' which identifies and classifies Human dura mater recovered prior to May 25, 2005.

C. Legal Authority

FDA is taking this action under the communicable disease provisions of the Public Health Service Act (the PHS Act) and the device provisions of the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

D. Costs and Benefits

Because this proposed rule would not impose any additional burden on the industry, this regulation is not anticipated to result in any compliance costs. The costs and cost savings to FDA resulting from removing an obsolete regulation are expected to be minimal.

II. Background

A. Introduction

On February 24, 2017, Executive Order 13777, entitled ''Enforcing the Regulatory Reform Agenda'' (*https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda,* 82 FR 12285, March 1, 2017) was issued. One of the provisions of the Executive Order requires Agencies to evaluate existing regulations and make recommendations to the Agency head regarding their repeal, replacement, or modification, consistent with applicable law. As part of this initiative, FDA is proposing to revoke certain regulations as specified in this proposed rule.

B. Need for Regulation/History of Rulemaking

FDA regulates articles containing or consisting of human cells or tissues intended for implantation, transplantation, infusion, or transfer into a human recipient. These are defined in § 1271.3(d) as HCT/Ps. Tissues as defined in § 1270.3(j) recovered prior to May 25, 2005, are regulated under part 1270. HCT/Ps recovered on or after May 25, 2005, are subject to the regulations in part 1271. Examples of HCT/Ps include, but are not limited to the following: bone, ligament, skin, cornea, ligament, dura mater, heart valve, hematopoietic stem/progenitor cells derived from peripheral and cord blood, and semen or other reproductive tissue. Vascularized human organs for transplantation are not considered HCT/Ps. FDA currently regulates human dura mater recovered prior to May 25, 2005, under § 882.5975.

In the **Federal Register** of December 14, 1993 (58 FR 65514), FDA published an interim rule (1993 interim rule) for Human Tissue Intended for Transplantation. This rule provided specific donor suitability and testing requirements for certain tissue products. As the use of human tissue for transplantation increased, FDA determined that there was a need for a much more comprehensive set of regulatory requirements that included a broader scope of products. In the **Federal Register** of July 29, 1997 (62 FR 40429), FDA issued a final rule which clarified and modified provisions of the 1993 interim rule.

In the **Federal Register** of March 4, 1997 (62 FR 9721), FDA announced the availability of a document entitled ''Proposed Approach to the Regulation of Cellular and Tissue-Based Products.'' The purpose was to develop a plan to address the regulation of human cellular and tissue-based products in a more comprehensive, but not unduly burdensome manner. The plan detailed how cellular and tissue-based products would be regulated with a tiered approach based on risk and the necessity for FDA review.

As part of this approach, FDA advanced three regulatory proposals including: (1) Registration and Listing; (2) Communicable-Disease Screening and Testing; and (3) Processing Standards. FDA published three final rules to implement the proposed approach as follows:

(1) ''Human Cells, Tissues, and Cellular and Tissue-Based Products;

Establishment Registration and Listing'' (66 FR 5447, January 19, 2001), which set forth part 1271, subpart A (General Provisions) and subpart B (Procedures for Registration and Listing) (effective dates April 4, 2001, and January 21, 2004 based on the applicability of the HCT/P establishment). The final rule requires HCT/P establishments to register with the Agency and list the HCT/Ps they manufacture.

(2) ''Eligibility Determination for Donors of Human Cells, Tissues, and Cellular and Tissue-Based Products'' (69 FR 29786, May 25, 2004), which set forth part 1271, subpart C (Donor Eligibility) (effective date May 25, 2005). The final rule requires HCT/P establishments to screen and test cell and tissue donors for risk factors for, and clinical evidence of, relevant communicable disease agents and diseases.

(3) ''Current Good Tissue Practice for Human Cell, Tissue, and Cellular and Tissue-Based Product Establishments, Inspection and Enforcement'' (69 FR 68611, November 24, 2004), which set forth part 1271, subpart D (Current Good Tissue Practice), subpart E (Additional Requirements for Establishments Described in § 1271.10), and subpart F (Inspection and Enforcement of Establishments Described in § 1271.10) (effective date May 25, 2005). The final rule requires HCT/P establishments to follow current good tissue practice, which governs the methods used in, and the facilities and controls used for, the manufacture of HCT/Ps; recordkeeping; and the establishment of a quality program.

FDA issued these regulations to increase the safety of HCT/Ps, and public confidence in their safety, by helping to prevent the introduction, transmission, and spread of communicable disease. The regulations were issued to protect the public health while minimizing regulatory burden, which in turn would encourage significant innovation.

C. Applicability of § 882.5975 and Part 1270

The Agency did not revoke part 1270 at the same time the Agency proposed part 1271 because it would have been impractical to apply part 1271 retroactively to human tissue, as defined in § 1270.3(j), that was recovered before the effective date of the final rule. Instead, the Agency decided that human tissue, as defined in § 1270.3(j), that was recovered prior to May 25, 2005, would remain subject to the regulations in part 1270. However, in the final rules applicable to HCT/Ps (66 FR 5447 and 5448; 69 FR 68611), FDA noted its intention to revoke part 1270 in the future when we were confident that there was no human tissue regulated under part 1270 available for use.

Part 1270 applies only to human tissue defined in § 1270.3(j) and recovered prior to May 25, 2005. The device classification set forth in 21 CFR 882.5975, ''Human dura mater,'' is only applicable to human dura mater recovered prior to May 25, 2005. Human dura mater recovered on or after May 25, 2005, is subject to the regulations in part 1271 when an establishment does not qualify for any of the exceptions in § 1271.15. Further, human dura mater is regulated solely under section 361 of the PHS Act and part 1271 when the HCT/P meets all the criteria set out in § 1271.10(a). Otherwise the HCT/P is regulated as a drug, device, and/or biological product under the FD&C Act, and/or section 351 of the PHS Act, and applicable regulations, including part 1271.

Products that meet the definition of an HCT/P in § 1271.3(d) that are recovered on or after May 25, 2005, including those that have been regulated after May 25, 2005, as drugs, devices, and/or biological products under section 351 of the PHS Act and/or the FD&C Act will not be affected by revocation of part 1270.

We do not believe there are currently any tissues intended for transplantation remaining in inventory that were recovered prior to May 25, 2005, that would be subject to these regulations. Therefore, the regulations under § 882.5975 and part 1270 are outdated and obsolete.

III. Legal Authority

FDA is issuing this proposed rule under the communicable disease provisions of the PHS Act, which provide FDA with the authority to issue and enforce regulations designed to prevent the introduction, transmission, and spread of communicable disease (42 U.S.C. 216, 243, 264, 271), and provisions of the FD&C Act applicable to devices (21 U.S.C. 351, 360, 360c, 360e, 360j, 360*l,* 371)).

IV. Description of the Proposed Rule

Part 1270 became effective in 1997, and applies only to human tissue defined in § 1270.3(j) and recovered prior to May 25, 2005. It is highly unlikely there is any human tissue regulated under part 1270 remaining in inventory today that is suitable for human transplantation. This regulation is outdated and has been replaced with part 1271.

V. Proposed Effective Date

FDA is proposing that any final rule based on the proposed rule become effective 30 days after the date of its publication in the **Federal Register**.

VI. Preliminary Economic Analysis of Impacts

We have examined the impacts of the proposed rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all 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, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' We believe that this proposed rule is not a significant regulatory action as defined by Executive Order 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the proposed rule, if finalized, would not create new regulatory responsibilities for small entities, we propose to certify that the proposed rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the 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.'' The current threshold after adjustment for inflation is $156 million, using the most current (2019) Implicit Price Deflator for the Gross Domestic Product. This proposed rule would not result in an expenditure in any year that meets or exceeds this amount.

This proposed rule, if finalized, would remove the obsolete regulations under part 1270 for human tissue intended for transplantation into a human recipient and § 882.5975 for human dura matter. These regulations

only apply to tissue derived from a human body and recovered prior to May 25, 2005. We believe it is highly unlikely any such human tissues remain available for use today. The proposed rule therefore is not anticipated to result in any compliance costs to the industry. We expect the economic impact on the FDA resulting from removing an obsolete regulation to be minimal.

Table 1 summarizes the estimated benefits and costs of the proposed rule, if finalized. Annualized over 10 years, the estimated benefits (*i.e.,* cost savings) of the proposed rule would be $0 at both the 3 and 7 percent discount rate. The present value of the estimated benefits (*i.e.,* cost savings) of the proposed rule would also be $0 at both the 3 and 7 percent discount rate. The annualized costs of the proposed rule, if finalized, would be $0 at both 3 and 7 percent discount rate. The present value of costs of the proposed rule would also be $0 at both 3 and 7 percent discount rate.

TABLE 1—SUMMARY OF BENEFITS, COSTS AND DISTRIBUTIONAL EFFECTS OF PROPOSED RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year ollars	Discount rate	Period covered (years)	
Benefits:							
Annualized Monetized $millions/year	$0 0	$0 0	$0 0	2019 2019	7 3	10 10	
Annualized Quantified							
Qualitative	Field investigators would no longer need to reference the obsolete regulations, resulting in very minor cost savings for FDA in terms of employee time.						
Costs:							
Annualized Monetized millions/year	0 0	0 0	0 0	2019 2019	7 3	10 10	
Annualized Quantified	.....	.....	.....	.....	7 3		
Qualitative							
Transfers:							
Federal Annualized Monetized millions/year	.....	.....	.....	.....	7 3		
From/To	From:			To:			
Other Annualized Monetized millions/year	.....	.....	.....	.....	7 3		
From/To	From:			To:			

Effects:
State, Local or Tribal Government: None.
Small Business: None.
Wages: None.
Growth: None.

In line with Executive Order 13771, in table 2 we estimate present and annualized values of costs and cost savings over an infinite time horizon. The present value of the net costs and cost savings would be $0 at both 3 and 7 percent discount rate.

TABLE 2—EXECUTIVE ORDER 13771 SUMMARY TABLE

[In $ millions 2016 dollars, over an infinite time horizon]

Item	Primary estimate (7%)	Lower estimate (7%)	Upper estimate (7%)	Primary estimate (3%)	Lower estimate (3%)	Upper estimate (3%)
Present Value of Costs	$0	$0	$0	$0	$0	$0
Present Value of Cost Savings	0	0	0	0	0	0
Present Value of Net Costs	0	0	0	0	0	0
Annualized Costs	0	0	0	0	0	0
Annualized Cost Savings	0	0	0	0	0	0
Annualized Net Costs	0	0	0	0	0	0

We have developed a comprehensive Preliminary Economic Analysis of Impacts that assesses the impacts of the proposed rule. The full preliminary analysis of economic impacts is available in the docket for this proposed rule (Ref. 1) and *https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm.*

VII. Analysis of Environmental Impact

We have determined under 21 CFR 25.31(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Paperwork Reduction Act of 1995

FDA tentatively concludes that this proposed rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paper Reduction Act of 1995 is not required.

IX. Federalism

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. We have determined that the proposed rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

X. Consultation and Coordination With Indian Tribal Governments

We have analyzed this proposed rule in accordance with the principles set forth in Executive Order 13175. We have tentatively determined that the rule does not contain policies that would have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Agency solicits comments from tribal officials on any potential impact on Indian Tribes from this proposed action.

XI. References

The following reference is on display at the Dockets Management Staff (see **ADDRESSES**) and is available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; it is also available electronically at *https://www.regulations.gov.* FDA has verified the website address, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA, ''Preliminary Regulatory Impact Analysis; Initial Regulatory Flexibility Analysis; Unfunded Mandates Reform Act Analysis, Revocation of the Regulations for Human Tissue Intended for Transplantation; Proposed Rule'' dated March 24, 2020. Also available at: *https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations.*

List of Subjects

21 CFR Part 882

Medical devices, Neurological devices.

21 CFR Part 1270

Communicable diseases, HIV/AIDS, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act, it is proposed that 21 CFR parts 882 and 1270 are amended as follows:

PART 882—NEUROLOGICAL DEVICES

■ 1. The authority citation for part 882 continues to read as follows:

Authority: 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

§ 882.5975 [Removed]

■ 2. Remove § 882.5975.

PART 1270—[REMOVED]

■ 3. Under the authority of 42 U.S.C. 216, 243, 264, 271, 21 CFR part 1270 is removed.

Dated: December 2, 2020.

Stephen M. Hahn,

Commissioner of Food and Drugs.

Dated: December 11, 2020

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–27828 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF EDUCATION

34 CFR Part 300

[Docket ID ED–2020–OSERS–0191]

Proposed Guidance; Questions and Answers on Serving Children With Disabilities Placed by Their Parents in Private Schools

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice of proposed guidance.

SUMMARY: The U.S. Department of Education (Department) seeks public comment on proposed guidance that addresses State and local responsibilities under Part B of the Individuals with Disabilities Education Act (IDEA) for providing equitable services to parentally placed private school children with disabilities. The proposed guidance updates and supersedes the Department's guidance titled Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools issued in April 2011.

DATES: We must receive your comments on or before January 20, 2021.

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

- *Federal eRulemaking Portal:* Go to *www.regulations.gov* to submit your comments electronically. Information on using *Regulations.gov*, including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under ''Help.''

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

FOR FURTHER INFORMATION CONTACT: Rebecca Walawender, U.S. Department of Education, 400 Maryland Avenue SW, Room 5145, Washington, DC 20202–5076. Telephone: (202) 245–7399. Email: *Rebecca.Walawender@ed.gov.*

SUPPLEMENTARY INFORMATION:

Invitation to Comment: We invite you to submit comments on the proposed guidance. See ADDRESSES for instructions on how to submit comments.

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

Background: The Department describes the background for the proposed guidance, and our reasons for

proposing the guidance, in the proposed guidance document. The proposed guidance is available at *https://sites.ed.gov/idea/idea-files/q-and-a-children-with-disabilities-private-schools-parentally-placed/.* The proposed guidance is a ''significant guidance document'' under Executive Order 13891.

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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

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

Mark Schultz,

Commissioner, Rehabilitative Services Administration.Delegated the authority to performthe functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2020–27872 Filed 12–18–20; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2020–0620; FRL–10017–81–Region 7]

Air Plan Approval; Missouri; Removal of Control of Emissions From Solvent Cleanup Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing approval of a State Implementation Plan (SIP) revision submitted by the State of Missouri on January 15, 2019, and supplemented by letter on June 14, 2019. Missouri requests that the EPA remove a rule related to control of emissions from the solvent cleanup operations in the Kansas City, Missouri area from its SIP. This removal does not have an adverse effect on air quality. The EPA's proposed approval of this rule revision is in accordance with the requirements of the Clean Air Act (CAA).

DATES: Comments must be received on or before January 20, 2021.

ADDRESSES: You may send comments, identified by Docket ID No. EPA–R07–OAR–2020–0620to *https://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received will be posted without change to *https://www.regulations.gov/,* including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the ''Written Comments'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: William Stone, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219; telephone number: (913) 551–7714; email address: *stone.william@epa.gov.*

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

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I. Written Comments

Submit your comments, identified by Docket ID No. EPA–R07–OAR–2020–0620 at *https://www.regulations.gov.* Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

II. What is Being Addressed in this Document?

The EPA is proposing to approve the removal of 10 Code of State Regulations (CSR) 10–2.215, *Control of Emissions from Solvent Cleanup Operations,* from the Missouri SIP.

According to the June 14, 2019 letter from the Missouri Department of Natural Resources, available in the docket for this proposed action, Missouri rescinded the rule because there are no sources subject to the rule, and the rule is no longer necessary for attainment and maintenance of the 1979, 1997, or 2008 National Ambient Air Quality Standards (NAAQS) for Ozone.

III. Background

The EPA established a 1-hour ozone NAAQS in 1971. 36 FR 8186 (April 30, 1971). On March 3, 1978, the EPA designated Clay, Platte and Jackson counties (hereinafter referred to in this document as the ''Kanas City Area'') in nonattainment of the 1971 1-hour ozone NAAQS,[1] as required by the CAA Amendments of 1977. 43 FR 8962 (March 3, 1978). On February 8, 1979, the EPA revised the 1-hour ozone NAAQS, referred to as the 1979 ozone NAAQS. 44 FR 8202 (February 8, 1979). On February 20, 1985, the EPA notified Missouri that the SIP was substantially inadequate (hereinafter referred to as the ''SIP Call'') to attain the 1-hour ozone NAAQS in the Kansas City Area. *See* 50 FR 26198 (July 25, 1985).

[1] Missouri's June 14, 2019 letter incorrectly states that the Kansas City area was designated as a nonattainment area for the 1979 ozone NAAQS in 1978.

To address the SIP Call, Missouri submitted an attainment demonstration on May 21, 1986, and volatile organic compound (VOC) control regulations on December 18, 1987. *See* 54 FR 10322 (March 13, 1989) and 54 FR 46232 (November 2, 1989). The EPA subsequently approved the revised control strategy for the Kansas City Area. *See id.*

The EPA redesignated the Kansas City Area to attainment of the 1979 1-hour ozone standard and approved the ozone maintenance plan on July 23, 1992. 57 FR 27939 (June 23, 1992). Pursuant to section 175A of the CAA, the first 10-year maintenance period for the 1-hour ozone standard began on July 23, 1992, the effective date of the redesignation approval.

In 1995, the Kansas City area violated the 1979 1-hour ozone standard. Missouri revised the control strategy and contingency measures in the maintenance plan, which was approved on June 24, 2002. 67 FR 20036 (April 24, 2002). The revised control strategy included a newly promulgated RACT rule, 10 CSR 10–2.215, *Control of Emissions from Solvent Cleanup Operations.*

On April 30, 2004, the EPA published a final rule in the **Federal Register** stating the 1979 ozone NAAQS would no longer apply (*i.e.,* would be revoked) for an area one year after the effective date of the area's designation for the 8-hour ozone NAAQS. 69 FR 23951 (April 30, 2004). The Kansas City Area was designated as an unclassifiable area for the 1997 8-hour ozone NAAQS, effective June 15, 2004. *See id.* However, on May 3, 2005, EPA published a final rule designating the Kansas City Area as an attainment area for the 1997 8-hour ozone NAAQS based on new monitoring data. *See* 70 FR 22801 (May 3, 2005). The effective date of the revocation of the 1979 1-hour ozone standard for the Kansas City Area was June 15, 2005. *See* 70 FR 44470 (August 3, 2005). Missouri achieved the required maintenance of the 1979 1-hour ozone standard in 2014.

As noted above, 10 CSR 10–2.215, *Control of Emissions from Solvent Cleanup Operations,* was approved into the Missouri SIP as a RACT rule, effective May 24, 2002. 67 FR 20036 (April 24, 2002). At the time that the rule was approved into the SIP, 10 CSR 10–2.215 applied to any person in the Clay, Jackson and Platte Counties in Missouri that performs or allows the performance of any cleaning operation involving the use of a VOC solvent or solvent solution that emitted over 500 pounds per day of VOCs. The rule stated that once a source was subject to the rule, it would remain subject to the rule even if actual emissions drop below the 500 pounds per day of VOCs applicability level.

The rule also contains a list of operations that are exempt from the rule:

1. Cold cleaner;
2. Open top vapor degreaser;
3. Conveyorized cold cleaners;
4. Conveyorized vapor degreaser;
5. Nonmanufacturing area cleaning. Nonmanufacturing areas include cafeterias, laboratories, pilot facilities, restrooms, and office buildings;
6. Cleaning operations for which there has been made a best available control technology, reasonably available control technology, or lowest achievable emission rate determination; and
7. Cleaning operations which are subject to the Aerospace National Emission Standards for Hazardous Air Pollutant Standards source category, under 40 CFR part 63, subpart GG.

By letter dated January 15, 2019, Missouri requested that the EPA remove 10 CSR 10–2.215 from the SIP. Section 110(l) of the CAA prohibits EPA from approving a SIP revision that interferes with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the CAA. The State supplemented its SIP revision with a June 14, 2019 letter in order to address the requirements of section 110(l) of the CAA.

IV. What is the EPA's analysis of Missouri's SIP revision request?

A. 10 CSR 10–2.215 Applied to Existing Sources

In its June 14, 2019 letter, Missouri states that it intended its RACT rules, such as 10 CSR 10–2.215, to solely apply to existing sources in accordance with section 172(c)(1) of the CAA.[2] Missouri states that although the applicability section of 10 CSR 10–2.215 states that the rule applies to all persons who perform or allow the performance of cleaning operations that emit over 500 pounds per day of VOCs in Clay, Jackson and Platte Counties, the rule applied only to existing sources.

The EPA notes that the rule required a 30% reduction in plant-wide industrial VOC cleaning solvent emissions by May 1, 2003, based on emissions in 1997 and 1998. This provides support for Missouri's assertion that the rule was intended to apply to existing sources, despite the language in the rule that states that it is applicable to any solvent cleaning operation in Clay, Jackson and Platte counties that emit VOCs above the applicability threshold.

B. 10 CSR 10–2.215 Was Expected To Be Solely Applicable to the Ford Motor Company's Kansas City Assembly Plant

Missouri states that at the time of the rule's promulgation, the state expected that the rule would apply to a single existing source, the Ford Motor Company's Kansas City Assembly Plant (hereinafter ''Ford facility''). Missouri states that this is supported by a fiscal note in its rulemaking record that indicates that the rule applies to one automobile manufacturer.

The EPA has reviewed the April 16, 2001 Missouri Register, Vol. 26, No. 8, available in the docket for this proposed action, and notes that the Ford Motor Company commented on Missouri's promulgation of the rule concerning the costs of the rule. In addition, Missouri's 1998 revision to the Kansas City Maintenance SIP for the 1979 Ozone NAAQS (hereinafter ''1998 Revision''), available in the docket for today's action, indicates that one major source that would be affected by the solvent cleaning regulation was the Ford Motor Company in Kansas City. The 1998 Revision states that the Ford facility reported 909.5 tons of VOC emissions in 1994, and estimated that the rule would reduce VOC emissions by 30%, or 272.8 tons per year in the Kansas City area. Based upon Missouri's rulemaking history associated with promulgation of 10 CSR 10–2.215, and the 1998 Revision, the EPA agrees that the Ford facility was the only source expected to be subject to the rule.

C. 10 CSR 10–2.215 Does Not Reduce VOC Emissions and May Be Removed From the SIP

The EPA notes that the text of 10 CSR 10–2.215 states that once a source exceeds the applicability level of 500 pounds of VOC emissions per day, it remains subject to the rule even if actual emissions drop below the applicability level of the rule. However, this does not prohibit Missouri from rescinding the rule if it can demonstrate that the rescission of the rule does not interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the CAA, as required by Section 110(l) of the CAA.

The EPA has reviewed the Ford facility's 2008 Operating Permit number OP2008–044, and the 2015 Operating

[2] The EPA agrees with Missouri's interpretation of CAA section 172(c)(1) in regards to whether RACT is required for existing sources, but also notes that the State regulation establishing RACT may apply to new sources as well, dependent upon the State regulation's language.

Permit number OP2014–035, available in the docket for this proposed action. The operating permits do not list any solvent cleaning operations at the facility that are subject to 10 CSR 10–2.215, *Control of Emissions From Solvent Metal Cleaning,* and state that the rule is not applicable to the Ford facility. The Operating Permit states that emission point (EP) 42's miscellaneous solvent use related to maintenance activities including non-manufacturing area cleaning, facility painting, and other activities at the facility is exempt pursuant to 10 CSR 2.215(1)(C). 10 CSR 2.215(1)(C) exempts nonmanufacturing area cleaning which include cafeterias, laboratories, pilot facilities, restrooms, and office buildings.

The documentation submitted by Missouri provides evidence that at least at the time that 10 CSR 10–2.215 was proposed, both Missouri and Ford expected that the Ford facility would be subject to the rule, and Missouri expected that the Ford facility would be the only source subject to the rule. According to Ford's Emissions Inventory Questionnaire (EIQ), VOC emissions from EP–42 were 428.36 tons in 1997, and 239.46 tons in 1998. However, before 10 CSR 10–2.215 was promulgated, Ford reduced its VOC emissions from EP–42 to 8.18 tons in 2000, and emissions from EP–42 have since remained well below the applicability threshold of the rule, such that Ford was never subject to the rule's requirements. Therefore, the EPA agrees that the rule does not limit or reduce emissions of VOCs from any source in the Kansas City Area.

Missouri's June 14, 2019 letter states that any new sources or major modifications of existing sources are subject to new source review (NSR) permitting. Under NSR, a new major source or major modification of an existing source with a (potential to emit) PTE of 250 tons per year (tpy) or more of any NAAQS pollutant is required to obtain a Prevention of Significant Deterioration (PSD) permit when the area is in attainment or unclassifiable, which requires an analysis of Best Available Control Technology (BACT) in addition to an air quality analysis and an additional impacts analysis. Sources with a PTE greater than 100 tpy, but less than 250 tpy, are required to obtain a minor permit in accordance with Missouri's New Source Review permitting program, which is approved into the SIP.[3] The EPA agrees with this analysis.

Missouri's June 14, 2019 letter also includes information concerning ozone air quality in the Kansas City area from 1996 through 2018 that indicates a downward trend in monitored ozone design values. Missouri states that despite promulgation of more stringent ozone NAAQS in 1997, 2008 and 2015, the Kansas City area continues to monitor attainment. The EPA has confirmed that certified ambient air quality data for Kansas City Area as monitored at the Rocky Creek, Clay County state and local air monitoring station is compliant with the most recent ozone standard- the 2015 ozone NAAQS.[4] The 2016–2018 design value for that monitor is 70 parts per million.[5]

As stated above, Section 172(c)(1) of the CAA requires RACT for existing sources. Because Missouri has demonstrated that removal of 10 CSR 10–2.215 will not interfere with attainment of the NAAQS, RFP[6] or any other applicable requirement of the CAA because there are no existing sources that are subject to the rule, and therefore removal of the rule will not cause VOC emissions to increase, the EPA proposes to approve removal of 10 CSR 10–2.215 from the SIP.

V. Have the requirements for approval of a SIP revision been met?

The State submission has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submission also satisfied the completeness criteria of 40 CFR part 51, appendix V. The State provided public notice on this SIP revision from February 28, 2018, to April 5, 2018 and received five comments from the EPA that related to Missouri's lack of an adequate demonstration that the rule could be removed from the SIP in accordance with section 110(l) of the CAA. Missouri's June 14, 2019 letter addressed the EPA's comments. In addition, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

VI. What action is the EPA taking?

The EPA is proposing to approve Missouri's request to rescind 10 CSR 2.215 from the SIP because the rule applied to a single source that has permanently ceased operations and because the rule was not applicable to additional sources, it no longer serves to reduce emissions. Additionally, the maintenance period for the 1979 ozone NAAQS for the Kansas City Area ended in 2014 and the area continues to monitor attainment of the 2015 Ozone NAAQS. Any new sources or major modifications of existing sources in the Kansas City Area are subject to NSR permitting. We are processing this as a proposed action because we are soliciting comments on this proposed action. Final rulemaking will occur after consideration of any comments.

VII. Incorporation by Reference

In this document, the EPA is proposing to amend regulatory text that includes incorporation by reference. As described in the proposed amendments to 40 CFR part 52 set forth below, the EPA is proposing to remove provisions of the EPA-Approved Missouri Regulation from the Missouri State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

VIII. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely

[3] EPA's latest approval of Missouri's NSR permitting program rule was published in the **Federal Register** on October 11, 2016. 81 FR 70025.

[4] In accordance 40 CFR 50.19(b), the 2015 8-hour primary O_3 NAAQS is met at an ambient air quality monitoring site when 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentration is less than or equal to 0.070 ppm, as determined in accordance with appendix U to 40 CFR part 50.

[5] The monitoring data was reported, quality assured, and certified in accordance with the requirements set forth in 40 CFR part 58.

[6] RFP is not applicable to the Kansas City Area because the area is in attainment of all applicable ozone standards.

affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of the National Technology Transfer and Advancement Act (NTTA) because this rulemaking does not involve technical standards; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 14, 2020.

James Gulliford,

Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA proposes to amend 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart AA—Missouri

■ 2. In § 52.1320, the table in paragraph (c) is amended by removing the entry ''10–2.215'' under the heading ''Chapter 2—Air Quality Standards and Air Pollution Control Regulations for the Kansas City Metropolitan Area''.

[FR Doc. 2020–28121 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0053; FRL–10016–93]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities (October 2020)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of filing of petitions and request for comment.

SUMMARY: This document announces the Agency's receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before January 20, 2021.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petitions (PP) of interest as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (RD) (7505P), main telephone number: (703) 305–7090, email address: *RDFRNotices@epa.gov;* or Charles Smith, Biopesticides and Pollution Prevention Division (BPPD) (7511P), main telephone number: (703) 305–7090, email address: *BPPDFRNotices@epa.gov.* The mailing address for the contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at *http://www.epa.gov/dockets/comments.html.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse

human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the Agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, requesting the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. The Agency is taking public comment on the requests before responding to the petitioners. EPA is not proposing any particular action at this time. EPA has determined that the pesticide petitions described in this document contain data or information prescribed in FFDCA section 408(d)(2), 21 U.S.C. 346a(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. After considering the public comments, EPA intends to evaluate whether and what action may be warranted. Additional data may be needed before EPA can make a final determination on this pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this document, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for these petitions is available at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), EPA is publishing notice of the petitions so that the public has an opportunity to comment on these requests for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

A. Ameded Tolerances for Non-Inerts

PP 0E8859. (EPA–HQ–OPP–2020–0498). Interregional Research Project No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540, proposes upon establishment of tolerances referenced in this document under ''New Tolerances'' for *PP 0E8859,* to remove existing tolerances in 40 CFR 180.473 for residues of the herbicide, glufosinate ammonium, determined by measuring the sum of glufosinate ammonium, butanoic acid, 2-amino-4-(hydroxymethylphosphinyl) monoammonium salt, and its metabolites, 2-(acetylamino)-4-(hydroxymethyl phosphinyl)butanoic acid, and 3-(hydroxymethylphosphinyl)propanoic acid, expressed as 2-amino-4-(hydroxymethylphosphinyl)butanoic acid equivalents in or on Apple at 0.05 ppm; bushberry subgroup 13B at 0.15 ppm; canola, seed at 0.40 ppm; cotton, undelinted seed at 4.0 ppm; grape at 0.05 ppm; juneberry at 0.10 ppm; lingonberry at 0.10 ppm; olive at 0.50 ppm; pistachio at 0.10 ppm; potato at 0.80 ppm; and salal at 0.10 ppm. *Contact:* RD.

B. New Tolerance Exemptions for Inerts (Except PIPS)

1. *PP IN–11376.* (EPA–HQ–OPP–2020–0531). UPL NA Inc., 630 Freedom Business Center, Suite 402 King of Prussia, PA 19406, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180.910 for residues of Zinc Stearate (CAS Reg No. 557–05–1) when used as a pesticide inert ingredient in pesticide formulations applied pre- and post-harvest and not to exceed 6% by weight of the formulation. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

2. *PP IN–11384.* (EPA–HQ–OPP–2020–0450) Spring Regulatory Sciences, on behalf of BASF Corporation, 100 Park Avenue, Florham Park, New Jersey 07932, requests to establish an exemption from the requirement of a tolerance for residues of pyrrolo[3,4-c]pyrrole-1,4-dione, 3,6-bis(4-chlorophenyl)-2,5-dihydro- (CAS Reg. No. 84632–65–5), when used as an inert ingredient in pesticide formulations under 40 CFR 180.910. The petitioner believes no analytical method is needed because it is not required for an exemption from the requirement of a tolerance. *Contact:* RD.

C. New Tolerance Exemptions From Non-Inerts (Except PIPS)

PP 9F8816. (EPA–HQ–OPP–2020–0495). AFS32321 Crop Protection, Inc., P.O. Box 14069, Research Triangle Park, NC 27709, requests to establish an exemption from the requirement of a tolerance in 40 CFR part 180 for residues of the bactericide and fungicide *Bacillus subtilis* strain AFS032321 in or on all food commodities. The petitioner believes no analytical method is needed because it expects that, when *Bacillus subtilis* strain AFS032321 is used as proposed, residues that are of toxicological concern would not result. *Contact:* BPPD.

D. New Tolerances for Non-Inerts

1. *PP 9E8820.* (EPA–HQ–OPP–2020–0424). Nichino America, Inc., 4550 Linden Hill Road Suite 501, Wilmington, DE 19808, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide, isoprothiolane (Diisopropyl 1,3-dithiolan-2-ylidenemalonate)] in or on the raw agricultural commodity Banana at 1 parts per million (ppm); rice, bran, at 30 ppm; rice, husked, at 6 ppm; and rice, polished at 1.5 ppm. The analytical methodology column liquid chromatography-mass spectrometry (LC–MS) is used to measure and evaluate the chemical isoprothiolane. *Contact:* RD.

2. *PP 0E8849.* EPA–HQ–OPP–2020–0538. BASF Corporation, 26 Davis Drive, P.O. Box 13528, Research Triangle Park, NC 22709–3528, requests to establish a tolerance in 40 CFR part 180 for residues of the fungicide, mefentrifluconazole in or on banana at 1.5 ppm and coffee at 0.4 ppm. The analytical method L0076/09 (liquid chromatography, mass/mass detector (LC/MS/MS) and external standardization) is used to measure and evaluate the chemical mefentrifluconazole. *Contact:* RD.

3. *PP 0E8859.* (EPA–HQ–OPP–2020–0498). Interregional Research Project No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540, requests to establish tolerances in 40 CFR part 180.473 for residues of the herbicide, glufosinate ammonium, determined by measuring the sum of glufosinate ammonium, butanoic acid, 2-amino-4-(hydroxymethylphosphinyl) monoammonium salt, and its metabolites, 2-(acetylamino)-4-(hydroxymethyl phosphinyl)butanoic acid, and 3-(hydroxymethylphosphinyl)propanoic acid, expressed as 2-amino-4-(hydroxymethylphosphinyl)butanoic acid equivalents in or on Avocado at 0.03 (ppm) bushberry subgroup 13–07B at 0.15 ppm; cottonseed subgroup 20C at 4 ppm; fig at 0.07 ppm; fig, dried at 0.2 ppm; fruit, small, vine climbing, except fuzzy kiwifruit, subgroup 13–07F at 0.05 ppm; hop, dried cones at 0.9 ppm; melon subgroup 9A at 0.08 ppm, pepper/eggplant 8–10B at 0.08 ppm; rapeseed subgroup 20A at 0.4 ppm; squash/cucumber subgroup 9B at 0.15 ppm; tomato, paste at 0.11 ppm; tomato subgroup 8–10A at 0.06 ppm; tropical and subtropical, small fruit, edible peel, subgroup 23A at 0.5 ppm and vegetable, tuberous and corm, subgroup 1C at 0.8 ppm. The high-performance liquid chromatography-electrospray

ionization/tandem mass spectrometry (LC/MS/MS) is used to measure and evaluate the chemical. *Contact:* RD.

4. *PP* 0E8860. (EPA–HQ–OPP–2020–0475). The Interregional Research Project No. 4 (IR–4), Rutgers, The State University of New Jersey, 500 College Road East, Suite 201 W, Princeton, NJ 08540, requests to establish a tolerance in 40 CFR part 180.599 for residues of the miticide, acequinocyl [2-(acetyloxy)-3-dodecyl-1,4-naphthalenedione] and its metabolite, 2-dodecyl-3-hydroxy-1,4-naphthoquinone, calculated as the stoichiometric equivalent of acequinocyl in or on tropical and subtropical, medium to large fruit, smooth, inedible peel subgroup 24B at 7 ppm. The high-pressure liquid chromatography (HPLC) using mass spectrometric (MS/MS) detection is used to measure and evaluate the chemical. *Contact:* RD.

5. *PP 0F8842.* EPA–HQ–OPP–2020–0533. Meiji Seika Pharma Co., Ltd, c/o Landis International, Inc., 3185 Madison Highway, P.O. Box 5126, Valdosta, GA 31603–5126, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide, L-glufosinate Free Acid, in or on apple at 0.05 ppm; beet, sugar, molasses at 5.0 ppm; beet, sugar, roots at 0.9 ppm; beet, sugar, tops(leaves) at 1.5 ppm; bushberry subgroup 13B at 0.15 ppm; canola, meal at 1.1 ppm; canola, seed at 0.40 ppm; cattle, fat at 0.40 ppm; cattle, meal at 0.15 ppm; cattle, meat byproducts at 6.0 ppm; corn, field, forage at 4.0 ppm; corn, field, grain at 0.20 ppm; corn, field, stover at 6.0 ppm; corn, sweet, forage at 1.5 ppm; corn, sweet, kernels plus cob with husks removed at 0.30 ppm; corn, sweet, stover at 6.0 ppm; cotton, gin byproducts at 15 ppm; cotton, undelinted seed at 4.0 ppm; egg at 0.15 ppm; fruit, citrus, crop group 10–10 at .15 ppm; fruit, pome, crop group 11–10 at .25 ppm; fruit, stone, crop group 12–12 at 0.30 ppm; goat, fat at 0.40 ppm; goat, meat at 0.15 ppm; goat, meat byproducts at 6.0 ppm; grape at 0.05 ppm; hog, fat at 0.40 ppm; hog, meat at 0.15 ppm; hog, meat byproducts at 6.0 ppm; horse, fat at 0.40 ppm; horse, meat at 0.15 ppm; horse, meat byproducts at 6.0 ppm; milk at 0.15 ppm; nut, tree, crop group 14–12 at 0.50 ppm; olive at 0.50 ppm; potato at 0.80 ppm; potato, chips at 1.6 ppm; potato, granules/flakes at 2.0 ppm; poultry, fat at 0.15 ppm; poultry, meat at .15 ppm; poultry, meat byproducts at 0.60 ppm; sheep, fat at 0.40 ppm; sheep, meat at 0.15 ppm; sheep, meat byproducts at 6.0 ppm; soybean at 2.0 ppm; soybean, hulls at 10.0 ppm. The analytical methods HRAV–5A and BK/01/99 are used to measure and evaluate the chemical L-glufosinate free acid. *Contact:* RD.

6. *PP 0F8853.* (EPA–HQ–OPP–2020–0375). Syngenta Crop Protection, LLC, P.O. Box 18300, Greensboro, NC 27419, requests to establish a tolerance in 40 CFR part 180 for residues of the herbicide, bicyclopyrone in or on banana at 0.01 ppm; broccoli at 0.01 ppm; garlic, bulb at 0.02 ppm; hops, dried cones at 0.04 ppm; horseradish at 0.015 ppm; onion, bulb at 0.02 ppm; onion, green at 0.05 ppm; papaya at 0.01 ppm; plantains at 0.01 ppm; strawberry at 0.01 ppm; sweet potato, roots at 0.02 ppm; timothy, forage at 0.9 ppm; timothy, hay at 1.5 ppm; and watermelon at 0.01 ppm. The Analytical methods GRM030.05A, GRM030.05B, GRM030.08A is used to measure and evaluate the chemical bicyclopyrone. *Contact:* RD.

Authority: 21 U.S.C. 346a.

Dated: November 6, 2020.

Delores Barber,

Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2020–28117 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375; DA 20–1446; FRS 17293]

Petition for Reconsideration of Action in Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Chérie R. Kiser has filed a Petition for Reconsideration (Petition) on behalf of Global Tel*Link Corporation (GTL) in Federal Communications Commission (FCC) WC Docket No. 12–375.

DATES: Oppositions to the Petition must be filed on or before January 11, 2021. Replies to an opposition must be filed on or before January 20, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Peter Bean, Pricing Policy Division, Wireline Competition Bureau, at (202) 418–0786 or via email at *peter.bean@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the FCC's Public Notice, DA 20–1446, released December 3, 2020. The full text of the FCC's Public Notice is available at: (*https://docs.fcc.gov/public/attachments/DA-20-1446A1.pdf*). The full text of GTL's Petition for Reconsideration is available at: *https://ecfsapi.fcc.gov/file/1123843514310/GTL%20Petition%20for%20Reconsideration%20(11-23-20).pdf.*

GTL requests reconsideration of a single sentence from the *2020 ICS Report and Order on Remand* stating that ''the jurisdictional nature of a call depends on the physical location of the endpoints of the call and not on whether the area code or NXX prefix of the telephone number associated with the account, are associated with a particular state.'' [1] In order to avoid a potential overlap between a previously-announced reply comment date in this docket, 85 FR 67480, and the due date for oppositions to GTL's Petition; to provide more certainty with regard to the commencement of the pleading cycle for this Petition; and in the interest of allowing all stakeholders the opportunity to fully and meaningfully respond to the Petition, the Bureau finds good cause pursuant to 47 CFR 1.3 to waive, on its own motion, if necessary, the deadline for oppositions as set forth in 47 CFR 1.429(f) to permit a longer pleading cycle should **Federal Register** publication of a notice of the filing of the Petition occur on or before December 24, 2020. Should **Federal Register** Publication of the notice of the Petition occur after Thursday, December 24, 2020, the Bureau will extend the deadline for oppositions and replies to provide a full 15/10 day opposition period, respectively, as required under the Commission's rules.

The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. 801 because no rules are being adopted by the Commission.

Subject: Rates for Interstate Inmate Calling Services, FCC 20–111, published at 85 FR 67450, October 23, 2020, in WC Docket No. 12–375. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 1.

Federal Communications Commission.

Daniel Kahn,

Associate Bureau Chief, Wireline Competition Bureau.

[FR Doc. 2020–27982 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

[1] *2020 ICS Report and Order on Remand,* 35 FCC Rcd at 8503, para. 53; Petition at ii, 3.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 19–310 and 17–105; Report No. 3164; FRS 17301]

Petition for Reconsideration of Action in Proceedings

AGENCY: Federal Communications Commission.

ACTION: Petition for Reconsideration.

SUMMARY: Petition for Reconsideration (Petition) has been filed in the Commission's proceeding by Rachel Stilwell and Samantha Gutierrez, on behalf of REC Networks, musicFIRST Coalition and Future of Music Coalition.

DATES: Oppositions to the Petition must be filed on or before January 5, 2021. Replies to an opposition must be filed on or before January 15, 2021.

ADDRESSES: Federal Communications Commission, 45 L Street NE, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jamile Kadre, Industry Analysis Division, Media Bureau, (202) 418–2245.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document, Report No. 3164, released December 8, 2020. The full text of the Petition can be accessed online via the Commission's Electronic Comment Filing System at: *http://apps.fcc.gov/ecfs/*. The Commission will not send a Congressional Review Act (CRA) submission to Congress or the Government Accountability Office pursuant to the CRA, 5 U.S.C. 801(a)(1)(A), because no rules are being adopted by the Commission.

Subject: Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations; Modernization of Media Initiative, published at 85 FR 67303, October 22, 2020, in MB Docket Nos. 19–310 and 17–105. This document is being published pursuant to 47 CFR 1.429(e). *See also* 47 CFR 1.4(b)(1) and 1.429(f), (g).

Number of Petitions Filed: 1.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–28024 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 201207–0329]

RIN 0648–BJ90

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station Norfolk (NAVSTA Norfolk) over the course of five years (2021–2026). As required by the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take, and requests comments on the proposed regulations. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than January 20, 2021.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0154, by the following method:

• *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0154,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-norfolk-norfolk-virginia.* In case of problems accessing these documents, please call the contact listed above (see **FOR FURTHER INFORMATION CONTACT**).

Purpose and Need for Regulatory Action

This proposed rule would establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the Navy's construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at NAVSTA Norfolk.

We received an application from the Navy requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment only incidental to impact and vibratory pile driving. Please see Background below for definitions of harassment.

Legal Authority for the Proposed Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the Proposed Mitigation section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and

the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this proposed rule containing five-year regulations, and for any subsequent letters of authorization (LOAs). As directed by this legal authority, this proposed rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Proposed Rule

Following is a summary of the major provisions of this proposed rule regarding Navy construction activities. These measures include:

- Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities.
- Shutdown of construction activities under certain circumstances to avoid injury of marine mammals.
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of an incidental take authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of this proposed rule qualifies to be categorically excluded from further NEPA review.

Information in the Navy's application and this document collectively provide the environmental information related to proposed issuance of these regulations and subsequent incidental take authorization for public review and comment. We will review all comments submitted in response to this document prior to concluding our NEPA process or making a final decision on the request for incidental take authorization.

Summary of Request

In February 2020, NMFS received a request from the Navy for a proposed rule and LOA to take marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at NAVSTA Norfolk. NMFS reviewed the Navy's application, and the Navy provided an updated version addressing NMFS' questions and comments on May 22, 2020. The application was deemed adequate and complete and published for public review and comment on June 9, 2020 (85 FR 35267). We did not receive substantive comments on the NOR.

The Navy requests authorization to take a small number of five species of marine mammals by Level B harassment only. Neither the Navy nor NMFS expects serious injury or mortality to result from this activity. The proposed regulations would be valid for five years (2021–2026).

Description of Proposed Activity

Overview

The Navy is proposing to conduct construction activities at NAVSTA Norfolk on the Naval Station, and at nearby facilities off of the lower Chesapeake Bay. The Navy's proposed activities include pile replacement at the Morale, Welfare and Recreation Marina, and installation of two new floating docks at the V-area. Both areas are located on the Naval Station. The Navy also proposes to conduct maintenance/repair activities at the Naval Station and neighboring Defense Fuel Supply Point Craney Island and Lambert's Point Deperming Station (see Figure 1). The Navy has indicated specific projects where existing needs have been identified, as well as estimates for expected emergent or emergency repairs. The proposed project will include both vibratory pile driving and removal, and impact pile driving (hereafter, collectively referred to as ''pile driving'') over approximately 574 days over five years.

Dates and Duration

The proposed regulations would be valid for a period of five years (2021–2026). The specified activities may occur at any time during the five-year period of validity of the proposed regulations. The Navy expects pile driving across all sites to occur on approximately 574 days over the five-year duration, with the greatest amount of work occurring during Year 1 (approximately 208 days). The Navy plans to conduct all work during daylight hours.

Specific Geographic Region

NAVSTA Norfolk and the adjacent facilities where the Navy has proposed to conduct construction (Craney Island Fuel Depot and Lambert's Point Deperming Station) are located at the confluence of the Elizabeth River, James River, Nansemond River, LaFayette River, Willoughby Bay, and Chesapeake Bay (Figure 1).

Human-generated sound is a significant contributor to the ambient acoustic environment surrounding NAVSTA Norfolk, as it is located in close proximity to shipping channels as well as several Port of Virginia facilities with frequent, noise-producing vessel traffic. NAVSTA Norfolk is located in close proximity to shipping channels as well as several Port of Virginia facilities that, altogether, have an annual average of 1,459 vessel calls (Port of Virginia,

2019). Other sources of human-generated underwater sound not specific to naval installations include sounds from echo sounders on commercial and recreational vessels, industrial ship noise, and noise from recreational boat engines. Additionally, on average, maintenance dredging of the Navigation Channel occurs every two years (USACE and Port of Virginia, 2018).

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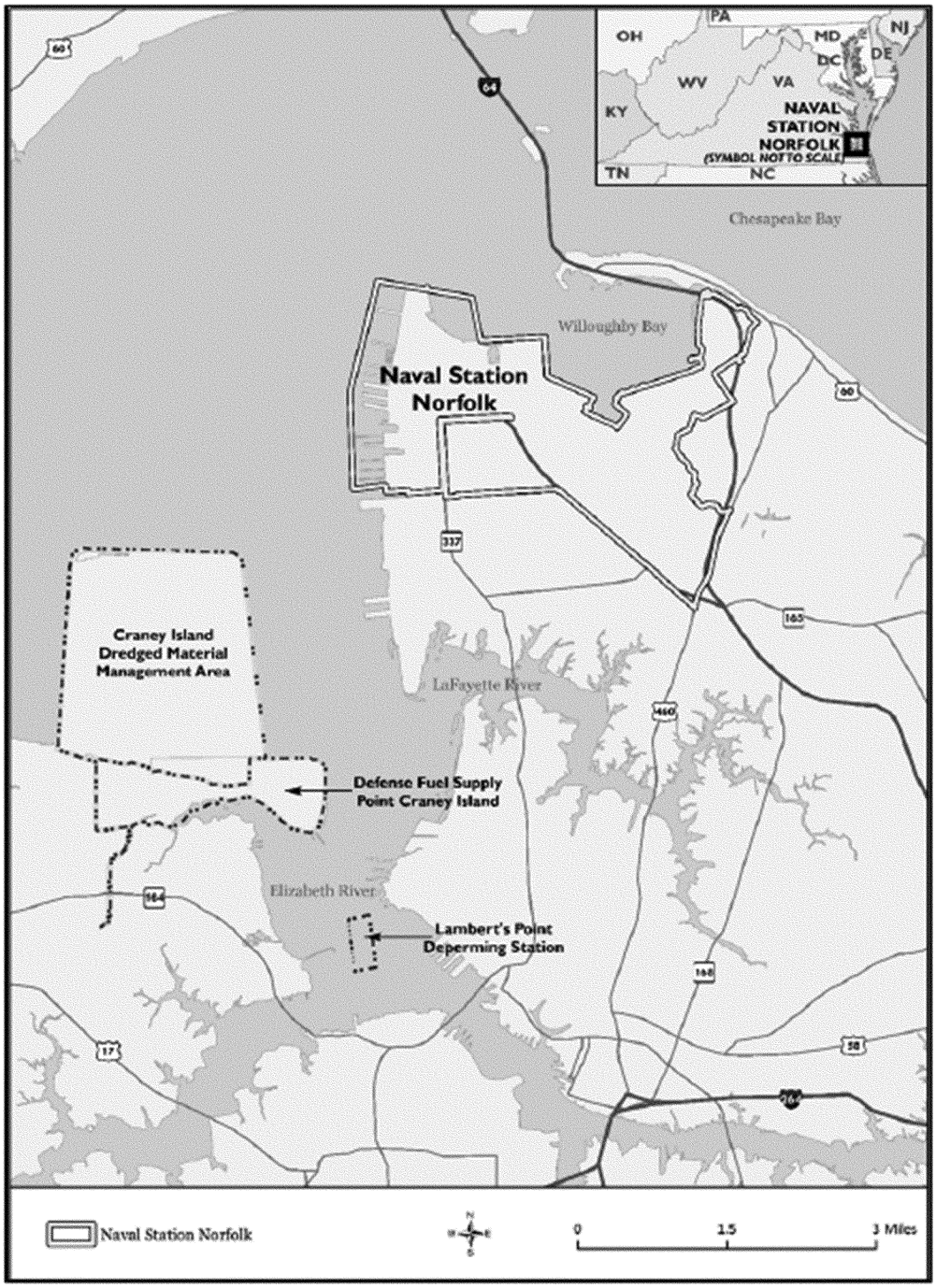

Figure 1-- Project Location

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Detailed Description of Specific Activity

The Navy's existing waterfront inspection program identifies fender pile system deficiencies and prioritizes, designs, and conducts maintenance and repairs. The inspection program also addresses repairs (emergent projects) required due to unforeseen events such as weather and vessel incidents. Because construction details are unknown for all emergent projects, potential numbers of fender piles to be extracted and installed were estimated by Navy waterfront infrastructure engineers based on historic emergent

maintenance pile driving actions and scheduled/forecasted maintenance.

The proposed action includes individual projects (where an existing need has been identified) and estimates for emergent or emergency repairs. The Navy proposes to conduct marine structure maintenance, pile replacement, and upgrades (MPU) activities over a five-year period. The Navy would also upgrade waterfront facilities at two areas.

Fender Pile Replacement: NAVSTA Norfolk Piers, Craney Island, and Lambert's Point

All piles that the Navy plans to replace in the NAVSTA Norfolk Piers, Defense Fuel Supply Point (DFSP) Craney Island and Lambert's Point areas are fender piles. Fender piles (or guide piles) protect in-water structures from direct contact with vessels and are not load-bearing. In-water piles may be treated timber, pre-stressed concrete, high-density polyethylene (HDPE) plastic, or hollow core fiberglass. Existing timber fender piles would be replaced by either composite (HDPE or hollow core fiberglass) or timber fender piles (depending on availability of composite piles). Table 1 includes the number and types of fender piles to be removed and installed at each location during the five years of proposed MPU activities. Please see Figure 1–2 and Figure 1–3 of the Navy's application for the detailed location of each pier. A full list of all pile replacement and removal in each year of the overall MPU project is provided in Appendix A of the Navy's application.

TABLE 1—FENDER PILES TO BE REMOVED (12-INCH [IN] TIMBER PILES) AND INSTALLED (16-IN COMPOSITE PILES) AT NAVSTA NORFOLK PIERS, DFSP CRANEY ISLAND, AND LAMBERT'S POINT

Location	Pile type	2021	2022	2023	2024	2025
NAVSTA Norfolk Piers	12-in Timber	630	555	100	405	948
	16-in Composite	208	196	0	267	845
DFSP Craney Island	12-in Timber	272	0	0	0	0
	16-in Composite	258	0	0	0	0
Lambert's Point Deperming Station.	12-in Timber	29	0	0	0	0
	16-in Composite	29	0	0	0	0

Waterfront Improvements: Morale, Welfare, and Recreation (MWR) Marina and V-Area

The MWR Marina features 200 deep-water slips, a boat ramp, and other recreational boating facilities (see Figure 1–2 of the Navy's application). Upgrades to the MWR Marina would consist of the replacement of timber load-bearing and guide piles with 24-by-24-in (61-by 61-cm) square pre-stressed concrete and composite or timber fender piles, respectively.

The V-Area currently features a bulkhead, a breakwater, two floating piers, and a boat ramp (see Figure 1–2 of the Navy's application). Upgrades to this area would include the construction of two additional floating docks, for a total addition of approximately 4,095 square feet (ft^2) 380.4 square meters of dock space. These docks would be constructed using 24-by-24-in (61-by 61-cm) square pre-stressed concrete for the load-bearing piles and composite or timber fender/guide piles.

For the purposes of this assessment, the Navy assumed these upgrades would occur in Year 1, with maintenance replacements occurring thereafter. Concrete piles are anticipated to be fully impact driven. Composite piles are anticipated to be impact or vibratory driven depending on pile type—hollow core fiberglass piles may be impact or vibratory driven, while HDPE piles would be impact driven.

The number of piles the Navy expects to remove and install are included in Table 2 and Table 3, respectively. The Navy does not plan to drive multiple piles concurrently.

TABLE 2—PILES TO BE REMOVED AT MWR MARINA AND V-AREA

Location	Pile size/type	Number of piles [1]
MWR Marina	12-in timber	100
	16-in composite	40
V-Area	16-in composite	40

[1] Includes piles for initial upgrade/construction as well as maintenance replacements over the five-year project span.

TABLE 3—PILES TO BE INSTALLED AT MWR MARINA AND V-AREA

Location	Pile size/type	Number of piles [1]
MWR Marina	24-by-24-in square concrete [2]	50
	16-in composite [3]	90
V-Area	24-by-24-in square concrete	50
	16-in composite [3]	90

[1] Includes piles for initial upgrade/construction as well as maintenance replacements over the five-year project span.
[2] Concrete piles are anticipated to be fully impact driven.
[3] The Navy may use timber piles if supply or funding issues prohibit the use of composite piles. However, as noted in Table 8, the sound source levels are expected to be the same for both pile types.

In extracting piles, the Navy would primarily use a vibratory hammer. In cases where removal with a vibratory hammer is not possible because piles break or are damaged, a clamshell may be used; a clamshell is a hinged steel apparatus that operates similar to a set of steel jaws, which grasps the pile as the attached crane pulls upward on the pile. Lastly, depending on site conditions, piles may be removed by wrapping the piles with a cable or chain and pulling them directly from the sediment with a crane. In some cases, depending on access and location, piles may be cut at or below the mud-line.

TABLE 4—ESTIMATED NUMBER OF PILE DRIVING DAYS EACH YEAR (574 DAYS TOTAL)

	2021	2022	2023	2024	2025
Pile Driving Days	208	84	18	76	188

In addition to pile driving, the Navy also plans to conduct pile repair, demolition of deck portions, wetwall repair, recoating of piles and mooring fittings, installation of a passive cathodic protection system, repair or replacement of pile caps, concrete spalling repairs, mooring foundation and substructure repair, repair or replacement of structural and non-structural components, rewrapping/replacement of steel cable straps on dolphins, and construction access and project staging.

Pile Repair—Several methods of pile repair may be used, including stubbing, wrapping, pile encapsulation, and welding. Pile stubbing is a process in which an existing, damaged length of timber pile above the ground line is removed and replaced with a new length of timber pile. All of the above repair activities would either occur over water or involve only minor in-water work, not including pile driving. We do not expect these activities to harass marine mammals and do not discuss them further.

Demolition of Deck Portions—A wire saw or other equipment would be used to cut timber or concrete decks that are damaged or need replacement into sections. Sections would be removed with a crane. Debris would be captured using debris curtains/sheeting and removed from the project area. Deck pieces would be hauled to a barge and then to an upland disposal site. Large concrete deck areas requiring repair would be cast-in-place with formwork, and repairs of smaller areas would be performed using hand trowels. We do not expect these activities to harass marine mammals and do not discuss them further.

Wetwall Repair—A wetwall is an above-water, reinforced concrete encasement for a sanitary sewer lift station pump. Repairs would occur by removing failed and delaminated concrete. The reinforced steel substructure would then be repaired and new concrete applied, either using cast-in-place methods or hand trowels. We do not expect wetwall repair to harass marine mammals and do not discuss it further.

Recoat Piles and Mooring Fittings—The Navy is proposing to clean and recoat some piles and mooring fittings. All coatings would be applied to dry surfaces and limited to areas above mean sea level (6.5 ft mean lower low water). We do not expect these activities to harass marine mammals and do not discuss them further.

Passive Cathodic Protection System—The Navy is proposing to install a passive cathodic protection system which is a metallic rod (anode) attached to a metal object to protect it from corrosion. We do not expect installation of the system to harass marine mammals and do not discuss it further.

Repair or Replacement of Pile Caps—The Navy is proposing to repair and/or replace pile caps. Replacement concrete pile caps may be cast-in-place, and the framework may be located below mean higher high water. However, we do not expect repair or replacement of pile caps to harass marine mammals, and we do not discuss it further.

Concrete Spalling Repairs—Concrete spalling occurs when concrete becomes chipped, scaled or flaked. Repair of spalled concrete involves removal of damaged sections and installation of new concrete. We do not expect concrete spalling repairs to harass marine mammals and do not discuss it further.

Mooring Foundation and Substructure Repair—Repairs may involve removal and replacement of concrete mooring foundations and concrete substructure on piers, wharfs, and quay walls. Work may include preservation of rebar and injection of epoxy, as required. We do not expect mooring foundation and substructure repair to harass marine mammals and do not discuss it further.

Repair or Replacement of Components—Structural and non-structural components of waterfront structures would be repaired or replaced as required. Replacement of components would involve removal of existing components and installation of new components. Components may include, but are not limited to the following:

- Timber wave breaks;
- cross bracing members;
- fender components, including but not limited to camels, chocks, and whalers;
- hand rails;
- splash guards;
- safety ladders;
- electrical conduit and wiring;
- light poles;
- guide pile systems for floats (used to secure a floating dock or barge to a pile but allow the floating dock or barge to move up and down with tidal changes); and
- brows (small, movable, bridge-like structures used to board or leave a vessel) or gangways.

We do not expect repair or replacement of these components to harass marine mammals and they are not discussed further.

Rewrap/Replace Steel Cable Straps on Dolphins—The Navy is proposing to rewrap and/or replace steel cable straps that hold dolphin pile groupings together. We do not expect these activities to harass marine mammals and do not discuss them further.

Construction Access and Project Staging—Barges would be used as platforms for conducting in-water work activities and to haul materials and equipment to and from work sites. Barges would be moored with spuds or anchors. Other than barges, no staging sites have been identified. If staging areas for equipment and materials are identified at a future date, they would occur in currently developed lots or managed fields.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the Navy's application summarize available information regarding status and trends, distribution and habitat preferences,

and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 5 lists all species or stocks for which take is expected and proposed for authorization, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2020). PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs (*e.g.,* Hayes *et al.* 2020). All values presented in Table 5 are the most recent available at the time of publication and are available in the 2019 SARs (Hayes *et al.* 2020).

TABLE 5—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-,-; N	1,396 (0; 1,380; see SAR)	22	12.15
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic (WNA) Coastal, Northern Migratory.	-,-; Y	6,639 (0.41; 4,759; 2011)	48	6.1–13.2
		WNA Coastal, Southern Migratory.	-,-; Y	3,751 (0.06; 2,353; 2011)	23	0–14.3
		Northern North Carolina Estuarine System (NNCES).	-,-; Y	823 (0.06; 782; 2013)	7.8	0.8–18.2
Family Phocoenidae (porpoises):						
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-, -; N	95,543 (0.31; 74,034; see SAR).	851	217
Order Carnivora—Superfamily Pinnipedia						
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	WNA	-; N	75,834 (0.15; 66,884, see SAR).	2,006	350
Gray seal	*Halichoerus grypus*	WNA	-; N	27,131 (0.19, 23,158, see SAR).	1,359	5,410

[1] Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all five species (with seven managed stocks) in Table 5 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have proposed authorizing take. While North Atlantic right whales (*Eubalaena glacialis*), minke whales (*Balaenoptera acutorostrata acutorostrata*), and fin whales (*Balaenoptera physalus*) have been documented in the area, the temporal and/or spatial occurrence of these whales is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here.

Based on sighting data and passive acoustic studies, the North Atlantic right whale could occur off Virginia year-round (DoN 2009; Salisbury *et al.* 2016). They have also been reported seasonally off Virginia during migrations in the spring, fall, and winter (CeTAP 1981, 1982; Niemeyer *et al.* 2008; Kahn *et al.* 2009; McLellan 2011b, 2013; Mallette *et al.* 2016a, 2016b, 2017, 2018a; Palka *et al.* 2017; Cotter 2019). Right whales are known to frequent the coastal waters of the mouth of the Chesapeake Bay (Knowlton *et al.* 2002) and the area is a seasonal management area (November 1–April 30) mandating reduced ship speeds out to

approximately 20 nautical miles (37 kilometers [km]) for the species; however, the project area is further inside the Bay.

North Atlantic right whales have stranded in Virginia, one each in 2001, 2002, 2004, 2005: Three during winter (February and March) and one in summer (September) (Costidis *et al.* 2017, 2019). In January 2018, a dead, entangled North Atlantic right whale was observed floating over 60 miles (96.6 km) offshore of Virginia Beach (Costidis *et al.* 2019). All North Atlantic right whale strandings in Virginia waters have occurred on ocean-facing beaches along Virginia Beach and the barrier islands seaward of the lower Delmarva Peninsula (Costidis *et al.* 2017). Due to the low occurrence of North Atlantic right whales in the project area, NMFS is not proposing to authorize take of this species.

Fin whales have been sighted off Virginia (Cetacean and Turtle Assessment Program (CeTAP) 1981, 1982; Swingle *et al.* 1993; DoN 2009; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; Aschettino *et al.* 2018; Engelhaupt *et al.* 2017, 2018; Cotter 2019), and in the Chesapeake Bay (Bailey 1948; CeTAP 1981, 1982; Morgan *et al.* 2002; Barco 2013; Aschettino *et al.* 2018); however, they are not likely to occur in the project area. Sightings have been documented around the Chesapeake Bay Bridge Tunnel (CBBT) during the winter months (CeTAP 1981, 1982; Barco 2013; Aschettino *et al.* 2018).

Eleven fin whale strandings have occurred off Virginia from 1988 to 2016 mostly during the winter months of February and March, followed by a few in the spring and summer months (Costidis *et al.* 2017). Six of the strandings occurred in the Chesapeake Bay (three on eastern shore; three on western shore) with the remaining five occurring on the Atlantic coast (Costidis *et al.* 2017. Documented strandings near the project area have occurred: February 2012, a dead fin whale washed ashore on Oceanview Beach in Norfolk (Swingle *et al.* 2013); December 2017, a live fin whale stranded on a shoal in Newport News and died at the site (Swingle *et al.* 2018); February 2014, a dead fin whale stranded on a sand bar in Pocomoke Sound near Great Fox Island, Accomack (Swingle *et al.* 2015); and, March 2007, a dead fin whale near Craney Island, in the Elizabeth River, in Norfolk (Barco 2013). Only stranded fin whales have been documented in the project area; no free-swimming fin whales have been observed. Due to the low occurrence of fin whales in the project area, NMFS is not proposing to authorize take of this species.

Minke whales have been sighted off Virginia (CeTAP 1981, 1982; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; McLellan 2017; Engelhaupt *et al.* 2017, 2018; Cotter 2019), near the CBBT (Aschettino *et al.* 2018), but sightings in the project area are from strandings (Jensen and Silber 2004; Barco 2013; DoN 2009). In August 1994, a ship strike incident involved a minke whale in Hampton Roads (Jensen and Silber 2004; Barco 2013). It was reported that the animal was struck offshore and was carried inshore on the bow of a ship (DoN 2009). Twelve strandings of minke whales have occurred in Virginia waters from 1988 to 2016 (Costidis *et al.* 2017). There have been six minke whale stranding from 2017 through 2020 in Virginia waters. Because all known minke whale occurrences in the project area are due to strandings, NMFS is not proposing to authorize take of this species.

Humpback Whale

Humpback whales are distributed worldwide in all major oceans and most seas. Most humpback whale sightings are in nearshore and continental shelf waters; however, humpback whales frequently travel through deep oceanic waters during migration (Calambokidis *et al.* 2001; Clapham, P.J. and Mattila, D.K., 1990). Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. Humpback whales in the project area are expected to be from the West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. Bettridge *et al.* (2003) estimated the size of the West Indies DPS at 12,312 (95% CI 8,688–15,954) whales in 2004–05, which is consistent with previous population estimates of approximately 10,000–11,000 whales (Stevick *et al.* 2003; Smith *et al.* 1999) and the increasing trend for the West Indies DPS (Bettridge *et al.* 2015).

Although humpback whales are migratory between feeding areas and calving areas, individual variability in the timing of migrations may result in the presence of individuals in high-latitude areas throughout the year (Straley, 1990). Records of humpback whales off the U.S. mid-Atlantic coast (New Jersey to North Carolina) from January through March suggest these waters may represent a supplemental winter feeding ground used by juvenile and mature humpback whales of U.S. and Canadian North Atlantic stocks (LaBrecque *et al.* 2015).

Humpback whales are most likely to occur near the mouth of the Chesapeake Bay and coastal waters of Virginia Beach between January and March; however, they could be found in the area year-round, based on shipboard sighting and stranding data (Barco and Swingle, 2014; Aschettino *et al.* 2015; 2016; 2017; 2018). Photo-identification data support the repeated use of the mid-Atlantic region by individual humpback whales. Results of the vessel surveys show site fidelity in the survey area for some individuals and a high level of occurrence within shipping channels—an important high-use area by both the Navy and commercial traffic (Aschettino *et al.* 2015; 2016; 2017; 2018). Nearshore surveys conducted in early 2015 reported 61 individual humpback whale sightings, and 135 individual humpback whale sightings in late 2015 through May 2016 (Aschettino *et al.* 2016). Subsequent surveys confirmed the occurrence of humpback whales in the nearshore survey area: 248 individuals were detected in 2016–2017 surveys (Aschettino *et al.* 2017), 32 individuals were detected in 2017–2018 surveys (Aschettino *et al.* 2018), and 80 individuals were detected in 2019 surveys (Aschettino *et al.* 2019). Sightings in the Hampton Roads area in the vicinity of NAVSTA Norfolk were reported in nearshore surveys and through tracking of satellite-tagged whales in 2016, 2017 and 2019. The numbers of whales detected, most of which were juveniles, reflect the varying level of survey effort and changes in survey objectives from year to year, and do not indicate abundance trends over time.

Bottlenose Dolphin

Along the U.S. East Coast and northern Gulf of Mexico, the bottlenose dolphin stock structure is well studied. There are currently 53 management stocks identified by NMFS in the western North Atlantic and Gulf of Mexico, including oceanic, coastal, and estuarine stocks (Hayes *et al.* 2017; Waring *et al.* 2015, 2016).

There are two morphologically and genetically distinct bottlenose dolphin morphotypes (distinguished by physical differences) described as coastal and offshore forms (Duffield *et al.* 1983; Duffield, 1986). The offshore form is larger in total length and skull length,

and has wider nasal bones than the coastal form. Both inhabit waters in the western North Atlantic Ocean and Gulf of Mexico (Curry and Smith, 1997; Hersh and Duffield, 1990; Mead and Potter, 1995) along the U.S. Atlantic coast. The coastal morphotype of bottlenose dolphin is continuously distributed along the Atlantic coast south of Long Island, New York, around the Florida peninsula, and along the Gulf of Mexico coast. This type typically occurs in waters less than 25 meters deep (Waring *et al.* 2015). The range of the offshore bottlenose dolphin includes waters beyond the continental slope (Kenney R.D., 1990), and offshore bottlenose dolphins may move between the Gulf of Mexico and the Atlantic (Wells *et al.* 1999).

Two coastal stocks are likely to be present in the MPU project area: Western North Atlantic Northern Migratory Coastal stock and Western North Atlantic Southern Migratory Coastal stock. Additionally, the Northern North Carolina Estuarine System stock may occur in the project area.

Bottlenose dolphins are the most abundant marine mammal along the Virginia coast and within the Chesapeake Bay, typically traveling in groups of 2 to 15 individuals, but occasionally in groups of over 100 individuals (Engelhaupt *et al.* 2014; 2015; 2016). Bottlenose dolphins of the Western North Atlantic Northern Migratory Coastal stock winter along the coast of North Carolina and migrate as far north as Long Island, New York, in the summer. They are rarely found north of North Carolina in the winter (NMFS, 2018a). The Western North Atlantic Southern Migratory Coastal stock occurs in waters of southern North Carolina from October to December, moving south during winter months and north to North Carolina during spring months. During July and August, the Western North Atlantic Southern Migratory Coastal stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to the eastern shore of Virginia (NMFS, 2018a). It is possible that these animals also occur inside the Chesapeake Bay and in nearshore coastal waters. The North Carolina Estuarine System stock dolphins may also occur in the Chesapeake Bay during July and August (NMFS, 2018a).

Vessel surveys conducted along coastal and offshore transects from NAVSTA Norfolk to Virginia Beach in most months from August 2012 to August 2015 reported bottlenose dolphins throughout the survey area, including the vicinity of NAVSTA Norfolk (Engelhaupt *et al.* 2014; 2015; 2016). The final results from this project confirmed earlier findings that bottlenose dolphins are common in the study area, with highest densities in the coastal waters in summer and fall months. However, bottlenose dolphins do not completely leave this area during colder months, with approximately 200–300 individuals still present in winter and spring months (Engelhaupt *et al.* 2016).

Harbor Porpoise

Harbor porpoises inhabit cool temperate-to-subpolar waters, often where prey aggregations are concentrated (Watts and Gaskin, 1985). Thus, they are frequently found in shallow waters, most often near shore, but they sometimes move into deeper offshore waters. Harbor porpoises are rarely found in waters warmer than 63 degrees Fahrenheit (17 degrees Celsius) (Read 1999) and closely follow the movements of their primary prey, Atlantic herring (Gaskin 1992).

In the western North Atlantic, harbor porpoise range from Cumberland Sound on the east coast of Baffin Island, southeast along the eastern coast of Labrador to Newfoundland and the Gulf of St. Lawrence, then southwest to about 34 degrees North on the coast of North Carolina (Waring *et al.* 2016). During winter (January to March), intermediate densities of harbor porpoises can be found in waters off New Jersey to North Carolina, and lower densities are found in waters off New York to New Brunswick, Canada (Waring *et al.* 2016). Harbor porpoises sighted off the mid-Atlantic during winter include porpoises from other western North Atlantic populations (Rosel *et al.* 1999). There does not appear to be a temporally coordinated migration or a specific migratory route to and from the Bay of Fundy region (Waring *et al.* 2016). During fall (October to December) and spring (April to June), harbor porpoises are widely dispersed from New Jersey to Maine, with lower densities farther north and south (LaBrecque *et al.* 2015).

Based on stranding reports, passive acoustic recorders, and shipboard surveys, harbor porpoise occur in coastal waters primarily in winter and spring months, but there is little information on their presence in the Chesapeake Bay. They do not appear to be abundant in the NAVSTA Norfolk area in most years, but this is confounded by wide variations in stranding occurrences over the past decade.

Harbor Seal

The Western North Atlantic stock of harbor seals occurs in the MPU project area. Harbor seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported from southern New England to the mid-Atlantic region (DiGiovanni *et al.* 2011; Hayes *et al.* 2017; Kenney R. D. 2019; Waring *et al.* 2016). Regular sightings of seals in Virginia have become a common occurrence in winter and early spring (Costidis *et al.* 2019). Winter haulout sites for harbor seals have been documented in the Chesapeake Bay at the CBBT, on the Virginia Eastern Shore, and near Oregon Inlet, North Carolina (Waring *et al.* 2016; Rees *et al.* 2016; Jones *et al.* 2018).

Harbor seals regularly haul out on rocks around the portal islands of the CBBT and on mud flats on the nearby southern tip of the Eastern Shore from December through April (Rees *et al.* 2016; Jones *et al.* 2018). Seals captured in 2018 on the Eastern Shore and tagged with satellite-tracked tags that lasted from 2 to 5 months spent at least 60 days in Virginia waters before departing the area. All tagged seals returned regularly to the capture site while in Virginia waters, but individuals utilized offshore and Chesapeake Bay waters to different extents (Ampela *et al.* 2019). The area that was utilized most heavily was near the Eastern Shore capture site, but some seals ranged into the Chesapeake Bay.

Gray Seal

The Western North Atlantic stock of gray seal occurs in the project area. The western North Atlantic stock is centered in Canadian waters, including the Gulf of St. Lawrence and the Atlantic coasts of Nova Scotia, Newfoundland, and Labrador, Canada, and the northeast U.S. continental shelf (Hayes *et al.* 2017). Gray seals range south into the northeastern United States, with strandings and sightings as far south as North Carolina (Hammill *et al.* 1998; Waring *et al.* 2004). Gray seal distribution along the U.S. Atlantic coast has shifted in recent years, with an increased number of seals reported in southern New England (DiGiovanni *et al.* 2011; Kenney R.D., 2019; Waring *et al.* 2016). Recent sightings included a gray seal in the lower Chesapeake Bay during the winter of 2014 to 2015 (Rees *et al.* 2016). Along the coast of the United States, gray seals are known to pup at three or more colonies in Massachusetts and Maine.

Gray seals are uncommon in Virginia and in the Chesapeake Bay. Only 15 gray seal strandings were documented

in Virginia from 1988 through 2013 (Barco and Swingle, 2014). They are rarely found resting on the rocks around the portal islands of the CBBT from December through April alongside harbor seals. Seal observation surveys conducted at the CBBT recorded one gray seal in each of the 2014/2015 and 2015/2016 seasons while no gray seals were reported during the 2016/2017 and 2017/2018 seasons (Rees *et al.* 2016, Jones *et al.* 2018). Sightings have been reported off Virginia and near the project area during the winter and spring (Barco 2013; Rees *et al.* 2016; Jones *et al.* 2018; Ampela *et al.* 2019).

Unusual Mortality Events

An unusual mortality event (UME) is defined under Section 410(6) of the MMPA as a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response. Currently, ongoing UME investigations are underway for pinnipeds along the Northeast coast, and humpback whales along the Atlantic coast.

Northeast Pinniped UME

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire and Massachusetts. This event has been declared an UME. Additionally, seals showing clinical signs have been stranding as far south as Virginia, although not in elevated numbers; therefore, the UME investigation now encompasses all seal strandings from Maine to Virginia. Lastly, while take is not proposed for these species in this proposed rule, ice seals (harp and hooded seals) have also started stranding with clinical signs, again not in elevated numbers, and those two seal species have also been added to the UME investigation. Additional information is available at *https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2020-pinniped-unusual-mortality-event-along.*

Atlantic Humpback Whale UME

Since January 2016, elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida. This event has been declared an UME. A portion of the whales have shown evidence of pre-mortem vessel strike; however, this finding is not consistent across all whales examined, and additional research is needed. Additional information is available at *https://www.fisheries.noaa.gov/national/marine-life-distress/2016-2020-humpback-whale-unusual-mortality-event-along-atlantic-coast.*

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 6.

TABLE 6—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (three cetacean and two phocid pinniped species) have the reasonable potential to co-occur with the proposed construction activities. Please refer to Table 5. Of the cetacean species that may be present, one is classified as a low-frequency cetacean (*i.e.,* humpback whale) one is classified as a mid-frequency cetacean (*i.e.,* bottlenose dolphin), and one is classified as a high-frequency cetacean (*i.e.,* harbor porpoise).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The Estimated Take section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Proposed Mitigation section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely

to impact marine mammal species or stocks.

Acoustic effects on marine mammals during the specified activity can occur from vibratory and impact pile driving. The effects of underwater noise from the Navy's proposed activities have the potential to result in Level A and Level B harassment of marine mammals in the action area.

Description of Sound Sources

The marine soundscape is comprised of both ambient and anthropogenic sounds. Ambient sound is defined as the all-encompassing sound in a given place and is usually a composite of sound from many sources both near and far. The sound level of an area is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.,* waves, wind, precipitation, earthquakes, ice, atmospheric sound), biological (*e.g.,* sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.,* vessels, dredging, aircraft, construction).

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise ''ambient'' or ''background'' sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor, and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.* 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

In-water construction activities associated with the project would include impact pile driving, vibratory pile driving, and vibratory pile removal. The sounds produced by these activities fall into one of two general sound types: Impulsive and non-impulsive. Impulsive sounds (*e.g.,* explosions, gunshots, sonic booms, impact pile driving) are typically transient, brief (less than 1 second), broadband, and consist of high peak sound pressure with rapid rise time and rapid decay (ANSI 1986; NIOSH 1998; ANSI 2005; NMFS 2018a). Non-impulsive sounds (*e.g.* aircraft, machinery operations such as drilling or dredging, vibratory pile driving, and active sonar systems) can be broadband, narrowband or tonal, brief or prolonged (continuous or intermittent), and typically do not have the high peak sound pressure with raid rise/decay time that impulsive sounds do (ANSI 1995; NIOSH 1998; NMFS 2018a). The distinction between these two sound types is important because they have differing potential to cause physical effects, particularly with regard to hearing (*e.g.,* Ward 1997 in Southall *et al.* 2007).

Two types of pile hammers would be used on this project: Impact and vibratory. Impact hammers operate by repeatedly dropping a heavy piston onto a pile to drive the pile into the substrate. Sound generated by impact hammers is characterized by rapid rise times and high peak levels, a potentially injurious combination (Hastings and Popper 2005). Vibratory hammers install piles by vibrating them and allowing the weight of the hammer to push them into the sediment. Vibratory hammers produce significantly less sound than impact hammers. Peak sound pressure levels (SPLs) may be 180 dB or greater, but are generally 10 to 20 dB lower than SPLs generated during impact pile driving of the same-sized pile (Oestman *et al.* 2009). Rise time is slower, reducing the probability and severity of injury, and sound energy is distributed over a greater amount of time (Nedwell and Edwards 2002; Carlson *et al.* 2005).

The likely or possible impacts of the Navy's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors. Potential non-acoustic stressors could result from the physical presence of the equipment and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile driving.

Acoustic Impacts

The introduction of anthropogenic noise into the aquatic environment from pile driving is the primary means by which marine mammals may be harassed from the Navy's specified activity. In general, animals exposed to natural or anthropogenic sound may experience physical and psychological effects, ranging in magnitude from none to severe (Southall *et al.* 2007). In general, exposure to pile driving noise has the potential to result in auditory threshold shifts and behavioral reactions (*e.g.,* avoidance, temporary cessation of foraging and vocalizing, changes in dive behavior). Exposure to anthropogenic noise can also lead to non-observable physiological responses such an increase in stress hormones. Additional noise in a marine mammal's habitat can mask acoustic cues used by marine mammals to carry out daily functions such as communication and predator and prey detection. The effects of pile driving noise on marine mammals are dependent on several factors, including, but not limited to, sound type (*e.g.,* impulsive vs. non-impulsive), the species, age and sex class (*e.g.,* adult male vs. mom with calf), duration of exposure, the distance between the pile and the animal, received levels, behavior at time of exposure, and previous history with exposure (Wartzok *et al.* 2004; Southall *et al.* 2007). Here we discuss physical auditory effects (threshold shifts) followed by behavioral effects and potential impacts on habitat.

NMFS defines a noise-induced threshold shift (TS) as a change, usually an increase, in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). The amount of threshold shift is customarily expressed in dB. A TS can be permanent or temporary. As described in NMFS (2018), there are numerous factors to consider when examining the consequence of TS, including, but not limited to, the signal temporal pattern (*e.g.,* impulsive or non-impulsive), likelihood an individual would be exposed for a long enough duration or to a high enough level to induce a TS, the magnitude of the TS, time to recovery (seconds to minutes or hours to days), the frequency range of the exposure (*i.e.,* spectral content), the hearing and vocalization frequency range of the exposed species relative to the signal's frequency spectrum (*i.e.,* how an animal uses sound within the frequency band of the signal; *e.g.,* Kastelein *et al.* 2014), and the overlap between the animal and the source (*e.g.,* spatial, temporal, and spectral).

Permanent Threshold Shift (PTS)—NMFS defines PTS as a permanent, irreversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Available data from humans and other terrestrial mammals indicate that a 40 dB threshold shift approximates PTS onset (see Ward *et al.* 1958, 1959; Ward 1960; Kryter *et al.* 1966; Miller 1974; Ahroon *et al.* 1996; Henderson *et al.* 2008). PTS levels for

marine mammals are estimates, as with the exception of a single study unintentionally inducing PTS in a harbor seal (Kastak *et al.* 2008), there are no empirical data measuring PTS in marine mammals largely due to the fact that, for various ethical reasons, experiments involving anthropogenic noise exposure at levels inducing PTS are not typically pursued or authorized (NMFS 2018).

Temporary Threshold Shift (TTS)—TTS is a temporary, reversible increase in the threshold of audibility at a specified frequency or portion of an individual's hearing range above a previously established reference level (NMFS 2018). Based on data from cetacean TTS measurements (see Southall *et al.* 2007), a TTS of 6 dB is considered the minimum threshold shift clearly larger than any day-to-day or session-to-session variation in a subject's normal hearing ability (Schlundt *et al.* 2000; Finneran *et al.* 2000, 2002). As described in Finneran (2015), marine mammal studies have shown the amount of TTS increases with cumulative sound exposure level (SELcum) in an accelerating fashion: At low exposures with lower SELcum, the amount of TTS is typically small and the growth curves have shallow slopes. At exposures with higher SELcum, the growth curves become steeper and approach linear relationships with the noise SEL.

Depending on the degree (elevation of threshold in dB), duration (*i.e.,* recovery time), and frequency range of TTS, and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious (similar to those discussed in auditory masking, below). For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts. We note that reduced hearing sensitivity as a simple function of aging has been observed in marine mammals, as well as humans and other taxa (Southall *et al.* 2007), so we can infer that strategies exist for coping with this condition to some degree, though likely not without cost.

Currently, TTS data only exist for four species of cetaceans (bottlenose dolphin, beluga whale (*Delphinapterus leucas*), harbor porpoise, and Yangtze finless porpoise (*Neophocoena asiaeorientalis*)) and five species of pinnipeds exposed to a limited number of sound sources (*i.e.,* mostly tones and octave-band noise) in laboratory settings (Finneran 2015). TTS was not observed in trained spotted (*Phoca largha*) and ringed (*Pusa hispida*) seals exposed to impulsive noise at levels matching previous predictions of TTS onset (Reichmuth *et al.* 2016). In general, harbor seals and harbor porpoises have a lower TTS onset than other measured pinniped or cetacean species (Finneran 2015). Additionally, the existing marine mammal TTS data come from a limited number of individuals within these species. No data are available on noise-induced hearing loss for mysticetes. For summaries of data on TTS in marine mammals or for further discussion of TTS onset thresholds, please see Southall *et al.* (2007), Finneran and Jenkins (2012), Finneran (2015), and Table 5 in NMFS (2018). Installing piles requires a combination of impact pile driving and vibratory pile driving. For this project, these activities would not occur at the same time and there would be pauses in activities producing the sound during each day. Given these pauses and that many marine mammals are likely moving through the ensonified area and not remaining for extended periods of time, the potential for TS declines.

Behavioral Harassment—Exposure to noise from pile driving and removal also has the potential to behaviorally disturb marine mammals. Available studies show wide variation in response to underwater sound; therefore, it is difficult to predict specifically how any given sound in a particular instance might affect marine mammals perceiving the signal. If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007; NRC 2005).

Disturbance may result in changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located. Pinnipeds may increase their haul out time, possibly to avoid in-water disturbance (Thorson and Reyff 2006). Behavioral responses to sound are highly variable and context-specific and any reactions depend on numerous intrinsic and extrinsic factors (*e.g.,* species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day), as well as the interplay between factors (*e.g.,* Richardson *et al.* 1995; Wartzok *et al.* 2003; Southall *et al.* 2007; Weilgart 2007; Archer *et al.* 2010). Behavioral reactions can vary not only among individuals but also within an individual, depending on previous experience with a sound source, context, and numerous other factors (Ellison *et al.* 2012), and can vary depending on characteristics associated with the sound source (*e.g.,* whether it is moving or stationary, number of sources, distance from the source). In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater sound than do cetaceans, and generally seem to be less responsive to exposure to industrial sound than most cetaceans. Please see Appendices B–C of Southall *et al.* (2007) for a review of studies involving marine mammal behavioral responses to sound.

Disruption of feeding behavior can be difficult to correlate with anthropogenic sound exposure, so it is usually inferred by observed displacement from known foraging areas, the appearance of secondary indicators (*e.g.,* bubble nets or sediment plumes), or changes in dive behavior. As for other types of behavioral response, the frequency, duration, and temporal pattern of signal presentation, as well as differences in species sensitivity, are likely contributing factors to differences in response in any given circumstance (*e.g.,* Croll *et al.* 2001; Nowacek *et al.* 2004; Madsen *et al.* 2006; Yazvenko *et al.* 2007). A determination of whether foraging disruptions incur fitness consequences would require information on or estimates of the energetic requirements of the affected individuals and the relationship between prey availability, foraging effort and success, and the life history stage of the animal.

Stress responses—An animal's perception of a threat may be sufficient to trigger stress responses consisting of some combination of behavioral responses, autonomic nervous system responses, neuroendocrine responses, or immune responses (*e.g.,* Seyle 1950; Moberg 2000). In many cases, an animal's first and sometimes most

economical (in terms of energetic costs) response is behavioral avoidance of the potential stressor. Autonomic nervous system responses to stress typically involve changes in heart rate, blood pressure, and gastrointestinal activity. These responses have a relatively short duration and may or may not have a significant long-term effect on an animal's fitness.

Neuroendocrine stress responses often involve the hypothalamus-pituitary-adrenal system. Virtually all neuroendocrine functions that are affected by stress—including immune competence, reproduction, metabolism, and behavior—are regulated by pituitary hormones. Stress-induced changes in the secretion of pituitary hormones have been implicated in failed reproduction, altered metabolism, reduced immune competence, and behavioral disturbance (*e.g.,* Moberg 1987; Blecha 2000). Increases in the circulation of glucocorticoids are also equated with stress (Romano *et al.* 2004).

The primary distinction between stress (which is adaptive and does not normally place an animal at risk) and ''distress'' is the cost of the response. During a stress response, an animal uses glycogen stores that can be quickly replenished once the stress is alleviated. In such circumstances, the cost of the stress response would not pose serious fitness consequences. However, when an animal does not have sufficient energy reserves to satisfy the energetic costs of a stress response, energy resources must be diverted from other functions. This state of distress will last until the animal replenishes its energetic reserves sufficient to restore normal function.

Relationships between these physiological mechanisms, animal behavior, and the costs of stress responses are well studied through controlled experiments and for both laboratory and free-ranging animals (*e.g.,* Holberton *et al.* 1996; Hood *et al.* 1998; Jessop *et al.* 2003; Krausman *et al.* 2004; Lankford *et al.* 2005). Stress responses due to exposure to anthropogenic sounds or other stressors and their effects on marine mammals have also been reviewed (Fair and Becker 2000; Romano *et al.* 2002b) and, more rarely, studied in wild populations (*e.g.,* Romano *et al.* 2002a). For example, Rolland *et al.* (2012) found that noise reduction from reduced ship traffic in the Bay of Fundy was associated with decreased stress in North Atlantic right whales. These and other studies lead to a reasonable expectation that some marine mammals will experience physiological stress responses upon exposure to acoustic stressors and that it is possible that some of these would be classified as ''distress.'' In addition, any animal experiencing TTS would likely also experience stress responses (NRC, 2003), however distress is an unlikely result of this project based on observations of marine mammals during previous, similar projects in the area.

Masking—Sound can disrupt behavior through masking, or interfering with, an animal's ability to detect, recognize, or discriminate between acoustic signals of interest (*e.g.,* those used for intraspecific communication and social interactions, prey detection, predator avoidance, navigation) (Richardson *et al.* 1995). Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher intensity, and may occur whether the sound is natural (*e.g.,* snapping shrimp, wind, waves, precipitation) or anthropogenic (*e.g.,* pile driving, shipping, sonar, seismic exploration) in origin. The ability of a noise source to mask biologically important sounds depends on the characteristics of both the noise source and the signal of interest (*e.g.,* signal-to-noise ratio, temporal variability, direction), in relation to each other and to an animal's hearing abilities (*e.g.,* sensitivity, frequency range, critical ratios, frequency discrimination, directional discrimination, age or TTS hearing loss), and existing ambient noise and propagation conditions. Masking of natural sounds can result when human activities produce high levels of background sound at frequencies important to marine mammals. Conversely, if the background level of underwater sound is high (*e.g.,* on a day with strong wind and high waves), an anthropogenic sound source would not be detectable as far away as would be possible under quieter conditions and would itself be masked.

Airborne Acoustic Effects—Although pinnipeds are known to haul-out regularly on man-made objects in the vicinity of some of the potential project sites, we believe that incidents of take resulting solely from airborne sound are unlikely. There is a possibility that an animal could surface in-water, but with head out, within the area in which airborne sound exceeds relevant thresholds and thereby be exposed to levels of airborne sound that we associate with harassment, but any such occurrence would likely be accounted for in our estimation of incidental take from underwater sound. Therefore, authorization of incidental take resulting from airborne sound for pinnipeds is not warranted, and airborne sound is not discussed further here. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA.

Marine Mammal Habitat Effects

The Navy's construction activities could have localized, temporary impacts on marine mammal habitat by increasing in-water sound pressure levels and slightly decreasing water quality. Construction activities are of short duration and would likely have temporary impacts on marine mammal habitat through increases in underwater sound. Increased noise levels may affect acoustic habitat (see masking discussion above) and adversely affect marine mammal prey in the vicinity of the project area (see discussion below). During impact and vibratory pile driving, elevated levels of underwater noise would ensonify the project area where both fish and mammals may occur and could affect foraging success. Additionally, marine mammals may avoid the area during construction, however, displacement due to noise is expected to be temporary and is not expected to result in long-term effects to the individuals or populations.

A temporary and localized increase in turbidity near the seafloor would occur in the immediate area surrounding the area where piles are installed (and removed in the case of the temporary piles). The sediments on the sea floor will be disturbed during pile driving; however, suspension will be brief and localized and is unlikely to measurably affect marine mammals or their prey in the area. In general, turbidity associated with pile installation is localized to about a 25-ft (7.6-meter) radius around the pile (Everitt *et al.* 1980). Cetaceans are not expected to be close enough to the pile driving areas to experience effects of turbidity, and any pinnipeds could avoid localized areas of turbidity. Therefore, we expect the impact from increased turbidity levels to be discountable to marine mammals and do not discuss it further.

In-Water Construction Effects on Potential Foraging Habitat

The proposed activities would not result in permanent impacts to habitats used directly by marine mammals except for the actual footprint of the project. The total seafloor area affected by pile installation and removal is a very small area compared to the vast foraging area available to marine mammals in the project area and lower Chesapeake Bay.

Avoidance by potential prey (*i.e.,* fish) of the immediate area due to the temporary loss of this foraging habitat is

also possible. The duration of fish avoidance of this area after pile driving stops is unknown, but we anticipate a rapid return to normal recruitment, distribution and behavior. Any behavioral avoidance by fish of the disturbed area would still leave large areas of fish and marine mammal foraging habitat in the nearby vicinity in the project area and lower Chesapeake Bay.

Effects on Potential Prey

Sound may affect marine mammals through impacts on the abundance, behavior, or distribution of prey species (*e.g.,* fish). Marine mammal prey varies by species, season, and location. Here, we describe studies regarding the effects of noise on known marine mammal prey.

Fish utilize the soundscape and components of sound in their environment to perform important functions such as foraging, predator avoidance, mating, and spawning (*e.g.,* Zelick *et al.* 1999; Fay, 2009). Depending on their hearing anatomy and peripheral sensory structures, which vary among species, fishes hear sounds using pressure and particle motion sensitivity capabilities and detect the motion of surrounding water (Fay *et al.* 2008). The potential effects of noise on fishes depends on the overlapping frequency range, distance from the sound source, water depth of exposure, and species-specific hearing sensitivity, anatomy, and physiology. Key impacts to fishes may include behavioral responses, hearing damage, barotrauma (pressure-related injuries), and mortality.

Fish react to sounds which are especially strong and/or intermittent low-frequency sounds, and behavioral responses such as flight or avoidance are the most likely effects. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. The reaction of fish to noise depends on the physiological state of the fish, past exposures, motivation (*e.g.,* feeding, spawning, migration), and other environmental factors. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.,* Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Several studies have demonstrated that impulse sounds might affect the distribution and behavior of some fishes, potentially impacting foraging opportunities or increasing energetic costs (*e.g.,* Fewtrell and McCauley, 2012; Pearson *et al.* 1992; Skalski *et al.* 1992; Santulli *et al.* 1999; Paxton *et al.* 2017). However, some studies have shown no or slight reaction to impulse sounds (*e.g.,* Pena *et al.* 2013; Wardle *et al.* 2001; Jorgenson and Gyselman, 2009; Cott *et al.* 2012).

SPLs of sufficient strength have been known to cause injury to fish and fish mortality. However, in most fish species, hair cells in the ear continuously regenerate and loss of auditory function likely is restored when damaged cells are replaced with new cells. Halvorsen *et al.* (2012a) showed that a TTS of 4–6 dB was recoverable within 24 hours for one species. Impacts would be most severe when the individual fish is close to the source and when the duration of exposure is long. Injury caused by barotrauma can range from slight to severe and can cause death, and is most likely for fish with swim bladders. Barotrauma injuries have been documented during controlled exposure to impact pile driving (Halvorsen *et al.* 2012b; Casper *et al.* 2013).

The most likely impact to fish from pile driving activities at the project areas would be temporary behavioral avoidance of the area. The duration of fish avoidance of an area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution and behavior is anticipated.

The area impacted by the project is relatively small compared to the available habitat in the remainder of the project area and the lower Chesapeake Bay, and there are no areas of particular importance that would be impacted by this project. Any behavioral avoidance by fish of the disturbed area would still leave significantly large areas of fish and marine mammal foraging habitat in the nearby vicinity. As described in the preceding, the potential for the Navy's construction to affect the availability of prey to marine mammals or to meaningfully impact the quality of physical or acoustic habitat is considered to be insignificant.

Estimated Take

This section provides an estimate of the number of incidental takes proposed for authorization, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns and potential TTS for individual marine mammals resulting from exposure to pile driving and removal. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown zones) discussed in detail below in Proposed Mitigation section, Level A harassment is neither anticipated nor proposed to be authorized.

As described previously, no mortality is anticipated or proposed to be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

Level B Harassment for non-explosive sources—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and

can be difficult to predict (Southall *et al.* 2007, Ellison *et al.* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 μPa (rms) (microPascal, root mean square) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

The Navy's construction includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) are applicable.

Level A harassment for non-explosive sources—NMFS' *Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing* (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's proposed construction includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 7—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels.

The sound field in the project area is the existing background noise plus additional construction noise from the proposed project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving and vibratory pile driving). The largest calculated Level B harassment zone extends 7.2 km (4.5 mi) from the source (though truncated by land in some directions), with an area of 4.7 km^2 (1.8 mi^2), as calculated using geographic information system (GIS) data as determined by the transmission loss modeling.

TABLE 8—PROJECT SOUND SOURCE LEVELS

Pile size and type	Installation method	RMS SPL	Peak SPL	SEL	Source
24-in Square Concrete	Impact	176	189	163	Illingworth and Rodkin, 2017.
16-in Composite	Impact	165	177	157	Caltrans, 2015.[1]
	Vibratory	158			Illingworth and Rodkin, 2017.
12-in Timber	Vibratory	[2] 158			Illingworth and Rodkin, 2017.

[1] These source levels are from a 12-inch timber pile (Table 2–2, page 2–16).

[2] NMFS typically recommends a proxy source level of 152dB RMS SPL for installation and removal of 12-in timber piles; however, the Navy's application included specialized modeling (described below) using 158dB RMS SPL. Given that modeling and that 158dB RMS SPL is a more conservative source level, NMFS concurred with the use of 158dB RMS SPL as the proxy source level for 12-in timber piles.

The Navy contracted the University of Washington, Applied Physics Laboratory (APL) to conduct site-specific acoustic transmission loss modeling for the project. The APL's full report is included in Appendix B of the Navy's application. NMFS independently reviewed and concurred with the modeling in the report, and has adopted the resulting isopleths for the project, as included in Table 9.

TABLE 9—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS

Site	Pile size and type	Level A harassment isopleth (m)				Level B harassment isopleth (m) [1]
		LF cetacean	MF cetacean	HF cetacean	Phocid	
Impact Pile Driving						
Pier 3	16-in Composite	18	<10m			27
Pier 12	16-in Composite	18				24
MWR Marina	24-in Concrete	52				59
	16-in Composite	11				18
V-Area	24-in Concrete	42				47
	16-in Composite	11				17
Craney Island	16-in Composite	16				21
Lambert's Point	16-in Composite	19				28
Vibratory Pile Driving						
Pier 3	16-in Composite/12-in Timber	<10m				5,615
Pier 12						4,159
MWR Marina						469
V-Area						382
Craney Island						3,001
Lambert's Point						7,161

[1] Please refer to Tables 6–5 and 6–6 in the Navy's application for the areas of the Level B harassment zones.

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. We describe how the information provided above is brought together to produce a quantitative take estimate.

Humpback Whale

Humpback whales occur in the mouth of the Chesapeake Bay and nearshore waters of Virginia during winter and spring months. Most detections during shipboard surveys were of one or two juveniles per sighting. Although two individuals were detected in the vicinity of MPU project activities, there is no evidence that they linger for multiple days. Because no density estimates are available for the species in this area, the Navy estimated one take for every 60 days of pile driving. However, given the potential group size of two, as indicated by the sightings referenced above, NMFS has estimated that two humpback whales may be taken by Level B harassment for every 60 days of pile driving. Therefore, given the number of project days expected in each year (Table 4), NMFS is proposing to authorize a total of 24 takes by Level B harassment of humpback whale over the five-year authorization, with no more than eight takes by Level B harassment in one year.

The largest Level A harassment zone for low-frequency cetaceans extends approximately 52 m from the source during impact pile driving of 24-in concrete piles at the MWR Marina (Table 9). For most activities, the Level A harassment zone is less than 20 m. The Navy is planning to implement a 50-m shutdown zone for humpback whales during impact pile driving of 24-in concrete piles, and shutdown zones that include the entire Level A harassment isopleth for all activities, as indicated in Table 15. Therefore, the Navy did not request, and NMFS does not propose to authorize Level A harassment take of humpback whale.

Bottlenose Dolphin

The expected number of bottlenose dolphins in the project area was estimated using inshore seasonal densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent areas near Virginia Beach, Virginia, from August 2012 through August 2015 (Engelhaupt *et al.* 2016). To calculate Level B harassment takes of bottlenose dolphin, NMFS used the Chesapeake Bay density of 1.38 dolphins/km^2 (Engelhaupt *et al.* 2016). This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and is the most representative density for the project area. NMFS conservatively multiplied the density of 1.38 dolphins/km^2 by the largest Level B harassment zone for each project location (Table 11) and then by the proportional number of estimated pile driving days at each location for each year (Table 10). For example, to calculate Level B harassment takes associated with work at Pier 3 in 2021, NMFS multiplied the density (1.38 dolphins/km^2) by largest Level B harassment zone for Pier 3 (10.3 km^2) by the proportional number of pile driving days at Pier 3 in 2021 (24.6) for a total of 350 Level B harassment takes at Pier 3 in 2021. Therefore, NMFS proposes to authorize 7,566 takes by Level B harassment of bottlenose dolphin across all five years, with no more than 2,742 in one year.

TABLE 10—ESTIMATED NUMBER OF PILE DRIVING DAYS AT EACH PROJECT LOCATION

Location [1]	Estimated number of pile driving days (all seasons)	Proportional number of pile driving days [3]				
		2021	2022	2023	2024	2025
Pier 3	68	24.6	10.0	2.1	9.0	22.3
Pier 12	352	127.6	51.5	11.0	46.6	115.3
MWR Marina	52	18.8	7.6	1.6	6.9	17.0
V-Area	44	15.9	6.4	1.4	5.8	14.4
Craney Island	52	18.8	7.6	1.6	6.9	17.0
Lambert's Point	8	2.9	1.2	0.3	1.1	2.6

TABLE 10—ESTIMATED NUMBER OF PILE DRIVING DAYS AT EACH PROJECT LOCATION—Continued

Location [1]	Estimated number of pile driving days (all seasons)	Proportional number of pile driving days [3]				
		2021	2022	2023	2024	2025
Estimated Total Pile Driving Days per Year	[2] 574	208	84	18	76	188
Percentage of Total Pile Driving Days		36	15	3	13	33

[1] While the Navy plans to conduct work at additional locations not listed here, these locations are assumed to be representative of the overall project site (ex: all pile driving lumped together at Lambert's Point Deperming Station), as noted in Appendix A of the Navy's application. Pile driving at these additional locations is included in the total number of pile driving days assumed here.

[2] NMFS recognizes that due to rounding, the sum of the estimated number of work days at each location is 576, not 574. However, as mentioned previously, the Navy expects construction to last 574 days across all five years.

[3] The number of pile driving days indicated per year at each location is intended to inform our assessment of both the total and maximum annual taking allowable under the rule. NMFS does not expect that the Navy will conduct exactly the fractional number of days of pile driving indicated for each year in each location.

TABLE 11—ANNUAL LEVEL B HARASSMENT TAKES OF BOTTLENOSE DOLPHIN BY PROJECT LOCATION

Location	Largest Level B harassment zone (km^2)	Level B harassment takes [1]					
		2021	2022	2023	2024	2025	Total
Pier 3	10.3	350.2	141.4	30.3	128.0	316.6	966.6
Pier 12	13.1	2,305.9	931.2	199.6	842.5	2,084.2	6,363.5
MWR Marina	0.2	5.2	2.1	0.5	1.9	4.7	14.4
V-Area	0.2	4.4	1.8	0.4	1.6	4.0	12.1
Craney Island	2.2	57.2	23.1	5.0	20.9	51.7	157.9
Lambert's Point	4.7	18.8	7.6	1.6	6.9	17.0	51.9
Total Level B Harassment Takes per Year		2,742	1,107	237	1,002	2,478	7,566
Annual Takes as Percentage of Five-Year Total		36.2	14.6	3.1	13.2	32.8	

[1] Note actual calculations were not rounded at each step as they are shown in Table 10 and Table 11.

The Level A harassment zones for mid-frequency cetaceans extend less than 10 m from the source during all activities (Table 9). Given the small size of the Level A harassment zones, we do not expect Level A harassment take of bottlenose dolphins. Additionally, the Navy is planning to implement a 10 m shutdown zone for bottlenose dolphins during all pile driving and other in-water activities (Table 15), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS does not propose to authorize Level A harassment take of bottlenose dolphin.

Harbor Porpoise

Harbor porpoises are known to occur in the coastal waters near Virginia Beach (Hayes *et al.* 2019). Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Harbor porpoise sighting data collected by the U.S. Navy near NAVSTA Norfolk and Virginia Beach from 2012 to 2015 (Engelhaupt *et al.* 2014; 2015; 2016) did not produce enough sightings to calculate densities. One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016). Elsewhere in their range, harbor porpoises typically occur in groups of two to three individuals (Carretta *et al.* 2001; Smultea *et al.* 2017).

Because there are no density estimates for the species in the MPU project area, the Navy conservatively estimated two takes of harbor porpoise by Level B harassment per 60 pile driving days (Table 4), resulting in 20 takes by Level B harassment across the five year rule, and no more than 7 takes by Level B harassment in one year (Table 13). NMFS concurs with this estimate and proposes to authorize 20 takes by Level B harassment of harbor porpoise.

The Level A harassment zones for high-frequency cetaceans extend less than 10 m from the source during all activities (Table 9). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor porpoise. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 15). Therefore, the Navy did not request, and NMFS does not propose to authorize take by Level A harassment of harbor porpoise.

Harbor Seal

The expected number of harbor seals in the project area was estimated using systematic, land- and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from 2014 through 2019 (Jones *et al.* 2020). The average daily seal count from the 2014 through 2019 field seasons ranged from 8 to 23, with an average of 13.6 harbor seals across all the field seasons (Table 12) (rounded up to 14 seals).

TABLE 12—HARBOR SEAL COUNTS AT CHESAPEAKE BAY BRIDGE TUNNEL

Field season	"In season" survey days	Total seal count	Average daily seal count	Max daily seal count
2014–2015	11	113	10	33
2015–2016	14	187	13	39
2016–2017	22	308	14	40
2017–2018	15	340	23	45
2018–2019	10	82	8	17
Average			13.6	34.8

Source: Jones *et al.* 2020.

The Navy expects, and NMFS concurs, that harbor seals are likely to be present from November to April. NMFS calculated take by Level B harassment by multiplying 14 seals by the number of pile driving days expected in each year if fewer than 183 project days (half of the year) were expected. To account for seasonal occurrence (November to April), NMFS calculated take based on 183 project days for years which have more than 183 expected project days (2021, 2025). Therefore, NMFS proposes to authorize 7,616 takes by Level B harassment of harbor seals across the five-year duration of this rule, with no more than 2,562 takes by Level B harassment in one year (Table 13).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 9). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 15), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS does not propose to authorize take by Level A harassment of harbor seal.

Gray Seal

Very little information is available about the occurrence of gray seals in the Chesapeake Bay and coastal waters. Although the population of the United States may be increasing, there are only a few records at known haulout sites in Virginia used by harbor seals, strandings are rare, and they have not been reported in shipboard surveys. Assuming that they may utilize the Chesapeake Bay waters, the Navy conservatively estimates that one gray seal may be exposed to noise levels above the Level B harassment threshold for every 60 days of vibratory pile driving during the six month period when they are most likely to be present. NMFS concurs, and calculated take based on the number of project days for years which have fewer than 183 project days (half of the year). To account for the expected seasonal presence of gray seals, NMFS calculated take based on 183 project days for years which have more than 183 expected project days (2021, 2025). Therefore, NMFS is proposing to authorize nine takes by Level B harassment of gray seals over the five-year duration of the rule, with no more than three takes by Level B harassment in one year (Table 13).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 9). Given the small size of the Level A harassment zones and the low occurrence of gray seals in the project area, we do not expect Level A harassment take of gray seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 15), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS does not propose to authorize take by Level A harassment of gray seal.

TABLE 13—ESTIMATED TAKE BY LEVEL B HARASSMENT, BY SPECIES

Species	2021	2022	2023	2024	2025	Total
Humpback whale	6	4	2	4	8	24
Bottlenose dolphin	2,742	1,107	237	1,002	2,478	7,566
Harbor porpoise	7	3	1	3	6	20
Harbor seal	2,562	1,176	252	1,064	2,562	7,616
Gray seal	3	1	1	1	3	9

TABLE 14—ESTIMATED TAKE BY LEVEL B HARASSMENT (GREATEST ANNUAL TAKE EXPECTED), BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE

Species	Stock	Stock abundance	Level B harassment take	Percent of stock
Humpback Whale	Gulf of Maine	[b] 12,312	8	0.6
Bottlenose Dolphin	WNA Coastal, Northern Migratory [a]	6,639	1,353	20.4
WNA Coastal, Southern Migratory [a]	3,751	1,353	36.1	
NNCES [a]	823	36	4.4	
Harbor Porpoise	Gulf of Maine/Bay of Fundy	95,543	7	0.007
Harbor Seal	Western North Atlantic	75,834	2,562	3.4
Gray Seal	Western North Atlantic	[d] 27,131	3	0.01

[a] Take estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present would follow same probability of presence in the project area. Please see the Small Numbers section for additional information.

[b] West Indies DPS.

[c] Assumes multiple repeated takes of same individuals from small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see the Small Numbers section for additional information.

[d] This stock abundance estimate includes only the U.S. portion of this stock. The actual stock abundance, including the Canadian portion of the population, is estimated to be approximately 451,431 animals.

Proposed Mitigation

Under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In addition to the measures described later in this section, the Navy will employ the following mitigation measures:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;
- The Navy will conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;
- For those marine mammals for which Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level B harassment zone; and
- If take reaches the authorized limit for an authorized species, pile installation/removal will shut down immediately if these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures apply to the Navy's in-water construction activities.

Establishment of Shutdown Zones—The Navy will establish shutdown zones for all pile driving and removal activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 15).

Protected Species Observers (PSOs)—The placement of PSOs during all pile driving and removal activities (described in the Proposed Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile driving and removal. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

Monitoring for Level B Harassment—The Navy will monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable, and the Level A harassment zones. The Navy will monitor at least a portion of the Level B harassment zone on all pile driving days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

Pre-activity Monitoring—Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

Soft Start—Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

The Navy does not plan to use a pile driving energy attenuator during construction.

TABLE 15—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL

Site	Pile size and type	Shutdown Zone			
		LF cetacean	MF cetacean	HF cetacean	Phocid
Pier 3	16-in Composite	20	10m		
Pier 12	16-in Composite	20			
MWR Marina	24-in Concrete	50			
	16-in Composite	20			
V-Area	24-in Concrete	50			
	16-in Composite	20			
Craney Island	16-in Composite	20			
Lambert's Point	16-in Composite	20			
Pier 3 Pier 12. MWR Marina. V-Area. Craney Island. Lambert's Point.	16-in Composite/12-in Timber	10m			

Based on our evaluation of the Navy's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. NMFS' MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104 (a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) Action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) Long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

The Navy will submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of construction.

Visual Monitoring

Marine mammal monitoring during pile driving and removal must be conducted by PSOs meeting NMFS' standards and in a manner consistent with the following:

- Independent PSOs (*i.e.,* not construction personnel) who have no other assigned tasks during monitoring periods must be used;
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization;
- Other PSOs may substitute education (degree in biological science or related field) or training for experience; and
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction.

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

At least two PSOs will monitor all pile driving activities. Depending on available resources, and depending on the size of the zone associated with the activity, additional PSOs may be utilized as necessary. PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures. (See Figure 13–1 of the Navy's application for example representative monitoring locations.)

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless

of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

Acoustic Monitoring

The Navy intends to conduct a sound source verification (SSV) study for all pile types other than concrete and timber piles and will follow accepted methodological standards to achieve their objectives. The Navy will submit an acoustic monitoring plan to NMFS for approval prior to the start of construction.

Reporting

The Navy would submit a draft report to NMFS within 45 workdays of the completion of required monitoring for each MPU project. The report will detail the monitoring protocol and summarize the data recorded during monitoring. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring.
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory).
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance).
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.
- Age and sex class, if possible, of all marine mammals observed.
- PSO locations during marine mammal monitoring.
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active.
- Number of marine mammals detected within the harassment zones, by species.
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.

If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. The Navy must not resume their activities until notified by NMFS.

The report must include the following information:

i. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

ii. Species identification (if known) or description of the animal(s) involved;

iii. Condition of the animal(s) (including carcass condition if the animal is dead);

iv. Observed behaviors of the animal(s), if alive;

v. If available, photographs or video footage of the animal(s); and

vi. General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS's implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in Table 5, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment, identified above, while activities are underway.

No serious injury or mortality would be expected even in the absence of the proposed mitigation measures. For all species other than humpback whale, no Level A harassment is anticipated given the nature of the activities. For humpback whale, no Level A harassment is anticipated due to the proposed mitigation measures, which we expect the Navy will be able to effectively implement given the small Level A harassment zone sizes and high visibility of humpback whales.

The Navy's proposed pile driving activities and associated impacts will occur within a limited portion of the confluence of the Chesapeake Bay area. Localized noise exposures produced by project activities may cause short-term behavioral modifications in affected cetaceans and pinnipeds. However, as described previously, the mitigation and monitoring measures are expected to further reduce the likelihood of injury as well as reduce behavioral disturbances.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff 2006). Individual animals, even if taken multiple times, will most likely move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. Furthermore, many projects similar to this one are also believed to result in multiple takes of individual animals without any documented long-term adverse effects. Level B harassment will be minimized through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is located on a busy waterfront with high amounts of vessel traffic.

As previously described, UMEs have been declared for Northeast pinnipeds (including harbor seal and gray seal) and Atlantic humpback whales. However, we do not expect takes proposed for authorization in this action to exacerbate or compound upon these ongoing UMEs. As noted previously, no injury, serious injury, or mortality is expect or proposed for authorization, and Level B harassment takes of humpback whale, harbor seal and gray seal will be reduced to the level of least practicable adverse impact through the incorporation of the proposed mitigation measures. For the WNA stock of gray seal, the estimated stock abundance is 451,431 animals, including the Canadian portion of the stock (estimated 27,131 animals in the U.S. portion of the stock). Given that only 1 to 3 takes by Level B harassment are proposed for this stock annually, we do not expect this proposed authorization to exacerbate or compound upon the ongoing UME.

With regard to humpback whales, the UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.,* 12,312 (95% CI 8,688–15,954) whales in 2004–05 (Bettridge *et al.* 2003)), and appears to be experiencing consistent growth. Further, NMFS is proposing to authorize no more than eight takes by Level B harassment annually of humpback whale.

For the WNA stock of harbor seals, the estimated abundance is 75,834 individuals. The estimated M/SI for this stock (350) is well below the PBR (2,006). As such, the proposed Level B harassment takes of harbor seal are not expected to exacerbate or compound upon the ongoing UMEs.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities will not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected (with no known particular importance to marine mammals), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- No Level A harassment is anticipated or authorized;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks;
- The number of anticipated takes is very low for humpback whale, harbor porpoise, and gray seal;
- The specified activity and associated ensonifed areas are very small relative to the overall habitat ranges of all species and do not include habitat areas of special significance (Biologically Important Areas or ESA-designated critical habitat);
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the proposed activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such

as the temporal or spatial scale of the activities.

The authorized instances of take of humpback whale, harbor porpoise, harbor seal, and gray seal comprises less than one-third of the best available stock abundance (Table 14). The number of animals authorized to be taken from these stocks would be considered small relative to the relevant stock's abundances even if each estimated taking occurred to a new individual, which is an unlikely scenario.

Three bottlenose dolphin stocks could occur in the project area: WNA Coastal Northern Migratory, WNA Coastal Southern Migratory, and NNCES stocks. Therefore, the estimated takes of bottlenose dolphin by Level B harassment would likely be portioned among these stocks. Based on the stocks' respective occurrence in the area, NMFS estimated that there would be 100 takes from the NNCES stock over the five-year period (no more than 36 in one year), with the remaining takes evenly split between the northern and southern migratory coastal stocks. Based on consideration of various factors described below, we have determined the numbers of individuals taken would likely comprise less than one-third of the best available population abundance estimate of either coastal migratory stock.

Both the WNA Coastal Northern Migratory and WNA Coastal Southern Migratory stocks have expansive ranges and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these stocks it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The WNA Coastal Northern Migratory stock occurs during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold-water months, dolphins may occur in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia. During January-March, the WNA Coastal Southern Migratory stock appears to move as far south as northern Florida. From April to June, the stock moves back north to North Carolina. During the warm water months of July-August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of its mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Chesapeake Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~two months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur to only a small portion of either of the migratory coastal stocks.

Both migratory coastal stocks likely overlap with the NNCES stock at various times during their seasonal migrations. The NNCES stock is defined as animals that primarily occupy waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July-August). Animals from this stock also use coastal waters (≤1 km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. Comparison of dolphin photo-identification data confirmed that limited numbers of individual dolphins observed in Roanoke Sound have also been sighted in the Chesapeake Bay (Young, 2018). Like the migratory coastal dolphin stocks, the NNCES stock covers a large range. The spatial extent of most small and resident bottlenose dolphin populations is on the order of 500 km^2, while the NNCES stock occupies over 8,000 km^2 (LeBrecque *et al.* 2015). Given this large range, it is again unlikely that a preponderance of animals from the NNCES stock would depart the North Carolina estuarine system and travel to the northern extent of the stock's range. However, recent evidence suggests that there is likely a small resident community of NNCES dolphins of indeterminate size that inhabits the Chesapeake Bay year-round (E. Patterson, NMFS, pers. comm.).

Many of the dolphin observations in the Chesapeake Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (J. Mann, Potomac-Chesapeake Dolphin Project, pers. comm.). Similarly, using available photo-identification data, Engelhaupt *et al.* (2016) determined that specific individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 km from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by Level B harassment. Furthermore, the existence of a resident dolphin population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

In summary and as described above, the following factors primarily support our determination regarding the incidental take of small numbers of the affected stocks of bottlenose dolphin:

- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of any one stock concentrated in a relatively small area such as the project area or the Chesapeake Bay;
- The Chesapeake Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries; and
- Many of the takes would likely be repeats of the same animals and likely from a resident population of the Chesapeake Bay.

Based on the analysis contained herein of the proposed activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or

stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Navy maintenance construction activities would contain an adaptive management component.

The reporting requirements associated with this proposed rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Navy regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) Results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Request for Information

NMFS requests interested persons to submit comments, information, and suggestions concerning the Navy request and the proposed regulations (see **ADDRESSES**). All comments will be reviewed and evaluated as we prepare a final rule and make final determinations on whether to issue the requested authorization. This proposed rule and referenced documents provide all environmental information relating to our proposed action for public review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The U.S. Navy is the sole entity that would be subject to the requirements in these proposed regulations, and the Navy is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This proposed rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a federal agency. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports.

List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 8, 2020.

Samuel D. Rauch, III,

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

For reasons set forth in the preamble, 50 CFR part 218 is proposed to be amended as follows:

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.,* unless otherwise noted.

■ 2. Add subpart A to part 218 to read as follows:

Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

Sec.

218.1 Specified activity and geographical region.
218.2 Effective dates.
218.3 Permissible methods of taking.
218.4 Prohibitions.
218.5 Mitigation requirements.
218.6 Requirements for monitoring and reporting.
218.7 Letters of Authorization.
218.8 Renewals and modifications of Letters of Authorization.
218.9 [Reserved]

Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

§ 218.1 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station (NAVSTA) Norfolk.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs at NAVSTA Norfolk and adjacent Navy facilities.

§ 218.2 Effective dates.

Regulations in this subpart are effective from [EFFECTIVE DATE OF THE FINAL RULE] to [DATE 5 YEARS AFTER EFFECTIVE DATE OF THE FINAL RULE].

§ 218.3 Permissible methods of taking.

Under an LOA issued pursuant to § 216.106 of this chapter and § 218.7, the Holder of the LOA (hereinafter ''Navy'') may incidentally, but not intentionally, take marine mammals within the area described in § 218.1(b) by Level B harassment associated with construction activities, provided the

activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 218.4 Prohibitions.

(a) Except for the takings contemplated in § 218.3 and authorized by a LOA issued under § 216.106 of this chapter and § 218.7, it is unlawful for any person to do any of the following in connection with the activities described in § 218.1 may:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 218.7;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

§ 218.5 Mitigation requirements.

(a) When conducting the activities identified in § 218.20(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 218.7 must be implemented. These mitigation measures shall include but are not limited to:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) The Navy shall conduct briefings for construction supervisors and crews, the monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

(3) For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, the Navy shall cease operations and reduce vessel speed to the minimum level required to maintain steerage and safe working conditions.

(4) For all pile driving activity, the Navy shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(5) For all pile driving activity, the Navy shall implement shutdown zones with radial distances as identified in a LOA issued under § 216.106 of this chapter and § 218.7. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(6) The Navy shall deploy protected species observers (observers) as indicated in its Marine Mammal Monitoring Plan approved by NMFS.

(7) For all pile driving activities, a minimum of two observers shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures.

(8) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.,* must leave of their own volition) and their behavior shall be monitored and documented. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. Monitoring shall occur throughout the time required to drive a pile. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.,* the entire shutdown zone and surrounding waters must be visible to the naked eye).

(9) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. If pile driving is halted or delayed due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal.

(10) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

(11) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain), the Navy shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected.

(12) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. The Navy shall adhere to the following additional observer qualifications:

(i) Independent observers are required.

(ii) At least one observer must have prior experience working as an observer.

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience.

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer.

(v) Personnel who are engaged in construction activities may not serve as observers.

(13) The Navy shall use soft start techniques for impact pile driving. Soft start for impact drivers requires the Navy and those persons it authorizes or funds to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

(b) [Reserved]

§ 218.6 Requirements for monitoring and reporting.

(a) The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) The Navy shall deploy observers as indicated in its approved Marine Mammal Monitoring Plan.

(c) Observers shall be trained in marine mammal identification and behaviors. Observers shall have no other construction-related tasks while conducting monitoring.

(d) For all pile driving activities, a minimum of two observers shall be

stationed at the active pile driving site or in reasonable proximity in order to monitor the shutdown zone.

(e) The Navy shall monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable and the shutdown zones. The Navy shall monitor at least a portion of the Level B harassment zone on all pile driving days.

(f) The Navy shall conduct hydroacoustic data collection (sound source verification and propagation loss) in accordance with a hydroacoustic monitoring plan that must be approved by NMFS in advance of construction.

(g) The Navy shall submit a draft monitoring report to NMFS within 45 work days of the completion of required monitoring for each marine structure maintenance, pile replacement, and upgrades project. The report must detail the monitoring protocol and summarize the data recorded during monitoring. If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. Specifically, the report must include:

(1) Dates and times (begin and end) of all marine mammal monitoring.

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory).

(3) Environmental conditions during monitoring periods (at beginning and end of observer shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance (if less than the harassment zone distance).

(4) The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting.

(5) Age and sex class, if possible, of all marine mammals observed.

(6) Observer locations during marine mammal monitoring.

(7) Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting).

(8) Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active.

(9) Number of marine mammals detected within the harassment zones, by species.

(10) Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any.

(11) Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals.

(h) The Navy shall report the hydroacoustic data collected as required by a LOA issued under § 216.106 of this chapter and § 218.7.

(i) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. The Navy must not resume their activities until notified by NMFS.

(1) The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

§ 218.7 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Navy must apply for and obtain a modification of the LOA as described in § 218.8.

(e) The LOA shall set forth the following information:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 218.8 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 218.7 for the activity identified in § 218.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations, and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under § 216.106 of this chapter and § 218.7 for the activity identified in § 218.1(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation,

monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years.

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to § 216.106 of this chapter and § 218.7, a LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§ 218.9 [Reserved]

[FR Doc. 2020–27300 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 85, No. 245
Monday, December 21, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

60-Day Notice of Proposed Information Collection—Development Information Solution

AGENCY: Bureau for Management, Office of Acquisition and Assistance, Policy Division, United States Agency for International Development (USAID).

ACTION: Notice of request for public comment.

SUMMARY: The U.S. Agency for International Development (USAID) seeks Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, USAID requests public comment on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: Comments must be received no later than February 19, 2021.

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

1. *Web:* Through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments.
2. *Email: policymailbox@usaid.gov.*

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument, to Marcelle Wijesinghe at 202–916–2606 or via email at *mwijesinghe@usaid.gov.*

SUPPLEMENTARY INFORMATION:

Instructions

All comments must be in writing and submitted through the method(s) specified in the Addresses section above. All submissions must include the information collection title. Please include your name, title, organization, postal address telephone number, and email address in the text of the message. Please note that comments submitted in response to this Notice are public record. We recommend that you do not submit detailed personal information, Confidential Business Information, or any information that is otherwise protected from disclosure by statute.

USAID will only address comments that explain why the proposed collection would be inappropriate, ineffective, or unacceptable without a change. Comments that are insubstantial or outside the scope of the notice of request for public comment may not be considered.

Purpose

USAID is implementing the Development Information Solution (DIS) Pilot to consolidate reporting, improve efficiencies, and facilitate evidence-based decision-making. The purpose of this information collection is to require USAID contractors and grant recipients who collect indicator data under their award terms to: (1) Submit information to request access to the DIS, and (2) to submit indicator information to the DIS, which is collected under special award requirements unique to each award. In order to request access to the DIS, contractors and recipients of grants and cooperation agreements will need to submit the following information to USAID: Name, contact telephone number, name of organization, *Login.gov* username (which is the address used for *Login.gov* access), award number, award expiration date, the activities for which access is requested, and a signature and date to acknowledge agreement to the listed Rules of Behavior. We estimate that two persons may request access for each award that requires the collection of indicator data.

Contractors and recipients will use the access to DIS during the pilot to submit indicator data and narrative on the deviation between indicator results and targets, when required as a subset of performance reporting under special award requirements. We estimate that indicator information will be submitted to DIS quarterly. As the DIS pilot progresses, USAID will use information from the pilot to inform rulemaking under Regulation Identifier Number (RIN) 0412–AA90, which will require contractors and grant recipients to submit digital information required under awards through the DIS, replacing other current methods of submission. This information collection request will be updated in conjunction with the rulemaking to capture digital information submission requirements for information collected under other standard award terms.

Overview of Information Collection

- *Title of Information Collection:* USAID Development Information Solution Pilot.
- *Type of Review:* A New Information Collection.
- *Respondents:* USAID contractors and grant and cooperative agreement recipients.
- *Estimated Number of Annual Responses—DIS Access:* 2,368.
- *Estimated Number of Annual Burden Hours—DIS Access:* 1,184.
- *Estimated Number of Annual Responses—Indicator Information:* 11,236.
- *Estimated Number of Annual Burden Hours—Indicator Information:* 2,809.
- *Total Estimated Number of Annual Responses:* 13,604.
- *Total Estimated Number of Annual Burden Hours:* 3,993.

Dated: December 15, 2020.

Mark Walther,

Senior Procurement Executive.

[FR Doc. 2020–27989 Filed 12–18–20; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0040]

Pioneer Hi-Bred International; Determination of Nonregulated Status for Enhanced Grain Yield Potential and Glufosinate-Ammonium Resistant Maize

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that the corn variety designated as maize event DP202216, which has been genetically engineered

for increased yield potential and resistance to the herbicide glufosinate-ammonium, is no longer considered regulated under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on evaluation of information Pioneer submitted in its petition for a determination of nonregulated status, our analyses, and public comments received in response to previous notices announcing the availability of the petition for nonregulated status and our associated environmental assessment and plant pest risk assessment. This notice also announces the availability of our written determination and finding of no significant impact.

DATES: This change in regulatory status will be recognized December 21, 2020.

ADDRESSES: You may read the documents referenced in this notice and the comments we received at *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0040,* or in our reading Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

Supporting documents are also available on the APHIS website at *https://www.aphis.usda.gov/aphis/ourfocus/biotechnology/permits-notifications-petitions/petitions/petition-status.*

FOR FURTHER INFORMATION CONTACT: Ms. Cindy Eck, Biotechnology Regulatory Services, APHIS, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 851–3892; email: *cynthia.a.eck@usda.gov.*

SUPPLEMENTARY INFORMATION: Under the authority of the plant pest provisions of the Plant Protection Act (PPA) (7 U.S.C. 7701 *et seq.*), the regulations in 7 CFR part 340, regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products modified or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests.

Pursuant to the terms set forth in a final rule published in the **Federal Register** on May 18, 2020 (85 FR 29790–29838, Docket No. APHIS–2018–0034),[1] any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340.

APHIS received a petition (APHIS Petition Number 19–101–01p) from Pioneer Hi-Bred International, Inc. (Pioneer) on April 10, 2019, seeking a determination of nonregulated status for a maize event designated as DP202216, which has been genetically engineered for enhanced grain yield potential and glufosinate-ammonium resistance. The Pioneer petition stated that this maize is unlikely to pose a plant pest risk and, therefore, should not be regulated under APHIS' regulations in 7 CFR part 340.

According to our process[2] for soliciting public comment when considering petitions for determination of nonregulated status of GE organisms, APHIS accepts written comments regarding a petition once APHIS deems it complete. On July 25, 2019, APHIS published a notice[3] in the **Federal Register** (84 FR 35850–35851, Docket No. APHIS–2019–0040) announcing the availability of the Pioneer petition for public comment. Four comments were received. Two were opposed to deregulating DP202216 maize, one comment was in favor of deregulation, and one comment was unrelated to the petition. APHIS evaluated the issues raised during the initial comment period and, where appropriate, incorporated a discussion of them within a draft environmental assessment (EA).

A second opportunity for public involvement was provided on July 20, 2020, with a notice[4] published in the **Federal Register** (85 FR 43807–43809, Docket No. APHIS–2019–0040) announcing the availability of the draft EA and preliminary plant pest risk assessment (PPRA) for public review and comment. That comment period closed August 19, 2020. APHIS received two comments. Both comments were in favor of the petition, and neither commenter provided new information or data (for example, peer-reviewed publications or similar science-based literature) regarding the draft EA or preliminary PPRA.

National Environmental Policy Act

After reviewing and evaluating the comments received during the comment period on the draft EA, preliminary PPRA, and other information, APHIS has prepared a final EA, which provides the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the determination of nonregulated status of DP202216 maize. The EA was prepared in accordance with: (1) The National Environmental Policy Act (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on our EA, the response to public comments and other pertinent scientific data, APHIS has reached a finding of no significant impact (FONSI) with regard to the preferred alternative identified in the EA (to make a determination of nonregulated status of DP202216 maize).

Determination

Based on APHIS' analysis of field and laboratory data submitted by Pioneer, references provided in the petition, peer-reviewed publications, information analyzed in the EA, the PPRA, the public comments, and information provided in APHIS' response to those public comments, APHIS has determined that DP202216 maize is unlikely to pose a plant pest risk and therefore is no longer subject to our regulations governing the introduction of certain GE organisms.

Copies of the signed determination document, PPRA, final EA, and FONSI, as well as the previously published petition and supporting documents, are available as indicated under **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT** section in this notice.

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 16th day of December 2020.

Michael Watson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–28060 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–34–P

[1] Although this final rule (termed the SECURE rule) published revisions to 7 CFR part 340 with phased effective dates beginning August 17, 2020 (*https://www.aphis.usda.gov/brs/fedregister/BRS_2020518.pdf*), the SECURE rule stated that the petition evaluation process found in the previous regulations would continue to be used for a period of time following that August 17, 2020 effective date. This product was evaluated in accordance with that process.

[2] On March 6, 2012, APHIS published in the **Federal Register** (77 FR 13258–13260, Docket No. APHIS–2011–0129) a notice describing our public review process for soliciting public comments and information when considering petitions for determinations of nonregulated status for GE organisms. To view the notice, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2011-0129.*

[3] To view the notice, the petition, supporting documents, and the comments we received, go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2019-0040.*

[4] See footnote 3.

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2020–0030]

Availability of FSIS Guideline To Assist With the Donation of Eligible Meat & Poultry Products to Non-Profit Organizations

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of availability and request for comments.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of and requesting comment on a guideline for meat and poultry establishments interested in donating products to non-profit organizations. FSIS has received several questions from meat and poultry establishments and non-profit organizations on this subject and has decided to address the major concerns associated with donation in this guideline. FSIS encourages establishments to donate meat and poultry products to non-profit organizations, when possible, to reduce food loss and waste.

DATES: Submit Comments on or before February 19, 2021.

ADDRESSES: A downloadable version of the guideline is available to view and print at *https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/guidelines.* No hard copies of the guideline have been published.

FSIS invites interested persons to submit comments on this proposed rule. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field on this web page or attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350–E, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2016–0026. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202) 720–5627 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development by telephone at (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

In the United States, food waste is estimated as constituting between 30–40 percent of the food supply. This figure, based on estimates from USDA's Economic Research Service of a 31 percent food loss at the retail and consumer levels, corresponds to approximately 133 billion pounds and $161 billion worth of food in 2010. Wasted food is the single largest category of material placed in municipal landfills and represents nourishment that could have helped feed families in need.[1] Additionally, water, energy, and labor used to produce wasted food could have been employed for other purposes. Effectively reducing food waste will require cooperation among federal, state, tribal and local governments, faith-based institutions, environmental organizations, communities, and the entire supply chain.

In October 2018, the U.S. Department of Agriculture (USDA), the U.S. Environmental Protection Agency (EPA), and the U.S. Food and Drug Administration (FDA) launched the Winning on Reducing Food Waste Initiative in a formal agreement.[2] As part of the initiative, the agencies affirmed their shared commitment to work towards the national goal of reducing food loss and waste by 50 percent by 2030. The agencies agreed to coordinate food loss and waste actions such as education and outreach, research, community investments, voluntary programs, public-private partnerships, tool development, technical assistance, event participation, and policy discussion on the impacts and importance of reducing food loss and waste. While there have been significant actions taken and commitments made through public-private partnerships to date, there is still much work to be done. More information on USDA's Winning on Reducing Food Waste Initiative can be found on the USDA website at: *https://www.usda.gov/foodlossandwaste/winning.*

FSIS believes that meat and poultry businesses can be a critical component of reducing food loss and waste. Therefore, FSIS is announcing the availability of a guideline to help meat and poultry establishments understand FSIS's requirements for donating meat and poultry products to non-profit organizations. The guideline explains inspection, labeling, and shipping requirements and exemptions.

FSIS encourages interested parties to follow this guideline. This guideline represents current FSIS thinking, and FSIS will update it as necessary to reflect comments received and any additional information that becomes available. FSIS is seeking comments on this guideline as part of its efforts to continuously assess and improve the effectiveness of policy documents.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication online through the FSIS web page located at: *http://www.fsis.usda.gov/federal-register.* FSIS also will make copies of this publication available through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

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[1] See: *https://www.ers.usda.gov/webdocs/publications/43833/43680_eib121.pdf?v=4126.8.*

[2] See: *https://www.usda.gov/sites/default/files/documents/usda-fda-epa-formal-agreement.pdf.*

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Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done in Washington, DC.

Paul Kiecker,

Administrator.

[FR Doc. 2020–28082 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2018–0034]

Availability of FSIS Guideline for Industry Response to Customer Complaints

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice of availability.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of an updated version of the guideline for industry on how to respond to customer complaints of meat and poultry products contaminated with foreign materials. FSIS originally published the guideline in March 2019. Additionally, FSIS is responding to comments received on the March 2019 guideline.

ADDRESSES: A downloadable version of the guideline is available to view and print at *https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/compliance-guides-index.* No hard copies of the guideline have been published.

FOR FURTHER INFORMATION CONTACT: Rachel Edelstein, Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

The Food Safety and Inspection Service (FSIS) administers a regulatory program under the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*) to protect the health and welfare of consumers. The Agency is responsible for ensuring that meat, poultry, and egg products are safe, wholesome, and correctly labeled and packaged.

Updated Guideline

On March 11, 2019, FSIS announced the availability of a guideline to assist all FSIS-regulated establishments that slaughter, or further process inspected meat and poultry products to develop and implement procedures for responding to customer complaints of adulterated and misbranded meat and poultry products (84 FR 8662).

FSIS has updated the guideline based on comments received. Specifically, FSIS revised and reorganized the guideline to improve readability; further clarified that a customer complaint program is not required; included methods for establishments to demonstrate control of products; added information on when establishments must notify FSIS that adulterated or misbranded products have entered commerce; added and clarified when establishments are required to address foreign material contamination in their Hazard Analysis and Critical Control Point (HACCP) plan; and clarified applicable regulatory requirements for corrective actions, reassessments, and recall procedures.

While FSIS specifically developed this document to address foreign material customer complaints, establishments can apply the information to other customer complaints of adulterated or misbranded products in commerce. FSIS encourages establishments that may receive customer complaints regarding adulterated or misbranded meat and poultry products to follow this guideline. This document does not present or describe any new regulatory requirements. This guideline represents current FSIS thinking, and FSIS will update it as necessary to reflect comments received and any additional information that becomes available.

Comments and Responses

FSIS received public comments from six trade associations, a poultry products producer, a pork products producer, a consumer advocacy organization, a HACCP consulting group, and an equipment manufacturer. A summary of the comments and the Agency's responses follows:

Foreign Material Adulteration

Comment: Several trade associations stated that the guidelines applied an overreaching and overly broad concept of the term ''adulteration'' by suggesting that any amount of foreign material, regardless of size or nature, adulterates meat and poultry products. The comments asserted that not all contaminants are food safety hazards and that the guidelines should reflect a risk-based approach to foreign material adulteration, taking into account whether the foreign material would present a health hazard.

Response: The FMIA and the PPIA (21 U.S.C. 601 and 453) and FSIS regulations (9 CFR 301.2, 381.1, and 531.1) state that the term ''adulterated'' applies, among other circumstances, to meat or poultry products:

—If it bears or contains any poisonous or deleterious substance which may render it injurious to health;

—if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

—if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

Thus, under the FMIA and PPIA and the regulations, the presence of foreign materials adulterates meat and poultry products. Examples of foreign materials found in meat and poultry products include: Glass or metal fragments, which are deleterious substances that may injure health; machinery pieces, such as rubber or plastic, which are filthy, or unwholesome, or unfit for food; or sand or rocks, which typically contaminate food products because of preparation under insanitary conditions. FSIS disagrees that the Agency's interpretation of ''adulteration'' is overly broad.

FSIS assesses the public health concern or hazard presented when a recall action is initiated for products adulterated with foreign materials. FSIS categorizes the recall as Class I (reasonable probability that the use of the products will cause serious, adverse

health consequences or death), Class II (remote probability of adverse health consequences from the use of the products), or Class III (products will not cause adverse health consequences). FSIS Directive 8080.1, *Recall of Meat and Poultry Products,* provides further information on recall classifications: FSIS Directive 8080.1.

In response to these comments and related concerns raised, FSIS intends to revise and update the recall directive to clarify recall classification issues and instructions to FSIS personnel concerning recalls as necessary. In addition, FSIS intends to review recalls of meat and poultry products associated with foreign materials over the past several years to determine whether the Agency should make additional changes to this guidance or instructions to inspection program personnel to prevent or reduce related recalls.

Comment: One FSIS-regulated company comment agreed that the presence of any foreign object meets the definition of adulteration and requested that the Agency clarify that objects inherent to the product, such as bones and feathers, would not render the product adulterated.

Response: Objects inherent to a product are not ''foreign material,'' however, the presence of these objects can render meat or poultry products adulterated. The FMIA and PPIA definition of ''adulterated,'' states that, ''. . . in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health'' (21 U.S.C. 601(m)(1) and 453(g)(1)). Thus, for example, if the size and amount of bone in a product would present a health hazard, the product is adulterated. When bone or other materials inherent to products, such as feathers or hair, do not present a health hazard, they may make the products unwholesome or unfit for human food, and therefore, adulterated, depending on the amount of these materials and the nature of the products. For example, boneless skinless chicken breast with noticeable amounts of bone or feathers may be unwholesome and unfit for consumers.

Hazard Analysis and Critical Control Point (HACCP) Systems and Food Safety Hazards

Comment: Several trade associations and the consulting group commented that not all foreign materials are food safety hazards, and therefore, do not have to be addressed in an establishment's HACCP system.

Response: An establishment may not find in its hazard analysis that foreign material contamination is reasonably likely to occur in its meat or poultry products. Further, some foreign material contamination may not cause meat or poultry to be unsafe for human consumption. If establishments can support that foreign material contamination is not reasonably likely to occur, or if it has occurred, the contamination has not caused the products to be unsafe for human consumption, establishments would not need to address foreign material contamination in its HACCP plan.

However, if direct product contamination or product adulteration has occurred, the establishment must address the event in the HACCP system (*e.g.,* the HACCP plan, Sanitation Standard Operating Procedures (SOPs), and prerequisite programs) and take applicable corrective actions. If the presence of foreign material is a deviation from a critical limit, the establishment is required to take the corrective actions in the establishment's HACCP plan. If foreign material contamination has occurred, has caused products to become unsafe, and the establishment has not addressed the hazard in its HACCP plan, the establishment would be required to take corrective actions in 9 CFR 417.3(b), which would include reassessing its HACCP plan to determine whether the establishment needs to address foreign materials in its HACCP plan. If the establishment has found that foreign material contamination has occurred but does not constitute a food safety hazard, the establishment would need to assess whether it needs to make changes to its Sanitation SOP (9 CFR 416.14 and 416.15). An establishment should address any foreign material contamination issues related to sanitation in its Sanitation SOP. FSIS recognizes there may be foreign material contamination not related to sanitation issues or public health hazards. Establishments may be able to support addressing those foreign material contamination issues in other prerequisite programs under the HACCP system.

HACCP Preshipment Review

Comment: Many of the trade associations stated that the guideline expands the definition of a HACCP System to include any programs associated with a production lot, and that the expanded definition would impact the documents included in the preshipment review. The comments also stated that the preshipment review should only encompass corrective actions and documents related to monitoring and verification of critical control points (CCPs).

Response: The HACCP system includes the HACCP plan and all prerequisite programs associated with the HACCP plan (78 FR 32184). The HACCP regulations (9 CFR 417.5(c)) state that, ''Prior to shipping product, the establishment shall review the records associated with the production of that product, documented in accordance with this section.'' This regulation encompasses all records and does not limit the preshipment review to only CCP and corrective action records. When an establishment completes a preshipment review, it indicates that the establishment takes full and final responsibility for applying its HACCP controls to the products that it has produced.

HACCP Reassessment

Comment: Many trade associations requested clarification on when a HACCP plan reassessment is required. The consumer advocacy group commented that establishments should be compelled to reassess their HACCP plans to identify those points in production where there is a possibility of extraneous material contamination. One trade association commented that HACCP reassessment is only required and appropriate when the adulterant results from an unforeseen food safety hazard.

Response: An establishment is required to reassess the HACCP plan whenever changes occur that could affect the hazard analysis or alter the HACCP plan (9 CFR 417.4(a)(3)(i)). For example, if there is an equipment change that could result in contaminated products if the equipment is not properly maintained. In addition, as is noted above, whenever an establishment determines an unforeseen hazard has occurred, it must perform a reassessment as part of the corrective actions to determine if the hazard should be incorporated into the HACCP plan 9 CFR 417.3(b)(4)). Establishments are not required to reassess the HACCP plan after every customer complaint. For example, an establishment is not required to reassess its HACCP plan after receiving a customer complaint if:

- The establishment determines that the complaint is not valid or the complaint is unsubstantiated;
- The complaint concerns a hazard already addressed in the establishment's HACCP plan;
- The complaint does not describe contamination that posed a risk to human health; or

• The complaint does not concern a problem with the hazard analysis or HACCP plan, *e.g.,* misbranding unrelated to allergens.

When the establishment addresses foreign material contamination in its HACCP plan and a customer complaint represents a deviation from an existing critical limit, the establishment must perform corrective actions (9 CFR 417.3(a)) but is not required to perform a reassessment.

FSIS does not agree that an additional requirement that establishments reassess their HACCP plans specifically for extraneous material is necessary.

Sanitation Standard Operating Procedures (SOPs) Corrective Actions

Comment: One trade association requested more information on the regulatory requirements for Sanitation SOP corrective actions (9 CFR 416.15) and recordkeeping requirements (9 CFR 416.16) if no food safety hazard exists.

Response: The Sanitation SOP regulations (9 CFR 416.11–416.17) require that an establishment identify the procedures sufficient to prevent the direct contamination or adulteration of products (9 CFR 416.12(a)). When an establishment's Sanitation SOPs fail to prevent adulteration of products, including contamination by foreign materials, it must take appropriate corrective actions, including appropriate reevaluation and modification of the Sanitation SOPs (9 CFR 416.15) and document those actions (9 CFR 416.16). An establishment must address the Sanitation SOP corrective actions and recordkeeping requirements, even when a food safety hazard does not exist in that product. FSIS Sanitation SOP regulations do not provide for an ''allowance'' of direct contamination that is acceptable, the establishment must identify the procedures to prevent direct contamination or adulteration of products.

''*In-Commerce*'' *Clarification*

Comment: Many comments requested clarification on when adulterated products are considered ''in commerce'' and whether products on premises owned by the producing establishment, such as warehouses or other facilities, demonstrates that there is control of the products.

Response: FSIS stated in the guideline that, in general, products are considered to be ''in commerce,'' or having ''entered commerce,'' when they have left the direct control of the producing establishment and are in distribution, freely moving to consignees and customers. FSIS does not want to limit an establishment's flexibility and innovation for moving products by providing a strict definition of ''direct control.'' Common methods that establishments use to demonstrate that they are maintaining direct control include written procedures, programs, or agreements that describe their process for maintaining control. For example, an establishment may have physical control over products, through a company seal on a trailer or tamper evident tape on containers. Products may move between two establishments or facilities owned by the same corporation under direct control, provided the control is sufficiently documented and HACCP system decisions are consistent with the expressed control. The guideline was revised to include questions establishments can consider in determining if they have direct control and methods they can use to demonstrate control.

Reporting Adulterated Product in Commerce

Comment: Several trade associations requested clarification of the timeframe for establishments to notify the FSIS District Office when learning or determining that adulterated products have entered commerce. Commenters questioned whether an establishment is required to notify the District Office as soon as it has learned or has reason to believe adulterated products have entered commerce or instead when the establishment has completed its investigation and has determined that adulterated products have entered commerce. One industry comment suggested that the District Office be required to respond to the establishment within a specific time limit and provide the establishment information concerning whether the issue has been resolved, is pending review, or has been passed to an FSIS recall committee. The commenter also suggested that the District Office be required to provide guidance on whether the establishment would be required to take corrective actions or reassess their HACCP plan under the HACCP regulations.

Response: The notification regulation (9 CFR 418.2) requires an establishment to notify the District Office within 24 hours of learning or determining that an adulterated or misbranded meat or poultry product received by or originating from the establishment has entered commerce, if the establishment believes or has reason to believe this has happened. FSIS is not able to pinpoint a ''start time'' of the 24-hours, since every case is different. In many cases, the establishment will learn of a complaint and need to investigate the validity. During the investigation, the point at which the establishment ''believes, or has reason to believe'' adulterated product has entered commerce is when the establishment must report the event within 24 hours. The investigation does not have to be completed before the establishment believes, or has reason to believe, that adulterated product entered commerce.

The District Office will work with the establishment, but FSIS does not believe that providing detailed information will be necessary in all cases. District Offices will determine what information is appropriate and possible to provide to an establishment on a case-by-case basis. Official establishments should be familiar enough with the regulatory requirements in 9 CFR parts 416 and 417 to determine when corrective actions are required, what actions will meet the regulatory requirements, when a reassessment is required, how a reassessment is documented, and when the establishment should implement recall procedures. FSIS has clarified reassessment, notification, and corrective action regulatory requirements in the updated guidance. Establishments can contact FSIS field personnel or headquarters personnel if they have additional questions about a specific situation. The Agency recognizes that establishments need timely communication with the District Office and will ensure this communication continues.

Comment: A member of industry requested that FSIS clarify in the guideline what action domestic establishments should take if they shipped product adulterated by foreign material to a foreign country. The same commenter asked for clarification about what an establishment should do if they receive adulterated product from a foreign country.

Response: Official establishments are required to notify the District Office if they ship or receive adulterated products (9 CFR 418.2 and U.S.C. 612 and 459(b)). The notification requirement applies to domestic establishments that ship products to another country (*i.e.,* export). FSIS has added language in the guideline in the ''*Responsibilities at the Producing Establishment*'' section to clarify this requirement.

Isolated Events Versus Systemic Foreign Material Contamination

Comment: Several trade associations stated that the guideline failed to address the difference between an isolated foreign material contamination event and systemic foreign material

contaminations. One commenter stated that reporting an isolated event, with no evidence of other product in commerce, is premature and serves little purpose. Another commenter proposed notification only when an isolated event posed a public health risk, or when there were two or more foreign contamination issues of a similar nature or on-going findings of the same root cause.

Response: The notification requirement allows the Agency to quickly determine whether a recall action is necessary. If an establishment has evidence that the event is isolated, the establishment is still required to report the event to the District Office and should present this evidence to the District Office.

Recall Notification (9 CFR 418.2) and Notice of Receipt of Adulterated or Misbranded Product (FSIS Form 8140–1)

Comment: Many commenters questioned whether Form 8140–1 was necessary, given the regulatory requirement of 9 CFR 418.2. Many comments also suggested that the notification process needed to be consolidated, streamlined, and standardized among District Offices. Many comments suggested that all District Offices have a designated email account posted on the FSIS web page so that establishments can report shipment or receipt of adulterated or misbranded products. A separate comment was submitted recommending that establishments utilize the Agency's Public Health Information System (PHIS)to report incidents.

Response: FSIS is in the process of modernizing inspector reporting methods and replacing the paper-based reporting with electronic reporting in PHIS. FSIS is also developing an optional industry interface in PHIS that will provide a centralized location for establishments to report to the applicable District Office that they have shipped or received adulterated or misbranded products. Establishments may continue to notify the District Offices through traditional methods, such as phone calls, and each District Office lists a 24-hour phone number that is available for reporting listed at *https://www.fsis.usda.gov/wps/portal/informational/districtoffices.*

Consumer Complaint Program Requirement

Comment: Many trade associations requested that the guideline clarify that there is no requirement that an establishment develop or implement a consumer complaint program and no requirement that a complaint handling program, if one exists, be incorporated into the HACCP plan or Sanitation SOPs. The consumer advocacy group commented that there should be a requirement for a consumer complaint program for all establishments.

Response: The guideline has been revised to further clarify that a customer complaint program is not required and, if one is developed, there is no requirement to incorporate the program into the HACCP system.

FSIS's regulatory requirements for HACCP (9 CFR part 417) and Sanitation SOPs (9 CFR part 416) address the requirements to prevent adulteration. As noted above, if changes occur that affect the hazard analysis or HACCP plan, including consumer complaints, or if hazardous foreign materials are found in the products and the HACCP plan does not address the hazard, the establishment is required to reassess the HACCP plan (9 CFR 417.4(a)(3)(i) and 417.4(b)) and make necessary changes to address the hazard. Based on the reassessment, the establishment may incorporate a new CCP into its HACCP plan to address foreign materials, or it may develop a prerequisite program (including the Sanitation SOP, as discussed below) to prevent the hazard that would be part of the HACCP system.

FSIS regulations require that an establishment's Sanitation SOPs describe all procedures sufficient to prevent adulteration of products (9 CFR 416.12(a)). When Sanitation SOPs, which are prerequisite to the HACCP plan, fail to prevent adulteration of products through contamination with foreign materials, the establishment is required to take corrective actions (9 CFR 416.15). Corrective actions include ensuring appropriate disposition of products, restoring sanitary conditions, preventing the recurrence of direct contamination or adulteration of products, and evaluating and making necessary modification of the Sanitation SOPs to prevent future adulteration with foreign materials.

Pet Food

Comment: One trade association stated that adulterated meat and poultry products may be diverted to the pet food industry, specifically dog and cat food. The commenter requested that the guideline state that FSIS does not allow or condone downgraded human food material that presents a health or safety risk be diverted to a by-product stream for use in pet food. The comment also requests a statement that any human food by-products, including adulterated human food processed at these facilities, is subject to FDA regulation under the Food Safety Modernization Act (FSMA) once it leaves the facility.

Response: These comments are generally outside the scope of this guideline. Except for the fee-for-service program for certifying products for dog and cat food in 9 CFR part 355.29, FSIS does not inspect pet food or products intended for pet food. However, FSIS revised the guideline to include language recommending that FSIS-inspected establishments communicate with pet food manufacturers before sending products to a pet food facility to ensure that the products are eligible under FDA requirements and is acceptable to the pet food manufacturer.

Rail Dust

Comment: A comment from the equipment manufacturer stated rail dust and black specks are the most frequent causes of foreign material contamination and that the industry should switch to an oil-free contamination-free system.

Response: FSIS regulations (9 CFR part 416) require an establishment's sanitation procedures to prevent direct contamination of products and for non-food contact surfaces to be cleaned as often as necessary to prevent insanitary conditions or the adulteration of products. The regulations provide inspected establishments flexibility to meet these regulatory requirements and most establishments do. Therefore, FSIS disagrees with the need to establish prescriptive, new requirements concerning sanitation systems.

Providing Flexibility

Comment: Many trade associations expressed concern that the inflexible approach in the guideline could deter the implementation of new foreign material detection methods and encouraged FSIS to adopt policies that encourage establishments to identify and address non-hazardous foreign material before an actual health risk is posed.

Response: The guideline does not set up any new requirements or limit flexibility. The Agency agrees that establishments should be encouraged to identify and address non-hazardous foreign material before an actual health risk is posed. The changes and clarifications the Agency has made to the guidance should encourage establishments to develop policies and procedures to better address foreign material hazards.

Formatting and Editorial Comments

Comment: Several comments made recommendations and suggestions for reorganizing, reformatting, and

clarifying the graphics and text in the guideline.

Response: FSIS appreciates these recommendations and made the recommended changes when the suggestions did not conflict with FSIS policy.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *http://www.fsis.usda.gov/federal-register.*

FSIS also will make copies of this publication available through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS provides information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

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Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done in Washington, DC.

Paul Kiecker,

Administrator.

[FR Doc. 2020–28112 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2020–0035]

Notice of Request for Renewal of an Approved Information Collection (Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to request renewal of the approved information collection regarding labeling requirements for raw meat and poultry products that do not meet the standard of identity regulations and to which solutions have been added. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2021.

DATES: Submit comments on or before February 19, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2020–0035. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202)205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions.

OMB Number: 0583–0152.

Expiration Date of Approval: 6/30/2021.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), and the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting renewal of an approved information collection regarding labeling requirements for raw meat and poultry products that do not meet the standard of identity regulations (9 CFR part 317 and part 381) and to which solutions have been added. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2021.

FSIS requires establishments that manufacture products containing added solutions to label the products with a descriptive designation that provides an accurate description of the raw meat or poultry component, the percentage of added solution incorporated into the raw meat or poultry product, and the individual ingredients or multi-

ingredient components in the solution listed in the descending order of predominance by weight on the product label (9 CFR 317.2(e)(2) and 381.117(h)). FSIS also requires that the product name and the descriptive designation be printed in a single easy-to-read type style and color and on a single-color contrasting background. None of the lower case letters can be smaller than one-third the size of the largest letter.

FSIS has made the following estimates based upon an information collection assessment:

Estimate of Burden: FSIS estimates that it will take each respondent 75 minutes per response to comply with the product labeling requirements.

Respondents: Official establishments and retail stores.

Estimated Number of Respondents: 6,100.

Estimated Number of Responses per Respondent: 8.

Estimated Total Annual Burden on Respondents: 61,000 hours.

Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence SW, Mailstop 3758, South Building, Washington, DC 20250; (202)720–5627.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *http://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How to File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Paul Kiecker,

Administrator.

[FR Doc. 2020–28061 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2020–0034]

Notice of Request for Renewal of an Approved Information Collection (Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery)

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and the Office of Management and Budget (OMB) regulations, the Food Safety and Inspection Service (FSIS) is announcing its intention to request renewal of the approved information collection regarding the qualitative customer and stakeholder feedback on service delivery by the Food Safety and Inspection Service. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2021.

DATES: Submit comments on or before February 19, 2021.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail, including CD–ROMs, etc.:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.

• *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2020–0034. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

Docket: For access to background documents or comments received, call (202)205–0495 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

OMB Number: 0583–0151.

Expiration Date of Approval: 6/30/2021.

Type of Request: Renewal of an approved information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18, 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*) and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS is requesting renewal of the approved information collection regarding qualitative customer and stakeholder feedback on service delivery by the Agency. There are no changes to the existing information collection. The approval for this information collection will expire on June 30, 2021.

The proposed information collection activity provides a means for FSIS to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Agency's commitment to improving service delivery.

By ''qualitative feedback,'' FSIS means information that provides useful insights on perceptions and opinions, but not a statistical survey that yields quantitative results that can be generalized to the population studied. Qualitative feedback provides insights into customer or stakeholder perceptions, experiences, and expectations; provides an early warning of issues with the Agency's customer service; and focuses attention on matters with respect to which communication or changes in operations might improve delivery of products or services. This collection will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. It will also allow the feedback to contribute directly to the improvement of program management.

The solicitation of qualitative feedback will target topics such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

FSIS will only submit a collection for approval under this generic clearance if it meets the following conditions:

The collection is voluntary;

The collection is low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;

The collection is non-controversial and does not raise issues of concern to other Federal agencies;

The collection is targeted to the solicitation of opinions from respondents who have had experience with the program, or who may have experience with the program in the near future;

Personally identifiable information (PII) is collected only to the extent necessary and is not retained; as a general matter, this information collection will not result in any new system of records containing privacy information and will not involve questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, or other matters that are commonly considered private;

Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of FSIS (if released, FSIS will indicate the qualitative nature of the information);

Information gathered will not be used for the purpose of substantially informing policy decisions; and

Information gathered will yield qualitative information; the collection will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. FSIS has made the following estimates based upon an information collection assessment:

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .5 hours per response.

Respondents: Individuals and households; businesses and organizations; State, local, or Tribal government.

Estimated Annual Number of Respondents: 4,000.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Annual Number of Responses: 4,000.

Estimated Total Annual Burden on Respondents: 2,000 hours.

Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence SW, Mailstop 3758, South Building, Washington, DC 20250; (202) 720–5627.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 720–5627.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of FSIS's functions, including whether the information will have practical utility; (b) the accuracy of FSIS's estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to

be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

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USDA Non-Discrimination Statement

No agency, officer, or employee of the USDA shall, on the grounds of race, color, national origin, religion, sex, gender identity, sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, or political beliefs, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the USDA.

How To File a Complaint of Discrimination

To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture Director, Office of Adjudication, 1400 Independence Avenue SW, Washington, DC 20250–9410,

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Paul Kiecker,

Administrator.

[FR Doc. 2020–28053 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Tri-County Resource Advisory Committee; Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Tri-County Resource Advisory Committee (RAC) will meet virtually. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with Title II of the Act. RAC information and virtual meeting information can be found at the following website: *https://www.fs.usda.gov/main/bdnf/workingtogether/advisorycommittees.*

DATES: The meeting will be held on January 25, 2020, beginning at 3:00 p.m., Mountain Standard Time.

All RAC meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held with virtual attendance only.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Beaverhead-Deerlodge National Forest Supervisor's Office. Contact 406–683–3987 to facilitate that inspection.

FOR FURTHER INFORMATION CONTACT: Jeanne Dawson, RAC Coordinator, by phone at (406) 683–3987 or by email at *jeanne.dawson@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to discuss and provide recommendations on fee change proposals for developed recreation sites on National Forest lands.

This meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by Monday, January 11, 2021, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments, requests for time for oral comments or requests for instructions to participate virtually must be sent to Jeanne Dawson, RAC Coordinator, 420 Barrett Street, Dillon, Montana 59725, by email to *jeanne.dawson@usda.gov,* or by phone at (406) 683–3987.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case-by-case basis.

Dated: December 14, 2020.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2020–27988 Filed 12–18–20; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

[Docket No. RBS–20–BUSINESS–0045]

Inviting Applications for Value-Added Producer Grants and Solicitation of Grant Reviewers

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice.

SUMMARY: This Notice announces that the Rural Business-Cooperative Service (Agency) is accepting applications for the Value-Added Producer Grant (VAPG) program. Approximately $19 million is currently available. The Agency may also utilize any funding that becomes available through enactment of FY 21 appropriations. The Agency will publish the program funding level on the Rural Development website (*https://www.rd.usda.gov/programs-services/value-added-producer-grants*). Section VII also announces solicitation of non-Federal independent grant reviewers to evaluate and score applications submitted under this Notice.

DATES: You must submit your application by March 22, 2021 or it will not be considered for funding. Paper applications must be postmarked and mailed, shipped or sent overnight by this date. You may also hand carry your application to one of our field offices, but it must be received by close of business on the deadline date. Electronic applications are permitted via *http://www.grants.gov* only and must be received before Midnight Eastern time on March 16, 2021. Late applications are not eligible for grant funding under this Notice.

ADDRESSES: You should contact your USDA Rural Development State Office if you have questions about eligibility or submission requirements. You are encouraged to contact your State Office well in advance of the application deadline to discuss your project and to ask any questions about the application process. Application materials are available at *http://www.rd.usda.gov/programs-services/value-added-producer-grants.*

If you want to submit an electronic application, follow the instructions for the VAPG funding announcement on *http://www.grants.gov.* Please review the *Grants.gov* website at *https://www.grants.gov/web/grants/applicants/registration.html* for instructions on the process of registering your organization as soon as possible to ensure you are able to meet the electronic application deadline. If you want to submit a paper application, send it to the State Office located in the state where your project will primarily take place. You can find State Office Contact information at *http://www.rd.usda.gov/contact-us/state-offices.*

FOR FURTHER INFORMATION CONTACT: Greg York at (202) 281–5289, *gregory.york@usda.gov* or Mike Daniels at (715) 345–7637, *mike.daniels@usda.gov,* Program Management Division, Rural Business-Cooperative Service, United States Department of Agriculture, 1400 Independence Avenue, SW, Mail Stop 3226, Room 5801–S, Washington, DC 20250–3226, Phone (202) 720–1400 or email *CPgrants@usda.gov*.

SUPPLEMENTARY INFORMATION:

Preface

The Agency encourages applications that will support recommendations made in the Rural Prosperity Task Force report to help improve life in rural America. The report can be found at *https://www.usda.gov/topics/rural/rural-prosperity.* Applicants are encouraged to consider projects that provide measurable results in helping rural communities build robust and sustainable economies through strategic investments in infrastructure, partnerships and innovation.

Key strategies include:

- Achieving e-Connectivity for rural America
- Developing the Rural Economy
- Harnessing Technological Innovation
- Supporting a Rural Workforce
- Improving Quality of Life

Please note the following:

Hemp projects: The Agriculture Improvement Act of 2018, Public Law 115–334, (the 2018 Farm Bill) required USDA to promulgate regulations and guidelines to establish and administer a program for the production of hemp in the United States. Prior to the 2018 Farm Bill, state departments of agriculture and institutions of higher learning were permitted to produce hemp as part of a pilot program for research purposes pursuant to the Agricultural Act of 2014, Public Law 113–79, (the 2014 Farm Bill). The Continuing Appropriations Act, 2021 and Other Extensions Act, Public Law 116–159, extends the program until September 30, 2021.

In determining eligibility for the applicant, project or use of funds, any project applying for funding under the VAPG program and proposing to produce, procure, supply or market any component of the hemp plant or hemp related by-products, must have a valid license from an approved state, tribal or federal plan pursuant to Section 10113 of the 2018 Farm Bill, be in compliance with regulations published by the Agricultural Marketing Service at 7 CFR part 990, and meet any applicable FDA and DEA regulatory requirements. Verification of valid hemp licenses will occur at the time of award. In addition, all projects proposing to use biomass feedstock from any part of the hemp plant must demonstrate assurance of an adequate supply of the feedstock.

In the absence of Federal oversight or regulations governing the 2014 Farm Bill pilot program, Rural Development will not award funds to any project proposing to produce, procure, supply or market any component of the hemp plant or hemp related by-products, or provide technical assistance related to such products, produced under the 2014 Farm Bill authority.

Local Agriculture Marketing Program (LAMP) Food Safety Implementation: Until Farm Bill implementation is finalized via the Agency rulemaking process, there will not be food safety reserve funding. Food safety training, certifications, and supplies that are eligible under the current program regulation may continue to be included in the work plan/budget.

Overview

Federal Agency Name: USDA Rural Business-Cooperative Service.

Funding Opportunity Title: Value-Added Producer Grant.

Announcement Type: Notice of Solicitation of Applications and Solicitation of Grant Reviewers

Catalog of Federal Domestic Assistance Number: 10.352.

Dates: Application Deadline. You must submit your complete paper application by March 22, 2021, or it will not be considered for funding. Electronic applications must be received by *http://www.grants.gov* no later than midnight Eastern time on March 16, 2021, or it will not be considered for funding.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, the paperwork burden associated with this Notice has been approved by the Office of Management and Budget (OMB) under OMB Control Number 0570–0039.

A. Program Description

The VAPG program is authorized under section 231 of the Agriculture Risk Protection Act of 2000 (Pub. L. 106–224), as amended by section 10102 of the Agriculture Improvement Act of 2018 (Pub. L. 115–334) (see 7 U.S.C.

1627c). Applicants must adhere to the requirements contained in the program regulation, 7 CFR 4284, subpart J, which is incorporated by reference in this Notice.

The objective of this grant program is to assist viable Independent Producers, Agricultural Producer Groups, Farmer and Rancher Cooperatives, and Majority-Controlled Producer-Based Businesses in starting or expanding value-added activities related to the processing and/or marketing of Value-Added Agricultural Products. Grants will be awarded competitively for either planning projects or working capital projects directly related to the processing and/or marketing of value-added products. Generating new products, creating and expanding marketing opportunities, and increasing producer income are the end goals of the program. All proposals must demonstrate economic viability and sustainability to compete for funding.

Funding priority will be made available to Beginning Farmers and Ranchers, Veteran Farmers and Ranchers, Socially-Disadvantaged Farmers and Ranchers, Operators of Small and Medium-Sized Farms and Ranches structured as Family Farms or Ranches, Farmer or Rancher Cooperatives, and projects proposing to develop a Mid-Tier Value Chain. See 7 CFR 4284.923 for Reserved Funds eligibility and 7 CFR 4284.924 for Priority Scoring eligibility.

Definitions

The following term is incorporated from Section 10102 of the Agriculture Improvement Act of 2018. Majority Controlled Producer-Based Business venture means a venture greater than 50 percent of the ownership and control of which is held by—

''(i) 1 or more producers; or

''(ii) 1 or more entities, 100 percent of the ownership and control of which is held by 1 or more producers. The term 'entity' means—

''(i) a partnership;

''(ii) a limited liability corporation;

''(iii) a limited liability partnership; and

''(iv) a corporation

Also, Market Expansion Project means a project in which the Independent Producer applicant seeks to expand the market for an existing value-added product (produced and marketed by the applicant for at least 2 years at the time of application) through sales to demonstrably new markets or to new customers in existing markets.

Additional terms you need to understand are defined in 7 CFR 4284.902.

B. Federal Award Information

Type of Instrument: Grant.

Approximate Number of Awards: To be determined.

Available Total Funding: $25 million.

Maximum Award Amount: Planning—$75,000; Working Capital—$250,000.

Project Period: Up to 36 months depending on the complexity of the project.

Anticipated Award Date: September 30, 2021.

Reservation of Funds: Ten percent of available funds for applications will be reserved for applicants qualifying as Beginning, Veteran, and Socially-Disadvantaged Farmers or Ranchers. An additional ten percent of available funds for applications from farmers or ranchers proposing development of Mid-Tier Value Chains will be reserved. Funds not obligated from these reserves prior to September 30, 2021, will be used for the VAPG general competition. If this is the case, Beginning, Veteran, and Socially-Disadvantaged Farmers or Ranchers and applicants proposing Mid-Tier Value Chains will compete with other eligible VAPG applications. In addition, any funds that become available for persistent poverty counties through enactment of FY 21 appropriations will be allocated for assistance in persistent poverty counties.

C. Eligibility Information

Applicants must comply with the program regulation 7 CFR part 4284 subpart J to meet all the following eligibility requirements. Required documentation is included in the application package. Applications which fail to meet any of these requirements by the application deadline will be deemed ineligible and will not be evaluated further.

1. Eligible Applicants

You must demonstrate within the application narrative that you meet all the applicant eligibility requirements of 7 CFR 4284.920 and 4284.921. This includes meeting the definition requirements at 7 CFR 4284.902 by demonstrating how you meet the definition for Agricultural Producer (*i.e.,* how you participate in the ''day to day labor, management, and field operations'' of your agricultural enterprise); how you qualify for one of the following applicant types: Independent Producer, Agricultural Producer Group, Farmer or Rancher Cooperative or Majority-Controlled Producer-Based Business; and whether you meet the Emerging Market, Citizenship, Legal Authority and Responsibility, Multiple Grants and Active Grants requirements of the section. Required documentation to support eligibility is contained at 7 CFR 4284.931 and in the application package.

Federally-recognized tribes and tribal entities must demonstrate that they meet the definition requirements for one of the four eligible applicant types. Rural Development State Offices and posted application toolkits will provide additional information on tribal eligibility.

Per 7 CFR 4284.921, an applicant is ineligible if they have been debarred or suspended or otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, ''Debarment and Suspension.'' The Agency will check the System for Award Management (SAM) to determine if the applicant has been debarred or suspended. In addition, an applicant will be considered ineligible for a grant due to an outstanding judgment obtained by the U.S. in a Federal Court (other than U.S. Tax Court), is delinquent on the payment of Federal income taxes, or is delinquent on Federal debt. The applicant must certify as part of the application that they do not have an outstanding judgment against them. The Agency will check the Do Not Pay System to verify this information.

Per the Consolidated Appropriations Act, 2018 (Pub. L. 116–93) or successor appropriations act, any corporation (i) that has been convicted of a felony criminal violation under any Federal law within the past 24 months or (ii) that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, is not eligible for financial assistance provided with funds appropriated by, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

Per 7 CFR 4284.905(a), Applicants must comply with other applicable Federal laws. Applicants who are proposing working capital grants to produce and market value-added products in the industries of wine, beer, distilled spirits or other alcoholic merchandise must comply with Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations, including but not limited to permitting, filing of taxes and

operational reports. Please visit TTB's website at *https://www.ttb.gov/* for more information. If you are not in compliance with TTB's requirements, the Agency may determine that you are not qualified to receive a Federal award and use that determination as a basis for making an award to another applicant. If, at any time after you have already received a VAPG award, you are found to be in noncompliance with TTB's operational reporting or tax requirements, the Agency may determine that you are not in compliance with your grant terms and conditions.

An Applicant may submit only one application in response to a solicitation and must explicitly direct that it competes in either the general funds competition or in one of the named reserved funds competitions. Multiple applications from separate entities with identical or greater than 75 percent common ownership, or from a parent, subsidiary or affiliated organization (with ''affiliation'' defined by Small Business Administration regulation 13 CFR 121.103, or successor regulation) are not permitted. Further, Applicants who have already received a Planning Grant for the proposed project cannot receive another Planning Grant for the same project. Applicants who have already received a Working Capital Grant for the proposed project cannot receive any additional grants for that project (Proposals from previous award recipients should be substantially different in terms of products and/or markets and should not merely be extensions of previously funded projects).

2. Cost-Sharing or Matching

There is a matching fund (cost-sharing) requirement of at least $1 for every $1 in grant funds provided by the Agency (matching funds plus grant funds must equal proposed Total Project Cost). Matching funds may be in the form of cash or eligible in-kind contributions. Matching contributions and grant funds may be used only for eligible project purposes, including any contributions exceeding the minimum amount required. Applicant matching contributions in the form of raw commodity, time contributed to the project, or goods or services for which no out-of-pocket expenditures are made during the grant period, must be characterized as in-kind contributions. Donations of goods and services from third-parties must be characterized as in-kind contributions. Tribal applicants may utilize grants made available under Public Law 93–638, the Indian Self-Determination and Education Assistance Act of 1975, as their matching contribution, and should check with appropriate tribal authorities regarding the availability of such funding.

Matching funds must be available at the time of application and must be certified and verified as described in 7 CFR 4284.931(b)(3) and (4). Do not include *projected* income as a matching contribution because it cannot be verified as available. Note that matching funds must also be discussed as part of the scoring criterion Commitments and Support as described in section. E.1.(c)

3. Project Eligibility

You must demonstrate within the application narrative that you meet all the project eligibility requirements of 7 CFR 4284.922.

(a) *Product eligibility.* Applicants for both planning and working capital grants must meet all requirements at 7 CFR 4284.922(a), including that your value-added product must result from one of the five methodologies identified in the definition of Value-Added Agricultural Product at 7 CFR 4284.902. In addition, you must demonstrate that, as a result of the project, the customer base for the agricultural commodity or value-added product will be expanded, by including a baseline of current customers for the commodity, and an estimated target number of customers that will result from the project; and that, a greater portion of the revenue derived from the marketing or processing of the value-added product is available to the applicant producer(s) of the agricultural commodity, by including a baseline of current revenues from the sale of the agricultural commodity and an estimate of increased revenues that will result from the project. Note that working capital grants for market expansion projects per 7 CFR 4284.922(b) must demonstrate expanded customer base and increased revenue resulting only from sales of existing products to new customers. VAPG recognizes that market expansion projects may involve marketing and promotion activities such as trade shows, farmers markets, and various media advertising which also result in increased sales to existing customers. However, market expansion award recipients must use grant and matching funds only on activities that demonstrably focus on marketing products they have produced and sold for at least two years, to new markets and/or to new customers in existing markets, such that the producer's customer base (number of customers) is expanded, per program requirements. Grant and matching funds cannot be deliberately expended on sales of existing products to existing customers.

In addition, per the Agriculture Improvement Act of 2018, working capital applications must include a statement describing the direct or indirect producer benefits intended to result from the proposed project within a reasonable period of time after the receipt of a grant.

(b) *Purpose eligibility.* Applicants for both planning and working capital grants must meet all requirements at 7 CFR 4284.922(b) regarding maximum grant amounts, verification of matching funds, eligible and ineligible uses of grant and matching funds, and a substantive, detailed work plan and budget.

(1) *Planning Grants.* A planning grant is used to fund development of a defined program of economic planning activities to determine the viability of a potential value-added venture, specifically for paying a qualified consultant to conduct and develop a feasibility study, business plan, and/or marketing plan associated with the processing and/or marketing of a value-added agricultural product. Planning grant funds may not be used to fund working capital activities.

(2) *Working Capital Grants.* This type of grant provides funds to operate a value-added project, specifically to pay the eligible project expenses directly related to the processing and/or marketing of the value-added products that are eligible uses of grant funds. Working capital funds may not be used for planning purposes.

(c) *Reserved Funds Eligibility.* To qualify for Reserved Funds as a Beginning, Veteran, or Socially-Disadvantaged Farmer or Rancher or if you propose to develop a Mid-Tier Value Chain, you must meet the requirements found at 7 CFR 4284.923. If your application is eligible, but is not awarded under the Reserved Funds, it will automatically be considered for general funds in that same fiscal year, as funding levels permit.

(d) *Priority Points.* To qualify for Priority Points for projects that contribute to increasing opportunities for Beginning Farmers or Ranchers, Socially-Disadvantaged Farmers or Ranchers, or if you are an Operator of a Small or Medium-sized Farm or Ranch structured as a Family Farm, a Veteran Farmer or Rancher, propose a Mid-Tier Value Chain project, or are a Farmer or Rancher Cooperative, you must meet the applicable eligibility requirements at 7 CFR 4284.923 and 4284.924 and must address the relevant proposal evaluation criterion.

Priority points will also be awarded during the scoring process to eligible Agricultural Producer Groups, Farmer or Rancher Cooperatives, and Majority-Controlled Producer-Based Business Ventures that best contribute to creating or increasing marketing opportunities for Beginning Farmers or Ranchers, Socially-Disadvantaged Farmers or Ranchers, and/or Veteran Farmers or Ranchers. You must meet the eligibility requirements at 7 CFR 4284.923 and 4284.924 and must address the relevant proposal evaluation criterion.

4. Eligible Uses of Grant and Matching Funds

Eligible uses of grant and matching funds are discussed, along with examples, in 7 CFR 4284.925. In general, grant and cost-share matching funds have the same use restrictions and must be used to fund only the costs for eligible purposes as defined at 7 CFR 4284.925 (a) and (b).

5. Ineligible Uses of Grant and Matching Funds

Federal procurement standards prohibit transactions that involve a real or apparent conflict of interest for owners, employees, officers, agents, or their immediate family members having a personal, professional, financial or other interest in the outcome of the project; including organizational conflicts, and conflicts that restrict open and free competition for unrestrained trade. A list (not all-inclusive) of ineligible uses of grant and matching funds is found in 7 CFR 4284.926.

D. Application and Submission Information

1. Address to Request Applications

The application toolkit, regulation, and official program notification for this funding opportunity can be obtained online at *http://www.rd.usda.gov/programs-services/value-added-producer-grants.* You may also contact your USDA Rural Development State Office by visiting *http://www.rd.usda.gov/contact-us/state-offices.* The toolkit contains an application checklist, templates, required grant forms, and instructions. Although the Agency highly recommends the use of the templates in the toolkit, is not mandatory.

2. Content and Form of Application Submission

You may submit your application in paper form or electronically through *Grants.gov*. Your application must contain all required information.

To apply electronically, you must follow the instructions for this funding announcement at *http://www.grants.gov.* Please note that we cannot accept emailed or faxed applications.

You can locate the *Grants.gov* downloadable application package for this program by using a keyword, the program name, or the Catalog of Federal Domestic Assistance (CFDA) Number for this program.

When you enter the *Grants.gov* website, you will find information about applying electronically through the site, as well as the hours of operation.

To use *Grants.gov*, you must already have a DUNS number and you must also be registered and maintain registration in SAM. We strongly recommend that you do not wait until the application deadline date to begin the application process through *Grants.gov*.

You must submit all your application documents electronically through *Grants.gov*.

After electronically applying through *Grants.gov*, you will receive an automatic acknowledgement from *Grants.gov* that contains a *Grants.gov* tracking number.

If you want to submit a paper application, send it to the State Office located in the state where your project will primarily take place. You can find State Office contact information at *http://www.rd.usda.gov/contact-us/state-offices* . An optional-use Agency application template is available online at *http://www.rd.usda.gov/programs-services/value-added-producer-grants.*

Your application must contain all the required forms and proposal elements described in 7 CFR 4284.931, unless otherwise clarified in this Notice. You are encouraged, but not required to utilize the Application Toolkits found at *http://www.rd.usda.gov/programs-services/value-added-producer-grants,* however, you must provide all of the information requested by the template. You must become familiar with the program regulation at 7 CFR part 4284, subpart J in order to submit a successful application. Basic application contents are outlined below:

- Standard Form (SF)-424, ''Application for Federal Assistance,'' to include your DUNS number and SAM (CAGE) code and expiration date (or evidence that you have begun the SAM registration process). Because there are no specific fields for a CAGE code and expiration date, you may identify them anywhere on the form. You must include your DUNS number in the application for it to be considered for funding.
- SF–424A, ''Budget Information-Non-Construction Programs.'' This form must be completed and submitted as part of the application package.
- You must certify that there are no current outstanding Federal judgments against your property and that you will not use grant funds to pay for any judgment obtained by the United States. You must also certify that you are not delinquent on the payment of Federal income taxes, or any Federal debt. To satisfy the Certification requirement, you should include this statement in your application: ''[INSERT NAME OF APPLICANT] certifies that the United States has not obtained an unsatisfied judgment against its property, is not delinquent on the payment of Federal income taxes, or any Federal debt, and will not use grant funds to pay any judgments obtained by the United States.'' A separate signature is not required.

You must provide a valid permit or evidence of having begun the permitting process if you are proposing a working capital grant to produce and market value-added products in the industries of wine, beer, distilled spirits or other alcoholic merchandise.

You must provide a valid producer license issued by a state, tribe, or USDA, as applicable in accordance with 7 CFR part 990 if you are proposing to market value-added hemp products.

- Executive Summary and Abstract. A one-page Executive Summary containing the following information: legal name of applicant entity, application type (planning or working capital), applicant type, amount of grant request, a summary of your project, and whether you are submitting a simplified application, and whether you are requesting Reserved Funds. Also include a separate abstract of up to 100 words briefly describing your project.
- Eligibility discussion.
- Work plan and budget.
- Performance evaluation criteria.
- Proposal evaluation criteria.
- Certification and verification of matching funds.
- Reserved Funds and Priority Point documentation (as applicable).
- Feasibility studies, business plans, and/or marketing plans, as applicable.

Appendices containing required supporting documentation.

3. Dun and Bradstreet Data Universal Numbering System (DUNS) and System for Awards Management (SAM)

To be eligible (unless you are excepted under 2 CFR 25.110(b), (c) or (d), you are required to:

(a) Provide a valid DUNS number in your application, which can be obtained at no cost via a toll-free request line at (866) 705–5711;

(b) Register in SAM before submitting your application. You may register in SAM at no cost at *https://www.sam.gov/SAM/* . You must provide your SAM Cage Code and expiration date or evidence that you have begun the SAM registration process at time of application; and

(c) Continue to maintain an active SAM registration with current information at all times during which you have an active Federal award or an application or plan under consideration by a Federal awarding agency.

If you have not fully complied with all applicable DUNS and SAM requirements, the Agency may determine that the applicant is not qualified to receive a Federal award and the Agency may use that determination as a basis for making an award to another applicant. Please refer to Section F. 2 for additional submission requirements that apply to grantees selected for this program.

4. Submission Dates and Times

Application Deadline Date: March 22, 2021.

Explanation of Deadlines: Paper applications must be postmarked and mailed, shipped, or sent overnight by March 22, 2021. The Agency will determine whether your application is late based on the date shown on the postmark or shipping invoice. You may also hand deliver your application to one of our field offices, but it must be received by close of business on the deadline date. If the due date falls on a Saturday, Sunday, or Federal holiday, the application is due the next business day. Late applications will automatically be considered ineligible and will not be evaluated further.

Electronic applications must be received at *http://www.grants.gov* no later than Midnight Eastern time, March 16, 2021 to be eligible for funding. Please review the *Grants.gov* website at *https://www.grants.gov/web/grants/applicants/registration.html* for instructions on the process of registering your organization as soon as possible to ensure you are able to meet the electronic application deadline. *Grants.gov* will not accept applications submitted after the deadline.

5. Intergovernmental Review

Executive Order (E.O.) 12372, Intergovernmental Review of Federal Programs, applies to this program. This E.O. requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. A list of states that maintain a SPOC may be obtained at *https://www.whitehouse.gov/wp-content/uploads/2020/04/SPOC-4-13-20.pdf.* If your state has a SPOC, you must submit your application directly for review. Any comments obtained through the SPOC must be provided to RD for consideration as part of your application. If your state has not established a SPOC or you do not want to submit your application to the SPOC, RD will submit your application to the SPOC or other appropriate agency or agencies. Applications from federally recognized Indian tribes are not subject to Intergovernmental Review.

6. Funding Restrictions

Funding limitations and reservations found in the program regulation at 7 CFR 4284.927 will apply, including:

(a) Use of Funds. Grant funds may be used to pay up to 50 percent of the total eligible project costs, subject to the limitations established for the maximum total grant amount. Grant funds may not be used to pay any costs of the project incurred prior to the date of grant approval. Grant and matching funds may only be used for eligible purposes. (See examples of eligible and ineligible uses in 7 CFR 4284.925 and 4284.926, respectively).

(b) Grant Period (project period). Your project timeframe or grant period can be a maximum of 36 months in length from the date of award, depending on the complexity of your project. Your proposed grant period should begin no earlier than the anticipated award announcement date in this Notice and should end no later than 36 months following that date. If you receive an award, your grant period will be revised to begin on the actual date of award—the date the grant agreement is executed by the Agency—and your grant period end date will be adjusted accordingly. Your project activities should begin within 90 days of that date of award. The length of your grant period should be based on your project's complexity, as indicated in your application work plan. For example, it is expected that most planning grants can be completed within 12 months.

(c) Program Income. If income (Program Income) is earned during the grant period as a result of the project activities, it is subject to the requirements in 2 CFR 200.80, and must be managed and reported accordingly.

(d) Majority Controlled Producer-Based Business. The total amount of funds awarded to Majority Controlled Producer-Based Businesses in response to this announcement shall not exceed 10 percent of the total funds obligated for the program during the fiscal year.

(e) Reserved Funds. Ten percent of all funds available will be reserved to fund projects that benefit Beginning Farmers or Ranchers, Veteran Farmers or Ranchers or Socially-Disadvantaged Farmers or Ranchers. In addition, 10 percent of total funding available will be used to fund projects that propose development of Mid-Tier Value Chains as part of a Local or Regional Supply Chain Network. See related definitions in 7 CFR 4284.902. In addition, any funds that become available for persistent poverty counties through enactment of FY 21 appropriations will be allocated for assistance in persistent poverty counties.

(f) Disposition of Reserved Funds Not Obligated. For this announcement, any reserved funds that have not been obligated by September 30, 2021, will be available to the Secretary to make VAPG grants in accordance with Section 210A(i)(3(ii) of the Agriculture Improvement Act of 2018.

7. Other Submission Requirements

(a) National Environmental Policy Act.

This Notice has been reviewed in accordance with 7 CFR part 1970, ''Environmental Policies and Procedures,'' and it has been determined that an Environmental Impact Statement is not required because the issuance of regulations and instructions, as well as amendments to them, describing administrative and financial procedures for processing, approving, and implementing the Agency's financial programs is categorically excluded in the Agency's National Environmental Policy Act (NEPA) regulation found at 7 CFR 1970.53(f). We have determined that this Notice does not constitute a major Federal action significantly affecting the quality of the human environment.

The Agency will review each grant application to determine its compliance with 7 CFR part 1970 and whether proposed financial assistance by the Agency would have a disproportionately high and adverse human health or environmental effect on minority or low-income populations. The applicant may be asked to provide additional information or documentation to assist the Agency with this determination.

(b) Civil Rights Compliance Requirements.

All grants made under this Notice are subject to Title VI of the Civil Rights Act of 1964 as required by the USDA (7 CFR part 15, subpart A) and Section 504 of the Rehabilitation Act of 1973.

E. Application Review Information

Applications will be reviewed and processed as described at 7 CFR 4284.940. The Agency will review your application to determine if it is complete and eligible. If at any time, the Agency determines that your application is ineligible, you will be notified in writing as to the reasons it was determined ineligible and you will be informed of your review and appeal rights. Funding of successfully appealed applications will be limited to available funds.

The Agency will only score applications in which the applicant and project are eligible, which are complete and sufficiently responsive to program requirements, and in which the Agency agrees on the likelihood of financial feasibility for working capital requests. We will score your application according to the procedures and criteria specified in 7 CFR 4284.942, and with tiered scoring thresholds as specified below.

1. Scoring Criteria

For each criterion, you must show how the project has merit and why it is likely to be successful. Your complete response to each criterion must be included in the body of the application, including summarizations of any feasibility studies, business and marketing plans. If you do not address all parts of the criterion, or do not sufficiently communicate relevant project information, you will receive lower scores. VAPG is a competitive program, so you will receive scores based on the quality of your responses. Simply addressing the criteria will not guarantee higher scores. The maximum number of points that can be awarded to your application is 100. For this announcement, the minimum score requirement for funding is 50 points.

The Agency application toolkit provides additional instructions to help you to respond to the criteria below.

(a) *Nature of the Proposed Venture (graduated score 0–30 points).*

For both planning and working capital grants, you must discuss the technological feasibility of the project, as well as operational efficiency, profitability, and overall economic sustainability resulting from the project. You must also demonstrate the potential for expanding the customer base for the agricultural commodity or value-added product, and the expected increase in revenue returns to the producer-owners providing the majority of the raw agricultural commodity to the project. Working capital applicants must also provide the potential number of jobs that will result from the project, along with a justifiable basis for these projections. Please see the application template for more information. All applicants must reference and summarize third-party data and other information that specifically supports your value-added project; discuss the value-added process you are proposing; describe the potential markets and distribution channels; the value to be added to the raw commodity through the value-added process; cost and availability of inputs, your experience in marketing the proposed or similar product; business financial statements; and any other relevant information that supports the viability of your project. Working capital applicants should demonstrate that these outcomes will result from the project and include supportable projections of increase in customer base, revenue returned to producers and jobs resulting from the project in order to receive up to the maximum number of points. Planning grant applicants should describe the expected results, and the reasons supporting those expectations.

Points will be awarded as follows:

(1) 0 points will be awarded if you do not address the criterion.

(2) 1–5 points will be awarded if you do not address each of the following: technological feasibility, operational efficiency, profitability, and overall economic sustainability.

(3) 6–13 points will be awarded if you address technological feasibility, operational efficiency, profitability, and overall economic sustainability, but do not reference third-party information that supports the success of your project.

(4) 14–22 points will be awarded if you address technological feasibility, operational efficiency, profitability, and overall economic, supported by third-party information demonstrating a reasonable likelihood of success.

(5) 23–30 points will be awarded if all criterion components are well addressed, supported by third-party information, and demonstrate a high likelihood of success.

(b) *Qualifications of Project Personnel (graduated score 0–20 points).*

You must identify all individuals who will be responsible for managing and completing the proposed tasks in the work plan, including the roles and activities that owners, staff, contractors, consultants or new hires may perform; and show that these individuals have the necessary qualifications and expertise, including those hired to do market or feasibility analyses, or to develop a business operations plan for the value-added venture. You must include the qualifications of those individuals responsible for leading or managing the total project (applicant owners or project managers), as well as those individuals responsible for conducting the various individual tasks in the work plan (such as consultants, contractors, staff or new hires). You must discuss the commitment and the availability of any consultants or other professionals to be hired for the project; especially those who may be consulting on multiple VAPG projects. If staff or consultants have not been selected at the time of application, you must provide specific descriptions of the qualifications required for the positions to be filled. Applications that demonstrate the strong credentials, education, capabilities, experience and availability of project personnel that will contribute to a high likelihood of project success will receive more points than those that demonstrate less potential for success in these areas.

Points will be awarded as follows:

(1) 0 points will be awarded if you do not address the criterion.

(2) 1–4 points will be awarded if qualifications and experience of all staff is not addressed and/or if necessary, qualifications of unfilled positions are not provided.

(3) 5–9 points will be awarded if all project personnel are identified but do not demonstrate qualifications or experience relevant to the project.

(4) 10–14 points will be awarded if most key personnel demonstrate strong credentials and/or experience, and availability indicating a reasonable likelihood of success.

(5) 15–20 points will be awarded if all personnel demonstrate strong, relevant credentials or experience, and availability indicating a high likelihood of project success.

(c) *Commitments and Support (graduated score 0–10 points).*

Producer, end-user, and third-party commitments will be evaluated under this criterion. Sole proprietors can receive a maximum of 9 points. Multiple producer applications can receive a maximum of 10 points.

(1) Producer commitments to the project will be evaluated based on the number of named and documented independent producers currently involved in the project; and the nature, level and quality of their contributions.

(2) End-user commitments will be evaluated based on potential or identified markets and the potential amount of output to be purchased, as indicated by letters of intent or contracts (purchase orders) from potential buyers referenced within the application. Applications that demonstrate

documented intent to purchase the value-added product will receive more points. Note: for planning grants, this criterion can be addressed by evidence of interest or support from identified or potential customers.

(3) Third-party commitments to the project will be evaluated based on the critical and tangible nature of their contribution to the project, such as technical assistance, storage, processing, marketing, or distribution arrangements that are necessary for the project to proceed; and the level and quality of these contributions. Applications that demonstrate strong technical and logistical support to successfully complete the project will receive more points.

Letters of commitment by producers, end-users, and third-parties should be summarized as part of your response to this criterion, and the letters must be included in Appendix B. Please note that VAPG does not require Congressional letters of support, nor do they carry any extra weight during the evaluation process. Also, note that because applications with cash matching contributions are awarded more points than those pledging only in-kind contributions, applicants will not be able to substitute an in-kind match for cash after awards are made.

Points will be awarded as follows:

(i) 0 points will be awarded if you do not address the criterion.

(ii) Independent Producer Commitment

(A) Sole Proprietor (one owner/producer): 1 point

(B) Multiple Independent Producers (note: in cases where family members, such as husband and wife, are eligible Independent Producers, each family member will count as one Independent Producer): 2 points

(iii) Level of Commitment

(A) All matching contributions are in-kind: 1 point

(B) Matching contribution consists of both cash and in-kind: 2 points

(C) All matching contributions are cash: 4 points

(iv) End-user commitment:

(A) No, or insufficiently documented, commitment from end-users: 0 points

(B) Well-documented commitment from one end-user: 1 point

(C) Well-documented commitment from more than one end-user: 2 points

(v) Third-party commitment:

(A) No, or insufficiently documented, commitment from third-parties: 0 points

(B) Well-documented commitment from one third-party: 1 point

(C) Well-documented commitment from more than one third-party: 2 points

(d) *Work Plan and Budget (graduated score 0–20 points).*

You must submit a comprehensive work plan and budget (for full details, see 7 CFR 4284.922(b)(5)). Your work plan must provide specific and detailed descriptions of the tasks and the key project personnel that will accomplish the project's goals. The budget must present a detailed breakdown and description of all estimated costs of project activities (including source and basis for their valuation) and allocate those costs among the listed tasks, as instructed in the application package. You must show the source and use of both grant and matching funds for all tasks. Matching funds must be spent at a rate equal to, or in advance of, grant funds. An eligible start and end date for the entire project, as well as for each individual project task must be clearly shown. The project timeframe must not exceed 36 months and should be scaled to the complexity of the project. Working capital applications must include an estimate of program income expected to be earned during the grant period (see 2 CFR 200.307).

Points will be awarded as follows:

(1) 0 points will be awarded if you do not address the criterion.

(2) 1–7 points will be awarded if the work plan and budget do not account for all project goals, tasks, costs, timelines, and responsible personnel.

(3) 8–14 points will be awarded if you provide a clear, comprehensive work plan detailing all project goals, tasks, timelines, costs, and responsible personnel in a logical and realistic manner that demonstrates a reasonable likelihood of success.

(4) 15–20 points will be awarded if you provide a clear, comprehensive work plan detailing all project goals, tasks, timelines, costs, and responsible personnel in a logical and realistic manner that demonstrates a high likelihood of success.

(e) *Priority Points up to 10 points (lump sum 0 or 5 points plus, graduated score 0–5 points).*

It is recommended that you use the Agency application package when applying for priority points and refer to the requirements specified in 7 CFR 4284.924. Priority points may be awarded in both the General Funds and Reserved Funds competitions.

(1) 5 points will be awarded if you meet the requirements for one of the following categories and provide the documentation described in 7 CFR 4284.923 and 4284.924 as applicable: Beginning Farmer or Rancher, Socially-Disadvantaged Farmer or Rancher, Veteran Farmer or Rancher, or Operator of a Small or Medium-sized Farm or Ranch that is structured as a Family Farm, Farmer or Rancher Cooperative, or are proposing a Mid-Tier Value Chain project.

(2) Up to 5 priority points will be awarded if you are an Agricultural Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture (referred to below as ''applicant group'') whose project ''best contributes to creating or increasing marketing opportunities'' for Operators of Small and Medium-sized Farms and Ranches that are structured as Family Farms, Beginning Farmers and Ranchers, Socially-Disadvantaged Farmers and Ranchers, and Veteran Farmers and Ranchers (referred to below as ''priority groups''). For each of the priority point levels below, applications must demonstrate how the proposed project will contribute to new or increased marketing opportunities for respective priority groups. Guidance on relevant information required to adequately demonstrate this requirement can be found in the program application package.

(i) 2 priority points will be awarded if the existing membership of the applicant group is comprised of either more than 50 percent of any one of the four priority groups or more than 50 percent of any combination of the four priority groups.

(ii) 1 priority point will be awarded if the existing membership of the applicant group is comprised of two or more of the priority groups. One point is awarded regardless of whether a group's membership is comprised of two, three, or all four of the priority groups.

(iii) 2 priority points will be awarded if the applicant's proposed project will increase the number of priority groups that comprise applicant membership by one or more priority groups. However, if an applicant group's membership is already comprised of all four priority groups, such an applicant would not be eligible for points under this criterion because there is no opportunity to increase the number of priority groups. Note also that this criterion does not consider either the percentage of the existing membership that is comprised of the four priority groups or the number of priority groups currently comprising the applicant group's membership.

(f) *Administrator Priority Categories (graduated score 0–10 points).*

The Administrator of the Agency may choose to award up to 10 points to an application to improve the geographic diversity of awardees and/or foster persistent poverty counties and/or help

reduce unemployment through job creation in a fiscal year. To ensure that funds are more broadly utilized in support of recommendations made in the Rural Prosperity Task Force report to help improve life in rural America, the Administrator may also choose to award points to eligible applicants who have never previously been awarded a VAPG grant. Eligible applicants who have never previously received VAPG funds and who want to be considered for discretionary points must specifically request consideration for these points and certify that neither the applicant entity or any of its owner or members have ever received a VAPG grant. To be considered for these points, you must discuss how your workplan and budget supports one or more of the five following key strategies:

Achieving e-Connectivity for Rural America;

Improving Quality of Life;

Supporting a Rural Workforce;

Harnessing Technological Innovation; and

Economic Development.

2. Review and Selection Process

The Agency will select applications for award under this Notice in accordance with the provisions specified in 7 CFR 4284.950(a).

If your application is eligible and complete, it will be qualitatively scored by at least two reviewers based on criteria specified in section E.1. of this Notice. One of these reviewers will be an experienced RD employee from your servicing State Office and at least one additional reviewer will be a non-Federal, independent reviewer, who must meet the following qualifications. Independent reviewers must have at least a bachelor's degree in one or more of the following fields: agri-business, agricultural economics, agriculture, animal science, business, marketing, economics or finance; and a minimum of 8 years of experience in an agriculture-related field (*e.g.* farming, marketing, consulting, or research; or as university faculty, trade association official or non-Federal government official in an agriculturally-related field). Each reviewer will score evaluation criteria (a) through (d) and the totals for each reviewer will be added together and averaged. The RD State Office reviewer will also assign priority points based on criterion (e) in section E.1. of this Notice. These will be added to the average score. The sum of these scores will be ranked highest to lowest and this will comprise the initial ranking.

The Administrator of the Agency may choose to award up to 10 Administrator priority points based on criterion (f) in section E.1. of this Notice. These points will be added to the cumulative score for a total possible score of 100.

A final ranking will be obtained based solely on the scores received for criteria (a) through (e). A minimum score of 50 points is required for funding. Applications for Reserved Funds will be funded in rank order until funds are depleted. Unfunded reserve applications will be returned to the general funds where applications will be funded in rank order until the funds are expended. Funding for Majority Controlled Producer-Based Business Ventures is limited to 10 percent of total grant funds expected to be obligated as a result of this Notice. These applications will be funded in rank order until the funding limitation has been reached. Grants to these applicants from Reserved Funds will count against this funding limitation. In the event of tied scores, the Administrator shall have discretion in breaking ties.

If your application is ranked, but not funded, it will not be carried forward into the next competition.

F. Federal Award Administration Information

1. Federal Award Notices

If you are selected for funding, you will receive a signed notice of Federal award by postal mail, containing instructions on requirements necessary to proceed with execution and performance of the award.

If you are not selected for funding, you will be notified in writing via postal mail and informed of any review and appeal rights. Funding of successfully appealed applications will be limited to available funding.

2. Administrative and National Policy Requirements

Additional requirements that apply to grantees selected for this program can be found in 7 CFR part 4284, subpart J; the Grants and Agreements regulations of the Department of Agriculture codified in 2 CFR parts 180, 400, 415, 417, 418, 421; 2 CFR parts 25 and 170; and 48 CFR 31.2, and successor regulations to these parts.

In addition, all recipients of Federal financial assistance are required to report information about first-tier sub-awards and executive compensation (see 2 CFR part 170). You will be required to have the necessary processes and systems in place to comply with the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282) reporting requirements (see 2 CFR 170.200(b), unless you are exempt under 2 CFR 170.110(b)). More information on these requirements can be found at *http://www.rd.usda.gov/programs-services/value-added-producer-grants.*

The following additional requirements apply to grantees selected for this program:

(a) Agency approved Grant Agreement.

(b) Letter of Conditions.

(c) Form RD 1940–1, ''Request for Obligation of Funds.''

(d) Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

(e) Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions.''

(f) SF LLL, ''Disclosure of Lobbying Activities,'' if applicable.

(g) Use Form SF 270, ''Request for Advance or Reimbursement.''

3. Reporting

After grant approval and through grant completion, you will be required to provide the following, as indicated in the Grant Agreement:

(a) An SF–425, ''Federal Financial Report,'' and a project performance report will be required on a semiannual basis (due 30 working days after end of the semiannual period). For the purposes of this grant, semiannual periods end on March 31st and September 30th. The project performance reports shall include the elements prescribed in the grant agreement.

(b) A final project and financial status report within 90 days after the expiration or termination of the grant.

(c) Provide outcome project performance reports and final deliverables.

G. Solicitation of Non-Federal Independent Grant Reviewers

Rural Development is seeking non-Federal independent grant reviewers under this Notice. Reviewers must be able to use their professional knowledge and experience to evaluate and score VAPG program applications against the evaluation criteria published in this Notice, and effectively communicate their findings in writing.

1. Qualifications.

All reviewers must meet the following qualifications.

(a) Have at least a bachelor's degree in one or more of the following fields: agri-business, agricultural economics, business, marketing, economics or finance, and

(b) A minimum of 8 years of experience in an agriculture-related field (*e.g.* farming, marketing,

consulting, or research; or as university faculty, trade association official or non-Federal government official in an agriculturally-related field).

2. Ethical Standards

Prospective reviewers must be able to exercise the highest level of ethical standards in avoiding conflict of interests and maintaining confidentiality.

(a) Conflict of Interest

Individuals selected as non-Federal independent grant reviewers will be required to certify that they do not have a conflict of interest or an appearance thereof with any VAPG application they are assigned to review. This may include but is not limited to certification that they did not apply for a VAPG grant and are not affiliated with persons or organizations applying for VAPG funds.

(b) Confidentiality

Reviewers will also be required to sign a certification statement regarding the safeguarding of information contained in assigned applications.

Failure to identify a conflict-of-interest or the unauthorized disclosure of information may subject reviewers to administrative sanction, *i.e.,* removal from the current review and/or disqualification from involvement in future reviews of grant applications.

3. Training.

All reviewers must review and understand program requirements and must attend a mandatory training webinar.

4. System Requirements.

(a) Reviewers must have reliable internet access using internet Explorer and must be able to reliably access applications and submit scores electronically and.

(b) All reviewers must be able to complete requirements for, obtain, and maintain USDA Level 2 e-Authorization credentialing.

To apply, please send a resume addressing relevant qualifications and experience to *CPGrants@wdc.usda.gov* by February 19, 2021.

H. Agency Contacts

If you have questions about this Notice, please contact the State Office as identified in the **ADDRESSES** section of this Notice. You are also encouraged to visit the application website for application tools, including an application guide and templates. The website address is: *http://www.rd.usda.gov/programs-services/value-added-producer-grants.* You may also contact National Office staff at *CPGrants@wdc.usda.gov* or call the main line at (202) 720–1400.

I. Nondiscrimination Statement

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *http://www.ascr.usda.gov/complaint_filing_cust.html* and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by:

(1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) Fax: (202) 690–7442; or

(3) Email: *program.intake@usda.gov.*

Rebeckah Freeman Adcock,

Administrator, Rural Business—Cooperative Service.

[FR Doc. 2020–27986 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

Rural Business-Cooperative Service

Solicitation of Applications for the Higher Blends Infrastructure Incentive Program (HBIIP) for Fiscal Year 2021

AGENCY: Commodity Credit Corporation and the Rural Business-Cooperative Service, USDA.

ACTION: Notice; announcement of opening date for Higher Blends Infrastructure Incentive Program second application window.

SUMMARY: The Commodity Credit Corporation (CCC) and the Rural Business-Cooperative Service (RBCS), a Rural Development agency of the United States Department of Agriculture (USDA), announced the general policy and application procedures for funding under the Higher Blends Infrastructure Incentive Program (HBIIP) in a Notice of Funding Availability (NOFA) which published on May 5, 2020 in the **Federal Register**. HBIIP provides up to $100 million in competitive grants to eligible entities for activities designed to expand the sales and use of renewable fuels under the Higher Blends Infrastructure Incentive Program (HBIIP). This Notice announces the opening date for a second HBIIP application window for the remaining (approximately) $22 million (of the $100 million) and amends certain provisions and requirements of the original solicitation and clarifying notices published in the **Federal Register** on May 15, 2020 and June 3, 2020.

DATES: The Agency will begin accepting applications through the HBIIP online portal as provided on the program website, *http://www.rd.usda.gov/HBIIP.* Applications for enrollment in the Higher Biofuels Infrastructure Incentive Program will be accepted beginning December 21, 2020 through January 19, 2021. Applications received after 5:59 p.m. Eastern Standard Time on January 19, 2021 will not be considered.

ADDRESSES: Application Submission: Instructions and additional resources for the application system for electronic submissions are available at *http://www.rd.usda.gov/HBIIP.*

Electronic submissions: Electronic submissions of applications will allow for the expeditious review of an Applicant's proposal. All Applicants must file their application electronically.

FOR ADDITIONAL INFORMATION CONTACT: For general inquiries regarding the HBIIP, contact Anthony Crooks:

Telephone (202) 205–9322, email: *EnergyPrograms@usda.gov.* Persons with disabilities that require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Authority: This solicitation is issued pursuant to; 62 Stat 1070, and the Commodity Credit Corporation Charter Act of 1948 (Charter Act); U.S. Code 15 U.S.C. 714.

Congressional Review Act

The requirements of the Congressional Review Act (CRA; 5 U.S.C. 801 *et seq.*), as specified by the Office of Information and Regulatory Affairs in the Office of Management and Budget for this program were met with the original solicitation published in the **Federal Register** on May 5, 2020 at 85 FR 26656.

Paperwork Reduction Act

The information collection and recordkeeping requirements contained in this Notice have been approved under OMB Control Number 0570–0072.

Overview

Federal Agency: The Commodity Credit Corporation (CCC) and the Rural Business-Cooperative Service (RBCS), (USDA).

Funding Opportunity Title: Higher Blends Infrastructure Incentive Program (HBIIP) for Fiscal Year 2021.

Announcement Type: Solicitation of Applications; announcement of opening date for Higher Blends Infrastructure Incentive Program second application window.

Catalog of Federal Domestic Assistance (CFDA) Title: The Higher Blends Infrastructure Incentive Program (HBIIP)—10.754.

Due Date for Applications: Applications will be accepted beginning December 21, 2020 through January 19, 2021. Applications received after 5:59 p.m. Eastern Standard Time on January 19, 2021 will not be considered.

I. Background

On May 5, 2020, the CCC and RBCS (the Agency) published a NOFA in the **Federal Register**, 85 FR 26656, announcing the availability of up to $100 million in competitive grants to eligible entities for activities designed to expand the sales and use of renewable fuels under the Higher Blends Infrastructure Incentive Program (HBIIP).

Under the original solicitation and clarifying notices of May 15, 2020 (85 FR 29394) and June 3, 2020 (85 FR 37824), 128 companies were enrolled in the HBIIP online application system and 121 applications were successfully submitted in the application window (before 11:59 p.m. EDT, August 13, 2020).

All meritorious applications for fueling stations and fleet facilities were awarded funds, amounting to approximately $64.3 million.

Based on the awards made in the original solicitation, $16.8 million of the ''Targeted Assistance Goal of approximately $40 million,'' established for Owners of 10 fueling stations or fewer, was met.

The original solicitation limited awards to fuel distribution facilities to ''approximately $14 million.'' The amount requested by these applicants significantly exceeded the amount available.

Approximately $22 million remains available under the original solicitation, the Agency determined it is in the public interest to announce a second round of funding and to make available approximately $15 million to fueling stations and fleet facilities and approximately $7 million to fuel/biodiesel distribution facilities, for purposes as originally specified. Additionally, the Agency reserves discretion to reallocate available funds (among applicant types, as established in the original solicitation) based on the number of applications received, the amount of requested funds and any funds returned by program recipients or made otherwise available to the program.

The purpose of this Notice is to announce that the Agency will accept applications for 30 days for the HBIIP beginning December 21, 2020.

II. General Funding Information

A. Type of Instrument

Grants. Awards to successful applicants will be in the form of cost-share grants for up to 50 percent of total eligible project costs, but not to exceed $3 million, whichever is less.

B. Available Funds

Of the $100 million made available under HBIIP in the original solicitation of May 5, 2020, approximately $22 million remains to eligible participants. Of the total amount of remaining funds, approximately $15 million will be made available to transportation fueling facilities (including fueling stations, convenience stores, hypermarket fueling stations, fleet facilities, and similar entities with capital investments) for eligible implementation activities related to higher blends of fuel ethanol greater than 10 percent ethanol, such as E15 or higher; and approximately $7 million will be made available to fuel/biodiesel distribution facilities (including terminal operations, depots, midstream partners and heating oil distribution facilities or equivalent entities), for eligible implementation activities related to higher blends of biodiesel greater than 5 percent biodiesel, such as B20 or higher. The Agency reserves discretion to reallocate available funds (among applicant types, as established in the original solicitation) based on the number of applications received, the amount of requested funds and any funds returned by program recipients or made otherwise available to the program.

C. Approximate Number of Awards

The number of awards will depend on the number of eligible participants and the total amount of requested funds. In the unlikely event that every successful applicant is awarded the maximum amount available, 8 awards will be made.

III. Program Requirements and Changes

To be eligible for an award under this solicitation, applications must meet all the requirements contained in the HBIIP NOFA published in the **Federal Register** on May 5, 2020 (85 FR 26656) and clarifying notices; May 15, 2020 (85 FR 29394) and June 3, 2020 (85 FR 37824) with the following exceptions for this second round of funding:

1. Grants for up to 50 percent of total eligible project costs, but not more than $3 million are available to eligible participants;

2. Of the remaining $22 million, approximately $15 million is available to vehicle fueling facilities, including, but not limited to, local fueling stations/locations, convenience stores (CS), hypermarket fueling stations (HFS), and fleet facilities; and approximately $7 million is available for fuel/biodiesel distribution facilities, terminal operations, midstream partners, and heating oil distribution facilities or equivalent entities;

3. RBCS reserves discretion to reallocate available funds (among applicant types, as established in the original solicitation) based on the number of applications received, the amount of requested funds and any funds returned by program recipients or made otherwise available to the program; and

4. Applicants selected to receive funds in the first round of funding (original solicitation) will not be considered.

Information can also be found at *http://www.rd.usda.gov/HBIIP.*

Robert Stephenson,

Executive Vice President, Commodity Credit Corporation.

Mark Brodziski,

Deputy Administrator, Rural Business-Cooperative Service.

[FR Doc. 2020–27765 Filed 12–18–20; 8:45 am]

BILLING CODE 3410–05–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meetings of the New Hampshire Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of public meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that the New Hampshire State Advisory Committee to the Commission will hold meetings on Monday January 11, 2021; Monday, January 25, 202; and Monday, February 8, 2021 at 4:00 p.m. (ET). The purpose of the meetings is to discuss the New Hampshire Advisory Committee's draft report on solitary confinement in New Hampshire.

DATES: These meetings will be held from 4:00 p.m. to 5:00 p.m. (ET) on 1/11/21, 1/25/21, and 2/8/21.

Please register for these meetings at the following links to receive details on how to join the meeting by audio and/or video:

- January 11, 2021: *https://tinyurl.com/NHSACJan11*
- January 25, 2021: *https://tinyurl.com/NHSACJan25*
- February 8, 2021: *https://tinyurl.com/NHSACFeb8*

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg at *mtrachtenberg@usccr.gov* or by phone at (202) 809–9618.

SUPPLEMENTARY INFORMATION: These meetings are available to the public through the above web links. If joining only via phone, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind, and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number found through registering at the web link provided for each meeting.

Members of the public are entitled to make comments during the open period at the end of each meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda

Mondays, January 11, 2021; January 25, 2021; and February 8, 2021 From 4:00 p.m.–5:00 p.m. (ET)

I. Welcome and Roll Call
II. Announcements and Updates
III. Approval of Minutes
IV. Draft Report Discussion: Solitary Confinement in New Hampshire
V. Public Comment
VI. Next Steps
VII. Adjournment

Dated: December 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–27993 Filed 12–18–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Tennessee Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Tennessee Advisory Committee (Committee) will hold a meetings via the web platform Webex on Thursday, January 21, 2021 at 12:00 p.m. Central Time. The purpose of the meeting is for the committee to discuss civil rights concerns in the state.

DATES: The meetings will be held on:

- Thursday, January 21, 2021, at 12:00 p.m. Central Time

https://civilrights.webex.com/civilrights/j.php?MTID=mb70f2f53600bfb6d09c0bef7c2132e1e

Or join by phone 800–360–9505 USA Toll Free. Access code: 1404 3971 590.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 499–4066.

SUPPLEMENTARY INFORMATION: Members of the public may listen to this discussion through the above call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Tennessee Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Chair's Comments
III. Committee Discussion
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: December 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–27987 Filed 12–18–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Illinois Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Illinois Advisory Committee (Committee) will hold a meeting via the online platform Webex on Tuesday, January 12, 2021 at 12:00 p.m. Central Time. The purpose of the meeting is for the Committee to approve final edits to their Fair Housing report and to discuss civil rights concerns in the state.

DATES: The meetings will be held on:

- Tuesday, January 12, 2021, at 12:00 p.m. Central Time

https://civilrights.webex.com/civilrights/j.php?MTID=m2ffcc752c757e662980c04d2a324f449

Or join by phone 800–360–9505 USA Toll Free. Access code: 199 023 8513

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 499–4066.

SUPPLEMENTARY INFORMATION: Members of the public may listen to this discussion through the above call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Individual who is deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.*

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Illinois Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome & Roll Call
II. Chair's comments
III. Fair Housing Report
IV. Next Steps
V. Public Comment
VI. Adjournment

Dated: December 15, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–27992 Filed 12–18–20; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Connecticut Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that the Connecticut Advisory Committee to the U.S. Commission on Civil Commission will hold meetings via conference call on Thursday, December 17, 2020 at 2:00 p.m. ET and Monday, December 21, 2020 at 1:00 p.m. ET. The purpose of the meetings is to consider next steps in the Committee's work on COVID–19 in nursing homes, including hearing from advocates and researchers on the topic.

DATES: Thursday, December 17, 2020, at 2:00 p.m. ET and Monday, December 21, 2020, at 1:00 p.m. ET.

ADDRESSES: *Public Call–In Information:* Dial 1–866–248–8441; conference ID: 3651719.

FOR FURTHER INFORMATION CONTACT: ≤ Barbara Delaviez at *ero@usccr.gov* or by phone at 202–539–8246.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–866–248–8441 and conference ID: 3651719. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). You may also remain anonymous. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Individuals who are deaf, deafblind and hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Federal Relay Service operator with the conference call-in numbers: 1–866–248–8441 and conference ID: 3651719.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be emailed to Barbara Delaviez at *ero@usccr.gov.* Persons who desire additional information may contact Regional Programs Unit at (312) 353–8311.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the respective meeting. Written comments may be emailed to Barbara Delaviez at *ero@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (202) 809–9618. Records and documents discussed during the meeting will be available for public viewing as they become available at the *www.facadatabase.gov.* Persons interested in the work of this advisory committee are advised to go to the Commission's website, *www.usccr.gov,* or to contact the Regional Programs Unit at the above phone number or email address.

Agenda

Thursday, December 17, 2020 at 2:00 p.m. ET and Monday, December 21 at 1:00 p.m. ET, 2020 at 1:00 p.m. (ET)

- Roll Call
- Project Next Steps and/or Briefing: COVID–19 in Nursing Homes in Connecticut
- Open Comment
- Next Steps
- Other Business
- Adjournment

Dated: December 16, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–28132 Filed 12–18–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–523–812]

Circular Welded Carbon-Quality Steel Pipe From the Sultanate of Oman: Preliminary Results of Antidumping Duty Administrative Review; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that circular welded carbon-quality steel pipe (CWP) from the Sultanate of Oman (Oman) has been sold in the United States at prices below normal value (NV) during the period of review (POR), December 1, 2018 through November 30, 2019. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dennis McClure, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5973.

SUPPLEMENTARY INFORMATION:

Background

On February 6, 2020, Commerce initiated the antidumping duty administrative review of the order [1] on circular welded carbon-quality steel pipe from the Sultanate of Oman.[2] This review covers one producer/exporter of the subject merchandise, Al Jazeera Steel Products Co. SAOG (Al Jazeera). On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[3] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days.[4] Accordingly, the deadline for the preliminary results of this review is now December 21, 2020. For a detailed description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[5]

Scope of the Order

The merchandise subject to the *Order* is CWP from Oman. A full description of the scope of the *Order* is contained in the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) and (a)(2) of the Tariff Act of 1930, as amended (the Act). Export price was calculated in accordance with section 772 of the Act. NV was calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is included as an appendix to this notice.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

Exporter/producer	Weighted-average dumping margin (percent)
Al Jazeera Steel Products Co. SAOG	1.57

We preliminarily determine that, for the period of December 1, 2018 through November 30, 2019, the following weighted-average dumping margin exists:

Disclosure, Public Comment, and Opportunity To Request a Hearing

We intend to disclose the calculations performed for these preliminary results of review to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[6] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[7] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[8] Case and rebuttal briefs should be filed using ACCESS.[9] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[10]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety by ACCESS by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national; and (4) a list of issues parties intend to discuss. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a date and time to be determined.[11]

We intend to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless the deadline is extended.[12]

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and U.S. Customs and Border Protection (CBP)

[1] *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 81 FR 91906 (December 19, 2016) (*Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 6896 (February 6, 2020).

[3] *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.

[4] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[5] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[6] *See* 19 CFR 351.309(c)(1)(ii).

[7] *See* 19 CFR 351.309(d)(1) and (2); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[8] *See* 19 CFR 351.309(c)(2) and (d)(2).

[9] *See* 19 CFR 351.303.

[10] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[11] *See* 19 CFR 351.310(c).

[12] *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

shall assess, antidumping duties on all appropriate entries covered by this review.[13]

Pursuant to 19 CFR 351.212(b)(1), as Al Jazeera reported the entered value for its U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales.[14] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis.* Where the respondent's weighted-average dumping margin is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

In accordance with our ''automatic assessment'' practice, for entries of subject merchandise during the POR produced by Al Jazeera for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[15]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for Al Jazeera will be the rate established in the final results of this review, except if the ultimate rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rates will be zero; (2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment of this proceeding in which the company was reviewed; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair value (LTFV) investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recently-completed segment of this proceeding for the manufacturer of subject merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 7.36 percent, the all-others rate established in the LTFV investigation.[16] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification to Interested Parties

The preliminary results of this review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: December 15, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Currency Conversion
VI. Recommendation

[FR Doc. 2020–28092 Filed 12–18–20; 8:45 am]

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[13] *See* 19 CFR 351.212(b).

[14] In these preliminary results, we applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

[15] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[16] *See Order.*

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–871]

Finished Carbon Steel Flanges from India: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) preliminarily finds that the Norma Group and R.N. Gupta & Co. Ltd. (Gupta), producers/exporters of finished carbon steel flanges (flanges) from India, did not sell subject merchandise at prices below normal value (NV) during the period of review (POR) August 1, 2018 through July 31, 2019. Additionally, Commerce preliminarily determines that Silbo Industries, Inc. (Silbo) had no shipments of subject merchandise during the POR. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Fred Baker, George McMahon, or Margaret Collins, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2924, (202) 482–1167, or (202) 482–6250, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 2, 2019, we published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on flanges from India, for the period August 1, 2018 through July 31, 2019.[1] Subsequently, Commerce received timely requests for an administrative review from the petitioners,[2] Gupta, the Norma Group, Bebitz Flanges Works Private Limited (Bebitz), and Jai Auto Pvt. Ltd. of India (Jai Auto).[3] On October

[1] *See Finished Carbon Steel Flanges from India and Italy: Antidumping Duty Orders,* 82 FR 40136 (August 24, 2017) (*Order*); *see also Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 84 FR 37834, 37835 (August 2, 2019).

[2] The petitioners are Weldbend Corporation and Boltex Manufacturing Co., L.P. (collectively, the petitioners).

[3] *See* Petitioners' Letter, ''Request for Administrative Review,'' dated September 3, 2019; *see also* Gupta's Letter, ''Request for Anti-Dumping

Continued

7, 2019, Commerce initiated an administrative review of the Order with respect to 41 companies.[4] On December 27, 2019, Commerce selected Gupta and the Norma Group [5] as the mandatory respondents for this review.[6] On April 9, 2020, Commerce extended the deadline for the preliminary results of this review until August 28, 2020.[7] On April 24, 2020 Commerce tolled all deadlines in administrative reviews by 50 days.[8] On July 21, 2020 Commerce tolled all deadlines in administrative reviews by an additional 60 days.[9] Accordingly, the deadline for the preliminary results of this administrative review is now December 16, 2020. For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[10]

Scope of the Order

The merchandise covered by the Order is finished carbon steel flanges from India. The product is currently classified under subheadings 7307.91.5010 and 7307.91.5050 of the Harmonized Tariff System of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of merchandise subject to the scope is dispositive.[11]

Rate for Non-Selected Companies

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act). Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available {time}''

We preliminarily calculated a zero percent dumping margin for Gupta and the Norma Group, the mandatory respondents in this review, and have assigned this rate (*i.e.,* 0.00 percent) to the non-selected companies.[12] For additional information, *see* the Preliminary Decision Memorandum.

The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *http://enforcement.trade.gov/frn/index.html.* The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

Methodology

Commerce is conducting this review in accordance with sections 751(a)(1)(B) and (2) of the Act. Export price is calculated in accordance with section 772 of the Act and normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Preliminary Determination of No Shipments

Based on our analysis of U.S. Customs and Border Protection (CBP) information and information provided by Silbo, we preliminarily determine that Silbo had no shipments of the subject merchandise during the POR.[13] Consistent with Commerce's practice, we will not rescind the review with respect to Silbo, but will complete the review and issue instructions to CBP based on the final results.[14]

Preliminary Results of Review

As a result of this review, Commerce preliminarily determines that the following weighted-average dumping margins exist for the period August 1, 2018 through July 31, 2019:

Producers/exporters	Weighted-average dumping margin (percent)
R. N. Gupta & Co., Ltd.	0.00

Duty Administrative Review,'' dated August 30, 2019; Norma Group's Letter, ''Request for an Administrative Review,'' dated August 30, 2019, and Norma Group's Letter, ''Request for Anti-Dumping Duty Administrative Review of Norma (India) Limited, USK Export Private Limited, Umashanker Khandelwal and Co. and Bansidhar Chiranjilal,'' dated September 3, 2019; Bebitz's Letter, ''Requests for Administrative Review,'' dated September 3, 2019; and Jai Auto's Letter, ''Request for Anti-Dumping Duty Administrative Review of Finished Carbon Steel Flanges from India,'' dated August 31, 2019.

[4] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 53411 (October 7, 2019) (*Initiation Notice*).

[5] In prior segments of this proceeding, we determined that Norma (India) Limited; USK Exports Private Limited; Uma Shanker Khandelwal & Co.; and Bansidhar Chiranjilal should be collapsed and treated as a single entity (the Norma Group). *See Finished Carbon Steel Flanges from India: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 82 FR 9719 (February 8, 2017) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum at 4–5; unchanged in *Finished Carbon Steel Flanges from India: Final Determination of Sales at Less Than Fair Value,* 82 FR 29483 (June 29, 2017) (*Final Determination*); *Finished Carbon Steel Flanges from India: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,* 84 FR 57848, 57849 (October 29, 2019), unchanged in *Finished Carbon Steel Flanges from India: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 21391 (April 17, 2020) (*2017–2018 Final Results*). In this review, the Norma Group presented evidence that the factual basis on which Commerce made its prior determination has not changed. *See* Norma Group's July 23, 2020 Supplemental Questionnaire Response (Norma July 23, 2020 SQR) at 2–8. Therefore, in this administrative review, Commerce continues to collapse and treat these four companies as a single entity.

[6] *See* Memorandum, ''Antidumping Duty Administrative Review of Finished Carbon Steel Flanges from India: Respondent Selection,'' dated December 27, 2019.

[7] *See* Memorandum, ''Finished Carbon Steel Flanges from India: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated April 9, 2020.

[8] *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.

[9] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[10] *See* Memorandum, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Finished Carbon Steel Flanges from India; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[11] For a complete description of the scope of the *Order, see* the Preliminary Decision Memorandum.

[12] *See, e.g., Xanthan Gum from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review, and Partial Rescission; 2018–2019,* 85 FR 75686, 74687 (November 23, 2020); *see also Albemarle Corp.* v. *United States,* 821 F. 3d 1345 (Fed. Cir. 2016); *see also Emulsion Styrene-Butadiene Rubber From the Republic of Korea: Preliminary Results of the Administrative Review of the Antidumping Duty Order; 2018–2019,* 85 FR 39534 (July 1, 2020).

[13] *See* Preliminary Decision Memorandum.

[14] *See Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2017– 2018,* 85 FR 1139 (January 9, 2020).

Producers/exporters	Weighted-average dumping margin (percent)
Norma (India) Limited/USK Exports Private Limited/ Uma Shanker Khandelwal & Co./Bansidhar Chiranjilal [15]	0.00
Review-Specific Average Rate Applicable to the Following Companies:	
Adinath International	0.00
Allena Group	0.00
Alloyed Steel	0.00
Bebitz Flanges Works Private Limited	0.00
C.D. Industries	0.00
CHQ Forge	0.00
CHW Forge Pvt. Ltd	0.00
Citizen Metal Depot	0.00
Corum Flange	0.00
DN Forge Industries	0.00
Echjay Forgings Limited	0.00
Falcon Valves and Flanges Private Limited	0.00
Heubach International	0.00
Hindon Forge Pvt. Ltd.	0.00
Jai Auto Private Limited	0.00
Kinnari Steel Corporation	0.00
M F Rings and Bearing Races Ltd.	0.00
Mascot Metal Manufactures	0.00
OM Exports	0.00
Punjab Steel Works (PSW)	0.00
R. D. Forge	0.00
Raaj Sagar Steels	0.00
Ravi Ratan Metal Industries	0.00
Rolex Fittings India Pvt. Ltd.	0.00
Rollwell Forge Pvt. Ltd.	0.00
SHM (ShinHeung Machinery)	0.00
Siddhagiri Metal & Tubes	0.00
Sizer India	0.00
Steel Shape India	0.00
Sudhir Forgings Pvt. Ltd.	0.00
Tirupati Forge	0.00
Umashanker Khandelwal Forging Limited	0.00

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b).

Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[16] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.[17] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

All submissions to Commerce must be filed electronically using ACCESS, and must also be served on interested parties.[18] An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time on the date that the document is due.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS within 30 days of publication of this notice.[19] Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs.

Pursuant to section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.213(h)(2), Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, unless extended.[20]

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[21]

For any individually examined respondents whose weighted-average dumping margin is above *de minimis* (*i.e.,* greater than or equal to 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales to that importer, and we will instruct CBP to assess antidumping duties on all appropriate entries covered by this review. For entries of subject merchandise during the POR produced by each respondent for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate such entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[22] Where either the individually-selected respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we intend to assign an assessment rate based on the methodology described in the ''Rates for Non-Examined Companies'' section. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review where applicable.

We intend to issue instructions to CBP 15 days after the date of publication of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the companies under review will be the rate established in the final results of this review, except if the rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1) (*i.e.,* less than 0.50 percent), in which case the cash deposit rate will be zero; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment; (3) if the exporter is not a firm covered in this review, a prior review, or the original

[15] Commerce initiated on ''Uma Shanker Khandelwal & Co.'' and ''Umashanker Khandelwal and Co.'' based on the requests for administrative review that Commerce received from the interested parties. *See Initiation Notice.* Because of the minor differences in the spelling of the aforementioned company names, we have combined them under the name Uma Shanker Khandelwal & Co., which is part of the collapsed entity, the Norma Group. Furthermore, we initiated on ''USK Export Private Limited,'' but the requests for a review of this company referenced both ''USK Export Private Limited'' and ''USK Exports Private Limited.'' In these preliminary results, we have combined them under the name USK Exports Private Limited, which is part of the collapsed entity, the Norma Group.

[16] *See* 19 CFR 351.309(c)(1)(ii).

[17] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[18] *See* 19 CFR 351.303(f).

[19] *See* 19 CFR 351.310(c).

[20] *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

[21] *See* 19 CFR 351.212(b)(1).

[22] For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 11.95 percent, the all-others rate established in the less-than-fair-value investigation.[23] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary 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 the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: December 15, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Preliminary Determination of No Shipments
V. Rates for Non-Examined Companies
VI. Discussion of the Methodology
VII. Recommendation

[FR Doc. 2020–28087 Filed 12–18–20; 8:45 am]

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[23] *See Order.*

DEPARTMENT OF COMMERCE

International Trade Administration

Limitation of Duty-Free Imports of Apparel Articles Assembled in Haiti Under the Caribbean Basin Economic Recovery Act (CBERA), as Amended by the Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE)

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notification of Annual Quantitative Limit on Imports of Certain Apparel from Haiti.

SUMMARY: CBERA, as amended, provides duty-free treatment for certain apparel articles imported directly from Haiti. One of the preferences is known as the ''value-added'' provision, which requires that apparel meet a minimum threshold percentage of value added in Haiti, the United States, and/or certain beneficiary countries. The provision is subject to a quantitative limitation, which is calculated as a percentage of total apparel imports into the United States for each 12-month period. For the period from December 20, 2020 through December 19, 2021, the quantity of imports eligible for preferential treatment under the value-added provision is 337,967,087 square meters equivalent.

DATES: The new limitations become effective December 20, 2020.

FOR FURTHER INFORMATION CONTACT: Laurie Mease, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–2043.

SUPPLEMENTARY INFORMATION:

Authority: Section 213A of the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703a) (''CBERA''), as amended; and as implemented by Presidential Proc. No. 8114, 72 FR 13655 (March 22, 2007), and No. 8596, 75 FR 68153 (November 4, 2010).

Background: Section 213A(b)(1)(B) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(B)), outlines the requirements for certain apparel articles imported directly from Haiti to qualify for duty-free treatment under a ''value-added'' provision. In order to qualify for duty-free treatment, apparel articles must be wholly assembled, or knit-to-shape, in Haiti from any combination of fabrics, fabric components, components knit-to-shape, and yarns, as long as the sum of the cost or value of materials produced in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, plus the direct costs of processing operations performed in Haiti or one or more beneficiary countries, as described in CBERA, as amended, or any combination thereof, is not less than an applicable percentage of the declared customs value of such apparel articles. Pursuant to CBERA, as amended, the applicable percentage for the period December 20, 2020 through December 19, 2021 is 60 percent.

For every twelve-month period following the effective date of CBERA, as amended, duty-free treatment under the value-added provision is subject to a quantitative limitation. CBERA, as amended, provides that the quantitative limitation will be recalculated for each subsequent 12-month period. Section 213A(b)(1)(C) of CBERA, as amended (19 U.S.C. 2703a(b)(1)(C)), requires that, for the twelve-month period beginning on December 20, 2020, the quantitative limitation for qualifying apparel imported from Haiti under the value-added provision will be an amount equivalent to 1.25 percent of the aggregate square meter equivalent of all apparel articles imported into the United States in the most recent 12-month period for which data are available. The aggregate square meters equivalent of all apparel articles imported into the United States is derived from the set of Harmonized System lines listed in the Annex to the World Trade Organization Agreement on Textiles and Clothing (''ATC''), and the conversion factors for units of measure into square meter equivalents used by the United States in implementing the ATC. For purposes of this notice, the most recent 12-month period for which data are available as of December 20, 2020 is the 12-month period ending on October 31, 2020.

Therefore, for the one-year period beginning on December 20, 2020 and extending through December 19, 2021, the quantity of imports eligible for preferential treatment under the value-added provision is 337,967,087 square meters equivalent. Apparel articles entered in excess of these quantities will be subject to otherwise applicable tariffs.

Lloyd Wood,

Deputy Assistant Secretary for Textiles, Consumer Goods and Materials.

[FR Doc. 2020–28036 Filed 12–18–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–909]

Certain Steel Nails From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Partial Rescission; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain steel nails (nails) from the

People's Republic of China (China) were sold in the United States at less than normal value (NV) during the period of review (POR) August 1, 2018 through July 31, 2019. We invite interested parties to comment on these preliminary results.

DATES: Applicable December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Benito Ballesteros, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–7425.

SUPPLEMENTARY INFORMATION:

Background

On October 7, 2019, Commerce published a notice of initiation of an administrative review of the antidumping duty order on nails from China.[1] This administrative review covers 308 [2] companies, including two mandatory respondents: Shandong Oriental Cherry Hardware Group Co., Ltd.; and Tianjin Zhonglian Metals Ware Co., Ltd. (Zhonglian).

On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days, thereby extending the deadline for these results until June 22, 2020.[3] On June 15, 2020, Commerce extended the deadline to issue the preliminary results by an additional 117 days.[4] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days, extending the deadline for these results until December 15, 2020.[5]

For a complete description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.[6] A list of topics included in the Preliminary Decision Memorandum is included as Appendix I to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Order

The products covered by the *Order* are nails from China. For a full description of the scope, *see* the Preliminary Decision Memorandum.[7]

Partial Rescission of Review

Section 351.213(d)(1) of Commerce's regulations provides that Commerce will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review. Commerce published the *Initiation Notice* on October 7, 2019.[8]

On December 30, 2019, Mid Continent Steel & Wire, Inc. (the petitioner) withdrew its request for review of The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker Inc. (collectively, Stanley).[9] Because the review request for Stanley was timely withdrawn, and because no other party requested a review of Stanley, we are rescinding this review with respect to Stanley.

Preliminary Determination of No Shipments

Ten companies [10] that are subject to this review reported that they did not have any shipments of subject merchandise during the POR.[11] To date, we have not received any information from either U.S. Customs and Border Protection (CBP), or from any other sources, that contradict these companies' no-shipment claims. Accordingly, we preliminarily determine that these companies had no shipments during the POR. For additional information, *see* the Preliminary Decision Memorandum. Consistent with Commerce's practice, we will not rescind this review with respect to these companies but will complete the review and issue appropriate instructions to CBP based on the final results of the review.[12]

Separate Rates

Commerce preliminary determines that information placed on the record by Qingdao D&L Group Ltd.; SDC International Australia Pty. Ltd.; Shanghai Curvet Hardware Products Co., Ltd.; Shanghai Yueda Nails Industry Co., Ltd., a.k.a. Shanghai Yueda Nails Co., Ltd.; Shanxi Tianli Industries Co., Ltd.; S-Mart (Tianjin) Technology Development Co., Ltd.; Suntec Industries Co., Ltd.; Tianjin Jinchi Metal Products Co., Ltd.; and Zhonglian demonstrated that these entities are entitled to separate rate status. For additional information, *see* the Preliminary Decision Memorandum.

China-Wide Entity

Commerce's policy regarding conditional review of the China-wide entity applies to this administrative review.[13] 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 in this review, the entity is not under review and the weighted-average dumping margin determined for the China-wide entity (*i.e.,* 118.04 percent) is not subject to change as a result of this review.[14]

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[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 84 FR 53411, 53417–53421 (October 7, 2019) (*Initiation Notice*); *see also Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China,* 73 FR 44961 (August 1, 2008) (*Order*).

[2] We note that we inadvertently initiated a review of one company twice, once as ''Tianjin Jinghai County Hongli Industry & Business Co., Ltd.'' and again as ''Tianjin Jinghai County Hongli Industry and Business Co., Ltd.'' We are treating these companies as the same entity for purposes of this segment of the proceeding.

[3] *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.

[4] *See* Memorandum, ''Certain Steel Nails form the People's Republic of China: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated June 15, 2020.

[5] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Steel Nails from the People's Republic of China; 2018–2019,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* Preliminary Decision Memorandum.

[8] *See Initiation Notice,* 84 FR at 53411.

[9] *See* Petitioner's Letter, ''Certain Steel Nails from China: Withdrawal of Request for Administrative Reviews,'' dated December 30, 2019.

[10] These companies are: (1) Dezhou Hualude Hardware Products Co., Ltd.; (2) Hebei Minmetals Co., Ltd.; (3) Nanjing Caiqing Hardware Co., Ltd.; (4) Nanjing Yuechang Hardware Co., Ltd.; (5) Shandong Qingyun Hongyi Hardware Products Co., Ltd.; (6) Shanxi Hairu Trade Co., Ltd.; (7) Shanxi Pioneer Hardware Industrial Co., Ltd.; (8) Tag Fasteners Sdn. Bhd.; (9) Tianjin Jinghai County Hongli Industry & Business Co.; and (10) Xi'an Metals & Minerals Import & Export Co., Ltd. All of these companies, except for Tag Fasteners Sdn. Bhd., received a separate rate in a previous segment of this proceeding.

[11] Shanxi Yuci Broad Wire Products Co., Ltd. and Certified Products International Inc. submitted no shipment certifications. However, neither company is under review and, therefore, we did not consider their no shipment claims.

[12] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694, 65694–95 (October 24, 2011).

[13] *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 (November 4, 2013).

[14] *See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012–2013,* 80 FR 18816, 18817.

Aside from the companies that demonstrated eligibility for a separate rate, and certain companies that had no POR shipments of subject merchandise, Commerce considers all other companies for which a review was requested to be part of the China-wide entity. For additional information, *see* the Preliminary Decision Memorandum; *see also* Appendix II for a list of companies considered to be part of the China-wide entity.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). We calculated export prices in accordance with section 772 of the Act. Because China is a non-market economy country within the meaning of section 771(18) of the Act, we calculated NV in accordance with section 773(c) of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.

Preliminary Results of Review

Commerce preliminarily determines that the following weighted-average dumping margins exist for the period August 1, 2018 through July 31, 2019:

Exporter	Weighted-average dumping margin (percent)
Tianjin Zhonglian Metals Ware Co., Ltd	18.31
Review-Specific Average Rate Applicable to the Following Companies:[15]	
Qingdao D&L Group Ltd	18.31
SDC International Australia Pty. Ltd	18.31
Shanghai Curvet Hardware Products Co., Ltd	18.31
Shanghai Yueda Nails Industry Co., Ltd., a.k.a. Shanghai Yueda Nails Co., Ltd	18.31
Shanxi Tianli Industries Co., Ltd	18.31
S-Mart (Tianjin) Technology Development Co., Ltd	18.31
Suntec Industries Co., Ltd	18.31
Tianjin Jinchi Metal Products Co., Ltd	18.31

We preliminarily calculated a rate for Zhonglian, the sole mandatory respondent, which is not zero, *de minimis,* or based entirely on adverse facts available. Accordingly, we have assigned Zhonglian's margin to the companies which preliminarily rebutted the presumption of government control, but which were not selected for individual examination in this administrative review, consistent with section 735(c)(3)(A) of the Act.

Disclosure and Public Comment

Commerce intends to disclose the calculations performed for these preliminary results to interested parties within five days of the date of publication of this notice, in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, the content of which is limited to issues raised in case briefs, may be filed no later than seven days after the date for filing case briefs.[16] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[17] Case and rebuttal briefs should be filed using ACCESS[18] and must be served on interested parties.[19] Executive summaries should be limited to five pages total, including footnotes. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[20]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically-filed document must be received successfully in its entirety through Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Unless otherwise extended, Commerce intends to issue the final results of this administrative review, which will include the results of our analysis of all issues raised in the case briefs, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[21] Commerce intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review.

If Zhonglian's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.50 percent) in the final results of this review, Commerce will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those sales, in accordance with 19 CFR 351.212(b)(1). Where an importer-specific *ad valorem* rate is not zero or *de minimis,* Commerce will instruct CBP to collect the appropriate duties at the time of liquidation.[22] Where either

[15] This rate is the rate calculated for Zhonglian.

[16] *See* 19 CFR 351.309(d).

[17] *See* 19 CFR 351.309(c)(2) and (d)(2).

[18] *See generally* 19 CFR 351.303.

[19] *See* 19 CFR 351.303(f).

[20] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[21] *See* 19 CFR 351.212(b).

[22] *See* 19 CFR 351.212(b)(1).

a respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,* Commerce will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[23]

For entries that were not reported in the U.S. sales data submitted by Zhonglian, Commerce will instruct CBP to liquidate such entries at the rate for the China-wide entity.[24] Additionally, if Commerce determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's cash deposit rate) will be liquidated at the rate for the China-wide entity.[25]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this review for shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For the companies listed above that have a separate rate, the cash deposit rate will be equal to the weighted-average dumping margin established in the final results of this review (except, if the rate is *de minimis,* then cash deposit rate will be zero); (2) for previously examined China and non-China exporters not listed above that at the time of entry are eligible for a separate rate based on a prior completed segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific cash deposit rate; (3) for all China exporters of subject merchandise that have not been found to be entitled to a separate rate at the time of entry, the cash deposit rate will be that for the China-wide entity (*i.e.,* 118.04 percent); and (4) for all non-China exporters of subject merchandise which at the time of entry are not eligible for a separate rate, the cash deposit rate will be the rate applicable to the China exporter that supplied that non-China exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary 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 the 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.

Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: December 14, 2020

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Rescission of Review, In Part
V. Preliminary Determination of No Shipments
VI. Discussion of the Methodology
VII. Recommendation

Appendix II

China-Wide Entity

Accurate Metal Machining Co., Ltd.
Air It On Inc.
Alsons Manufactuiring India Llp
Anhui Amigo Imp. & Exp. Co. Ltd.
Anhui Tea Imp. & Exp. Co. Ltd.
Artree (Xiamen) Group Ltd
Asiahan Industrial Trading Ltd.
Astrotech Steels Pvt. Ltd.
Baoding Jieboshun Trading Co., Ltd.
Beijing Camzone Industrial & Trading Co., Ltd.
Beijing Catic Industry Ltd.
Beijing Jinheung Co., Ltd.
Beijing Qin-Li Jeff Trading Co., Ltd.
Beijing Qin-Li Metal Industries Co., Ltd
Bodi Corporation
Bonuts Hardware Logistics
Cana (Rizhao) Hardware Co., Ltd.
Cangzhou Nandagang Guotai Hardware Products Co., Ltd.
Cangzhou Xinqiao International Trade Co., Ltd
Certified Products Taiwan Inc.
Changzhou Kya Trading Co., Ltd.
Chanse Mechatronics Scientech Development (Jiangsu) Inc.
Cheng Ch International Co., Ltd.
Chia Pao Metal Co., Ltd.
China Dinghao Co., Ltd.
China Linyi Global Trade Center Co., Ltd.
China Staple Enterprise (Tianjin) Co., Ltd.
Chinapack Ningbo Imp. & Exp. Co., Ltd.
Chite Enterprises Co., Ltd.
Chonyi International Co., Ltd.
Come Best (Thailand) Co., Ltd.
Continent Link Int'l Limited
Crelux International Co., Ltd.
Daejin Steel Co., Ltd.
De Fasteners Inc.
De Hui Screw Industry Co., Ltd.
Dezhou Xinjiayuan Hardware Products Co., Ltd.
Dingzhou Baota Metal Products Co., Ltd.
Dong E Fuqiang Metal Products Co., Ltd.
Dongguan Dongri Electrical Electric Equipment Co., Ltd.
Dongguan Further Wood Products Co., Ltd.
Eco-Friendly Floor Ltd.
Ejen Brothers Limited
Empac International Ltd.
Everglow Inc.
Faithful Engineering Products Co., Ltd.
Fastenal Asia Pacific Limited
Fastening Care
Fastgrow International Co., Inc.
Finepack Industrial Limited
Foshan Hosontool Development Hardware Co., Ltd.
Foxsemicon Integrated Technology
Fujian Win Win Import and Export Trading Co., Ltd.
GD.CP International Co., Ltd.
Gdcp Richmax International Ltd.
Geekay Wires Limited
Glori-Industry Hong Kong Inc.
Grace China International Co., Ltd.
Guangdong Meite Mechanical Co. Ltd.
Guangdong TC Meite Intelligent Tools Co., Ltd.
Guangzhou Aivy Nails Technology Co.
Guangzhou Noval Medical Co., Ltd.
Guangzhou Xinfeng International Freight Co., Ltd.
Hai Sheng Xin Group Co., Ltd.
Hangzhou G-wire Technology Co., Ltd.
Hangzhou Orient Industry Co., Ltd.
Happy Worth Limited
Hebei Cangzhou New Century Foreign Trade Co., Ltd.
Hebei Jinsidun Trade Co., Ltd.
Hebei Minghao Imp. & Exp. Co., Ltd.
Hengtuo Metal Products Co., Ltd.
Home Value Co., Ltd.
Hong Kong Mu Hong Electronic Business Limited
Hongkong Milley Limited
Hongkong Shengshi Metal Products Co., Ltd.
Hongyi (HK) Hardware Products Co., Ltd.
Huaiyang County Yinfeng Plastic Factory
Huanghua Haixin Hardware Products Co., Ltd.
Huanghua Yingjin Hardware Products
Inmax Industries Sdn. Bhd.
Inmax Sdn. Bhd.
Inno International
J&b Trading Company
Jade Shuttle Enterprise Co., Ltd.
Jau Yeou Industry Co., Ltd.
Jiang Men City Yu Xing Furniture Limited Company
Jiangmen Jianghai District Hengke Plastic Film Packing Factory
Jiangsu General Science Technology Co., Ltd.
Jiangsu Hexon Imp & Exp Co., Ltd.
Jiangsu Holly Corporation
Jiangsu Huaiyin Guex Tools
Jiangsu Inter-China Group Corp.
Jiangsu Soho Honry Imp. and Exp. Co., Ltd.
Jiangsu Vivaturf Co., Limited
Jiashan Lianchuang Plastic & Hardware
Jiaxing TSR Hardware Inc.
Jinhai Hardware Co., Ltd.
Jinheung Steel Corporation
Jinhua Ausen Crafts Co., Ltd
Jinsco International Corp.

[23] *See* 19 CFR 351.106(c)(2).
[24] *Id.*
[25] *Id.*

Kaierda Display Furniture Limited
Ko's Nail Incorporation
Koram Inc.
Koram Steel Co., Ltd.
Korea Wire Co., Ltd.
Liang Chyuan Ind. Co., Lmt.
Liang Chyuan Industrial Co., Limited.
Liang's Industrial Corp.
Liaocheng Minghui Hardware Products
Linyi FlyingArrow Imp. & Exp. Co. Ltd.
Linyi Royal Trading Co., Ltd
M&M Industries Co., Ltd.
Maanshan Lilai International Trade Co., Ltd.
Max Co., Ltd.
Maxwealth Development Intl Ltd.
Mayer(Hk)limited
Milkyway Chemical Supply Chain Service Co., Ltd.
Ming Cheng Hardware Company Limited
Mingguang Abundant Hardware Products Co., Ltd.
Mingguang Ruifeng Hardware Products Co., Ltd.
Modern Factory For Metal Products
MPROVE Co., Limited
Nailtech Co., Ltd.
Nanjing Duraturf Co., Ltd.
Nanjing Nuochun Hardware Co., Ltd.
Nanjing Tianxingtong Electronic Technology Co., Ltd.
Nanjing Tianyu International Co., Ltd.
Nanjing Toua Hardware & Tools Co., Ltd.
Nanjing Zeejoe International Trade
Nantong Intlevel Trade Co., Ltd.
Natuzzi China Limited
Nielsen Bainbridge LLC
Ningbo Adv. Tools Co., Ltd.
Ningbo Angelstar Trading Co., Ltd.
Ningbo Bright Max Co., Ltd.
Ningbo Fine Hardware Production Co., Ltd.
Ningbo Freewill Imp. & Exp. Co., Ltd.
Ningbo Home-dollar Imp.& Exp. Corp.
Ningbo Langyi Metal Products Co., Ltd.
Ningbo Nd Import & Export Co., Ltd.
Ningbo Otic Import and Export Co.
Ningbo Weifeng Fastener Co., Ltd.
Ningbo Wellpack Packaging Co., Ltd,
Ningbo WePartner Imp. & Exp. Co., Ltd.
Ningbo Yinzhou Angelstar International Trading
Ningbo Zenith Passion Imp. & Exp. Co, Ltd.
Ninghai Rayguang Horsemanship Produducts Co., Ltd.
Niran Vietnam Company Limited
Overseas Distribution Services Inc.
Overseas International Steel Industry
Paslode Co., Ltd.
Paslode Fasteners Co., Ltd.
Patek Tool Co., Ltd.
Perfect Seller Co., Ltd.
Potentech (Guangdong) Limited
President Industrial Inc.
Primesource Building Products
Promising Way (Hong Kong) Ltd.
Pro-Team Coil Nail Enterprise Inc.
Qingdao Ant Hardware Manufacturing Co., Ltd.
Qingdao Concord Trading Co., Ltd.
Qingdao D&L Hardware Co., Ltd.
Qingdao Gold Dragon Co., Ltd.
Qingdao Hongyuan Nail Industry Co., Ltd.
Qingdao JCD Machinery Co., Ltd.
Qingdao Jisco Co., Ltd.
Qingdao Meijialucky Industry and Co.
Qingdao MST Industry and Commerce Co., Ltd.
Qingdao Powerful Machinery Co., Ltd.
Qingdao Sunrise Metal Products Co., Ltd.
Qingdao TianHeng Xiang metal Products Co., Ltd
Qingdao Tiger Hardware Co., Ltd.
Qingdao Top Metal Industrial Co., Ltd.
Qingdao Top Steel Industrial Co., Ltd.
Qingdao Uni-Trend International Ltd.
Qingdao YuanYuan Metal Products LLC
Quanzhou Quanxing Hardware Crafts C
Quick Advance Inc.
Quzhou Monsoon Hardware Co., Ltd.
Region Industries Co., Ltd.
Region System Sdn. Bhd.
Rise Time Industrial Ltd.
Ri-Time Group Inc.
Ruifeng Hardware Products Co., Ltd.
Shaanxi Newland Industrial Co.
Shandong Dinglong Imp. & Exp. Co., Ltd.
Shandong Liaocheng Minghua Metal Pvt. Ltd.
Shandong Oriental Cherry Hardware Group Co., Ltd.
Shanghai Cedargreen Imp. & Exp. Co., Ltd.
Shanghai Centro Mechanical & Electrical
Shanghai Haoray International Trade Co., Ltd.
Shanghai Jade Shuttle Hardware Tools Co., Ltd.
Shanghai March Import & Export Co., Ltd.
Shanghai Seti Enterprise Int'l Co., Ltd.
Shanghai Shenda Imp. & Exp. Co., Ltd
Shanghai Sutek Industries Co., Ltd.
Shanghai Television and Electronics Import and Export Co., Ltd.
Shanghai Yiren Machinery Co., Ltd.
Shanghai Yueda Fasteners Co., Ltd.
Shanghai Zoonlion Industrial Co., Limited
Shanghai Zoonlion Industrial Co., Ltd.
Shanxi Easyfix Trade Co., Ltd.
Shanxi Fastener & Hardware Products
Shanxi Xinjintai Hardware Co., Ltd.
Shaoxing Bohui Import and Export Co., Ltd
Shaoxing Chengye Metal Producing Co., Ltd.
Shenzhen Chuangyuan Jiayi Trading Co., Ltd
Shenzhen Fake Trading Co., Ltd.
Shenzhen Jingmai Trade Co., Limited
Shenzhen Xinjintai Hardware Co., Ltd.
Shenzhen Yuantaifan Frame Craft
Sourcing Metrics Ltd.
Sueyi International Ltd.
Sumec Machinery and Electric Co., Ltd.
Suzhou Xingya Nail Co., Ltd.
Taizhou Dajiang Ind. Co., Ltd.
Team Builder Enterprise Ltd.
Test-Rite International Co., Ltd.
Theps International
Tian Heng Xiang Metal Products Co., Ltd.
Tianjin Baisheng Metal Products Co., Ltd.
Tianjin Bluekin Industries Ltd.
Tianjin Coways Metal Products Co., Ltd.
Tianjin Dagang Jingang Nail Factory
Tianjin Evangel Imp. & Exp. Co., Ltd.
Tianjin Fulida Supply Co., Ltd.
Tianjin High Wing International
Tianjin Hongli Qiangsheng Imp. & Exp.
Tianjin Huixinshangmao Co., Ltd.
Tianjin Hweschun Fasteners Manufacturing Co., Ltd.
Tianjin Jin Xin Sheng Long Metal Products Co., Ltd.
Tianjin Jinghai Yicheng Metal Pvt
Tianjin Jinjin Pharmaceutical Factory
Tianjin Jinmao Imp. & Exp. Corp., Ltd.
Tianjin Jinyifeng Hardware Co., Ltd.
Tianjin Jinzhuang Hardware Factory
Tianjin Lianda Group Co., Ltd.
Tianjin Liweitian Metal Technology
Tianjin Tialai Import & Export Company Ltd.
Tianjin Tianhua Environmental Plastics Co., Ltd.
Tianjin Universal Machinery Imp. & Exp. Corp.
Tianjin Yong Sheng Towel Mill
Tianjin Yongye Furniture Co., Ltd.
Tianjin Zhengjun Trade Company Limited
Tianjin Zhonglian Times Technology
Tianjin Zhongsheng Garment Co., Ltd.
Topworks Ltd.
Total Glory Logistics Co., Ltd. (Qingdao)
Trinity Steel Private Limited
Tsugaru Enterprise Co., Ltd.
Ujl Industries Co., Ltd.
Unicorn Fasteners Co., Ltd.
Verko Incorporated
Walkbase Rubber Products Co., Ltd.
Walsoon Trading Co., Ltd.
Weifang Wenhe Pneumatic Tools Co., Ltd.
Wenzhou Yodsn Fluid Equipment Co., Ltd.
Win Fasteners Manufactory (Thailand) Co., Ltd.
Wire Products Manufacturing Co., Ltd.
Wuhu Diamond Metal Products Co., ltd
Wulian Zhanpeng Metals Co., Ltd.
Wuxi Holtrent International Co., Ltd.
Wuxi Yushea Furniture Co., Ltd.
Xiamen Hongju Printing Industry &trade Co., Ltd.
Xuzhou Cip International Group Co, Ltd.
Yiwu Competency Trading Co., Ltd.
Yiwu Kingland Import & Export Co.
Yiwu Taisheng Decoration Materials Limited
Yiwu Yipeng Import & Export Co., Ltd.
Yongchang Metal Product Co., Ltd.
Youngwoo Fasteners Co., Ltd.
Yuyao Dingfeng Engineering Co. Ltd.
Zhanghaiding Hardware Co., Ltd.
Zhangjiagang Lianfeng Metals Products Co., Ltd.
Zhangjiagang Longxiang Industries Co., Ltd.
Zhaoqing Harvest Nails Co., Ltd.
Zhejiang Best Nail Industry Co., Ltd.
Zhejiang Jihengkang (JHK) Door Ind. Co., Ltd.
Zhejiang Rongpeng Imp. & Exp. Co., Ltd
Zhejiang Saiteng New Building Materials Co., Ltd.
Zhejiang Yiwu Yongzhou Imp. & Exp. Co., Ltd.
Zhong Shan Daheng Metal Products Co., Ltd.
Zhong Shan Shen Neng Metal Products Co., Ltd.
Zhucheng Jinming Metal Products Co., Ltd.
Zhucheng Runfang Paper Co., Ltd.
Zhuhai Trillion Trading Co., Ltd
Zon Mon Co., Ltd.

[FR Doc. 2020–28086 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

United States Travel and Tourism Advisory Board: Meeting of the United States Travel and Tourism Advisory Board

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The United States Travel and Tourism Advisory Board (Board or TTAB) will hold a meeting on Wednesday, January 13, 2021. The Board advises the Secretary of Commerce on matters relating to the U.S. travel and tourism industry. This will be the first meeting of the newly appointed 2020–2022 Board. The purpose of the meeting is for Board members to discuss key issues related to travel and tourism in the United States and for the Secretary of Commerce to charge the Board with recommending priorities in travel and tourism that should be addressed to support the recovery and growth of the sector and restore foreign travel to the United States. The final agenda will be posted on the Department of Commerce website for the Board at *https://www.trade.gov/us-travel-and-tourism-advisory-board* at least one week in advance of the meeting.

DATES: Wednesday, January 13, 2021, 1:00 p.m.–2:30 p.m. EST. The deadline for members of the public to register, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. EST on Wednesday, January 6, 2021.

ADDRESSES: The meeting will be held virtually. The access information will be provided by email to registrants.

Requests to register (including to speak or for auxiliary aids) and any written comments should be submitted by email to *TTAB@trade.gov.*

FOR FURTHER INFORMATION CONTACT: Jennifer Aguinaga, the United States Travel and Tourism Advisory Board, National Travel and Tourism Office, U.S. Department of Commerce; telephone: 202–482–2404; email: *TTAB@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Board advises the Secretary of Commerce on matters relating to the U.S. travel and tourism industry.

Public Participation: The meeting will be open to the public and will be accessible to people with disabilities. Any member of the public requesting to join the meeting is asked to register in advance by the deadline identified under the DATES caption. Requests for auxiliary aids must be submitted by the registration deadline. Last minute requests will be accepted, but may not be possible to fill. There will be fifteen (15) minutes allotted for oral comments from members of the public joining the meeting. To accommodate as many speakers as possible, the time for public comments may be limited to three (3) minutes per person. Members of the public wishing to reserve speaking time during the meeting must submit a request at the time of registration, as well as the name and address of the proposed speaker. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, the International Trade Administration may conduct a lottery to determine the speakers. Speakers are requested to submit a written copy of their prepared remarks by 5:00 p.m. EST on Wednesday, January 6, 2021, for inclusion in the meeting records and for circulation to the members of the Board.

In addition, any member of the public may submit pertinent written comments concerning the Board's affairs at any time before or after the meeting. Comments may be submitted to Jennifer Aguinaga at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5:00 p.m. EST on Wednesday, January 6, 2021, to ensure transmission to the Board prior to the meeting. Comments received after that date and time will be distributed to the members but may not be considered during the meeting. Copies of Board meeting minutes will be available within 90 days of the meeting.

Jennifer Aguinaga,

Designated Federal Officer, United States Travel and Tourism Advisory Board.

[FR Doc. 2020–28037 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–851–804]

Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the Czech Republic: Preliminary Affirmative Determination of Sales at Less Than Fair Value

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that seamless carbon and alloy steel standard, line, and pressure pipe (seamless pipe) from the Czech Republic is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is July 1, 2019 through June 30, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dmitry Vladimirov at (202) 482–0665, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

Commerce published the notice of initiation of this investigation on August 4, 2020.[1] Liberty Ostrava A.S. (Liberty Ostrava) and Moravia Steel A.S. (Moravia Steel) are the mandatory respondents in this investigation. For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[2] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are seamless pipe and redraw hollows from the Czech Republic, less than or equal to 16 inches in nominal outside diameter, regardless of wall-thickness, manufacturing process, end finish, or surface finish. For a full description of the scope of this investigation, *see* the ''Scope of the Investigation,'' in Appendix I of this notice.

[1] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic, the Republic of Korea, the Russian Federation, and Ukraine: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 47176 (August 4, 2020) (*Initiation Notice*).

[2] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

Scope Comments

In accordance with the *Preamble* to Commerce's regulations,[3] we set aside a period of time, as stated in the *Initiation Notice,* for parties to raise issues regarding product coverage (*i.e.,* scope).[4] We received several comments concerning scope of the antidumping duty (AD) and countervailing duty (CVD) investigations of seamless pipe as it appeared in the *Initiation Notice.* We are currently evaluating the scope comments filed by the interested parties. We intend to issue our preliminary decision regarding the scope of this and the companion AD and CVD investigations no later than February 3, 2021, the deadline for the preliminary determinations in the companion AD investigations.[5] We will issue a final scope decision after considering any relevant comments submitted in scope case and rebuttal briefs.[6]

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Tariff Act of 1930, as amended (the Act). Pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available to assign estimated weighted-average dumping margins to the mandatory respondents in this investigation because neither of the respondents submitted a response to Commerce's antidumping duty questionnaire. Further, Commerce preliminarily determines that these mandatory respondents failed to cooperate by not acting to the best of their ability to comply with a request for information and is using an adverse inference in selecting from among the facts otherwise available (*i.e.,* applying adverse facts available (AFA)) to these respondents, in accordance with section 776(b) of Act. For a full description of the methodology underlying our preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Section 733(d)(1)(ii) of the Act provides that, in the preliminary determination, Commerce shall determine an estimated all-others rate for all exporters and producers not individually investigated in accordance with section 735(c)(5) of the Act. Section 735(c)(5)(A) of the Act states that generally the estimated rate for all others shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. The estimated weighted-average dumping margins in this preliminary determination were calculated entirely under section 776 of the Act. In cases where no weighted-average dumping margins other than zero, *de minimis,* or those determined entirely under section 776 of the Act have been established for individually examined entities, in accordance with section 735(c)(5)(B) of the Act, Commerce typically averages the margins alleged in the petition and applies the results to all other entities not individually examined.

In the Petitions,[7] the petitioner calculated two estimated dumping margins, 50.45 percent and 51.70 percent. Therefore, consistent with our practice,[8] for the all-others rate in this investigation, we preliminarily assigned a simple average of the dumping margins alleged in the Petitions, which is 51.07 percent.[9]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist during the period July 1, 2019 through June 30, 2020:

Exporter/producer	Dumping margin (percent)
Liberty Ostrava A.S	51.70
Moravia Steel A.S	51.70
All Others	51.07

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of seamless pipe from the Czech Republic, as described in the ''Scope of the Investigation'' in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**.

We will also instruct CBP, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), to require a cash deposit equal to the margins indicated in the chart above. These suspension of liquidation instructions will remain in effect until further notice.

Verification

Because the mandatory respondents in this investigation did not act to the best of their ability to provide information requested by Commerce, and Commerce preliminarily determines each of the mandatory respondents to be uncooperative, we will not conduct verifications.

Disclosure

Normally, Commerce discloses to interested parties the calculations performed in connection with a preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of the notice of preliminary determination in the **Federal Register**, in accordance with 19 CFR 351.224(b). However, because Commerce preliminarily applied AFA to each of the mandatory respondents in this investigation, in accordance with section 776 of the Act, there are no calculations to disclose.

Public Comment

As noted above, Commerce will issue a preliminary scope decision no later than February 3, 2021. All interested parties will have the opportunity to submit case and rebuttal briefs on the preliminary scope determination by the deadline established in the memorandum. All parties filing scope briefs or rebuttals thereto, must file identical documents simultaneously on the records of all the ongoing AD and CVD seamless pipe investigations. No new factual information or business proprietary information may be included in either scope briefs or rebuttal scope briefs.

Interested parties are invited to comment on this preliminary determination no later than 30 days after the date of publication of this

[3] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*).

[4] *See Initiation Notice,* 85 FR at 47176.

[5] *See Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Republic of Korea, the Russian Federation, and Ukraine: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 73687 (November 19, 2020).

[6] The deadline for interested parties to submit scope case and rebuttal briefs will be established in the preliminary scope decision memorandum.

[7] *See* Petitioner's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties: Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic, the Republic of Korea, Russia, and Ukraine,'' dated July 8, 2020 (Petitions) at Volume IV; *see also* AD Investigation Initiation Checklist: Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the Czech Republic (July 28, 2020) (Initiation Checklist).

[8] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Sodium Nitrite from the Federal Republic of Germany,* 73 FR 38986, 38987 (July 8, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

[9] *See* Petitions at Volume IV and Initiation Checklist.

preliminary determination.[10] Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[11] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants and whether any participant is a foreign national; and (3) a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

An electronically filed document must be received successfully in its entirety by ACCESS by 5:00 p.m. Eastern Time on the established deadline. Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Final Determination

Section 735(a)(1) of the Act and 19 CFR 351.210(b)(1) provide that Commerce will issue the final determination within 75 days after the date of its preliminary determination. Accordingly, Commerce will make its final determination no later than 75 days after the signature date of this preliminary determination.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of our affirmative preliminary determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 15, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by the scope of this investigation is seamless carbon and alloy steel (other than stainless steel) pipes and redraw hollows, less than or equal to 16 inches (406.4 mm) in nominal outside diameter, regardless of wall-thickness, manufacturing process (*e.g.,* hot-finished or cold-drawn), end finish (*e.g.,* plain end, beveled end, upset end, threaded, or threaded and coupled), or surface finish (*e.g.,* bare, lacquered or coated). Redraw hollows are any unfinished carbon or alloy steel (other than stainless steel) pipe or ''hollow profiles'' suitable for cold finishing operations, such as cold drawing, to meet the American Society for Testing and Materials (ASTM) or American Petroleum Institute (API) specifications referenced below, or comparable specifications. Specifically included within the scope are seamless carbon and alloy steel (other than stainless steel) standard, line, and pressure pipes produced to the ASTM A–53, ASTM A–106, ASTM A–333, ASTM A–334, ASTM A–589, ASTM A–795, ASTM A–1024, and the API 5L specifications, or comparable specifications, and meeting the physical parameters described above, regardless of application, with the exception of the exclusions discussed below.

Specifically excluded from the scope of the investigation are: (1) All pipes meeting aerospace, hydraulic, and bearing tubing specifications, including pipe produced to the ASTM A–822 standard; (2) all pipes meeting the chemical requirements of ASTM A–335, whether finished or unfinished; and (3) unattached couplings. Also excluded from the scope of the investigation are all mechanical, boiler, condenser and heat exchange tubing, except when such products conform to the dimensional requirements, *i.e.,* outside diameter and wall thickness, of ASTM A–53, ASTM A–106 or API 5L specifications.

Subject seamless standard, line, and pressure pipe are normally entered under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7304.19.1020, 7304.19.1030, 7304.19.1045, 7304.19.1060, 7304.19.5020, 7304.19.5050, 7304.31.6050, 7304.39.0016, 7304.39.0020, 7304.39.0024, 7304.39.0028, 7304.39.0032, 7304.39.0036, 7304.39.0040, 7304.39.0044, 7304.39.0048, 7304.39.0052, 7304.39.0056, 7304.39.0062, 7304.39.0068, 7304.39.0072, 7304.51.5005, 7304.51.5060, 7304.59.6000, 7304.59.8010, 7304.59.8015, 7304.59.8020, 7304.59.8025, 7304.59.8030, 7304.59.8035, 7304.59.8040, 7304.59.8045, 7304.59.8050, 7304.59.8055, 7304.59.8060, 7304.59.8065, and 7304.59.8070. The HTSUS subheadings and specifications are provided for convenience and customs purposes; the written description of the scope is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum:

I. Summary
II. Background
III. Period of Investigation
IV. Scope of Investigation
V. Application of Facts Available, Use of Adverse Inference, and Calculation of All-Others Rate
VI. Recommendation

[FR Doc. 2020–28094 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–DS–P

[10] *See* 19 CFR 351.309(c)(1)(i); *see also* 19 CFR 351.303 (for general filing requirements).

[11] *See* 19 CFR 351.309(d); *see also* 19 CFR 351.303 (for general filing requirements).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA692]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Groundfish Management Team (GMT) will hold a week-long work session that is open to the public.

DATES: The GMT meeting will be held Monday, January 11 through Friday, January 15, 2021, from 9 a.m., Pacific Standard Time, until business for each day has been completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Todd Phillips, Pacific Council, (503) 820–2426.

SUPPLEMENTARY INFORMATION: The primary purpose of this week-long work

session is for the GMT to prepare for 2021 Pacific Council meetings. Specific agenda items will include: a detailed review of 2021/2022 harvest specifications and management measure process, planning for the 2023/2024 harvest specifications and management measure process, stock assessment and review planning, and GMT chair/vice chair elections. The GMT may also address groundfish management actions the Pacific Council has indicated on their year-at-a-glance calendar, such as: mothership utilization, non-trawl rockfish conservation area management changes, and sablefish gear switching. A detailed agenda will be available on the Pacific Council's website prior to the meeting.

Although nonemergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2412 at least 10 business days prior to the meeting date.

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

Dated: December 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–28073 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA638]

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The South Atlantic Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a meeting via webinar. See **SUPPLEMENTARY INFORMATION**.

DATES: The SSC meeting will take place from 9 a.m. to 5 p.m., Monday, January 11, 2021; and from 9 a.m. to 12 noon, Tuesday, January 12, 2021.

ADDRESSES:

Meeting address: The meeting will be held via webinar.

Council addresses: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public via webinar as it occurs and registration is required. Information regarding webinar registration will be posted to the Council's website at: *http://safmc.net/safmc-meetings/scientific-and-statistical-committee-meetings/* as it becomes available. The meeting agenda, briefing book materials, and online comment form will be posted to the Council's website two weeks prior to the meeting. Written comment on SSC agenda topics is to be distributed to the Committee through the Council office, similar to all other briefing materials. For this meeting, the deadline for submission of written comment is 12 p.m., Monday, January 4, 2021.

The following agenda items will be addressed by the SSC during the meeting:

1. Review the Southeast Data, Assessment, and Review (SEDAR) 36 Update assessment for Snowy Grouper and provide fishing level recommendations;
2. Receive an update on the SEDAR 73 Red Snapper assessment and data decisions made at the Data Workshop and create a sub-group that will help develop the P* value for Red Snapper;
3. Approve the schedule and make appointments for the upcoming Mutton Snapper stock assessment.

The SSC will provide guidance to staff and recommendations for Council consideration as appropriate.

Multiple opportunities for comment on agenda items will be provided during SSC meetings. Open comment periods will be provided at the start of the meeting and near the conclusion. Those interested in providing comment should indicate such in the manner requested by the Chair, who will then recognize individuals to provide comment. Additional opportunities for comment on specific agenda items will be provided, as each item is discussed, between initial presentations and SSC discussion. Those interested in providing comment should indicate such in the manner requested by the Chair, who will then recognize individuals to provide comment. All comments are part of the record of the meeting.

Although non-emergency issues not contained in the meeting agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–28071 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA685]

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 73 Assessment Webinar I for South Atlantic Red Snapper.

SUMMARY: The SEDAR 73 assessment of the South Atlantic stock of red snapper will consist of a data scoping webinar, a workshop, and a series of assessment webinars. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 73 Assessment Webinar I will be held via webinar

January 13, 2020, from 11 a.m. until 2 p.m. EST. The established times may be adjusted as necessary to accommodate the timely completion of discussion relevant to the assessment process. Such adjustments may result in the meeting being extended from or completed prior to the time established by this notice. Additional SEDAR 73 workshops and webinar dates and times will publish in a subsequent issue in the **Federal Register**.

ADDRESSES: The SEDAR 73 Assessment Webinar 1 will be held via webinar. The webinar is open to members of the public. Registration is available online at: *https://attendee.gotowebinar.com/register/6561279974832951051.*

SEDAR address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4373; email: *Kathleen.howington@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Assessment Webinar I:

- Finalize any data decisions remaining
- Continue discussion on modelling issues and decisions.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 10 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: December 16, 2020.

Rey Israel Marquez,

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

[FR Doc. 2020–28072 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–C–2020–0068]

The Article of Manufacture Requirement

AGENCY: Patent and Trademark Office, Department of Commerce.

ACTION: Request for information.

SUMMARY: The United States Patent and Trademark Office (USPTO) seeks public input on whether its interpretation of the *article of manufacture* requirement in the United States Code should be revised to protect digital designs that encompass new and emerging technologies.

DATES: Comments must be received by 5 p.m. EST on February 4, 2021.

ADDRESSES: You may submit comments and responses to the questions below by one of the following methods:

(a) *Electronic Submissions:* Comments can be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–C–2020–0068 on the home page and click ''search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this notice and click on the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format or MICROSOFT WORD® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included.

(b) *Written/Paper Submissions:* Send all written/paper submissions to: Mail Stop OPIA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22314, ATTN: Elizabeth Shaw. Submission packaging should clearly indicate that materials are responsive to Docket No. PTO–C–2020–0068, Office of Policy and International Affairs, Comment Request: Article of Manufacture Requirement of 35 U.S.C. 171. Although comments may be submitted by postal mail, electronic submissions are encouraged.

Submissions of Business Confidential Information: Any submissions containing business confidential information must be delivered in a sealed envelope marked ''confidential treatment requested'' to the address listed above. Submitters should provide an index listing the document(s) or information that they would like the Department of Commerce to withhold. The index should include information such as numbers used to identify the relevant document(s) or information, document title and description, and relevant page numbers and/or section numbers within a document. Submitters should provide a statement explaining their grounds for objecting to the disclosure of the information to the public as well. The USPTO also requests that submitters of business confidential information include a non-confidential version (either redacted or summarized) that will be available for public viewing and posted on *https://www.regulations.gov.* In the event that the submitter cannot provide a non-confidential version of its submission,

the USPTO requests that the submitter post a notice in the docket stating that it has provided the USPTO with business confidential information. Should a submitter either fail to docket a non-confidential version of its submission or to post a notice that business confidential information has been provided, the USPTO will note the receipt of the submission on the docket with the submitter's organization or name (to the degree permitted by law) and the date of submission.

FOR FURTHER INFORMATION CONTACT: Elizabeth Shaw, USPTO, Office of Policy and International Affairs, at *Elizabeth.Shaw2@uspto.gov* or 571–272–9300. Please direct media inquiries to the USPTO's Office of the Chief Communications Officer at 571–272–8400.

SUPPLEMENTARY INFORMATION:

Background

Section 171 of title 35 United States Code, provides that ''[w]hoever invents any new, original and ornamental design *for an article of manufacture* may obtain a patent therefor'' (emphasis added). To satisfy the requirement that the design must be for an article of manufacture, applicants have been required to show the design as applied to or embodied in an article of manufacture.[1]

The USPTO considers designs for computer-generated icons embodied in articles of manufacture to be statutory subject matter eligible for design patent protection under section 171.[2] For example, a claim for a computer-generated icon that is integral to the operation of the computer and that is shown on a computer screen, monitor, or other display panel complies with the article of manufacture requirement.[3]

Because certain new and emerging technologies, such as projections, holographic imagery, or virtual/augmented reality do not require a physical display screen or other tangible article to be viewable, the USPTO is exploring whether its practice should be revised to protect such digital designs.

Although current jurisprudence has not addressed whether a digital design not applied to or embodied in a physical article is eligible for design patent protection, the following section outlines current law and practice regarding the article of manufacture requirement.

35 U.S.C. 171—Patents for Designs

The language ''new, original and ornamental design for an article of manufacture'' set forth in section 171 has been interpreted by the courts to include at least three kinds of designs:

(A) A design for an ornament, impression, print, or picture applied to or embodied in an article of manufacture (surface indicia);

(B) a design for the shape or configuration of an article of manufacture; and

(C) a combination of the first two categories.[4]

A patentable design ''gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form.''[5]

Defining Article of Manufacture

The 2016 decision by the Supreme Court in *Samsung Electronics Co.* v. *Apple Inc.* is instructive on the ''article of manufacture'' requirement of section 171.[6] In that decision, the Court analyzed the term ''article of manufacture'' under 35 U.S.C. 289, a provision that provides additional remedy for infringement of a design patent. It found that the term ''article of manufacture'' has a broad meaning, and as used in section 289, encompasses both a product sold to a consumer and a component of that product.[7] The Court found that an ''article'' is just ''a particular thing,'' and ''manufacture'' means ''the conversion of raw materials by the hand, or by machinery, into articles suitable for the use of man'' and ''the articles so made,'' and concluded that an ''article of manufacture'' is ''simply a thing made by hand or machine.''[8] Moreover, the Court confirmed that its definition of ''article of manufacture'' comported with 35 U.S.C. 171 and 101, specifically noting that '''article of manufacture' in [section] 171 includes 'what would be considered a ''manufacture'' within the meaning of [s]ection 101.' ''[9]

A Picture Alone Is Not Eligible for Design Patent Protection

Historically, a picture standing alone is not patentable under section 171.[10] The factor that distinguishes statutory design subject matter from a mere picture or ornamentation has been the embodiment of the design in an article of manufacture.[11] For this reason, the USPTO has required that the design must be shown as applied to or embodied in an article of manufacture.[12]

[1] *Curver Luxembourg, SARL* v. *Home Expressions Inc.,* 938 F.3d 1334, 1337 (Fed. Cir. 2019) (confirming that ''long-standing precedent, unchallenged regulation, and agency practice all consistently support the view that design patents are granted only for a design applied to an article of manufacture, and not a design *per se*''); Manual of Patent Examining Procedure (MPEP) 1504.01.

[2] MPEP 1504.01(a)(I)(A). Note that a computer-generated icon is considered to be integral to the operation of a computer. *See Ex parte Strijland,* 26 U.S.P.Q.2d 1259, *4–5 (B.P.A.I. 1992).

[3] MPEP 1504.01(a)(I)(A).

[4] *Samsung Electronics Co.* v. *Apple Inc.,* 137 S. Ct. 429, 435 n.3 (2016) (explaining the legislative history behind the ''article of manufacture'' requirement in section 171, ''[a]s originally enacted, the provision protected 'any new and original design for a manufacture.' [sec] 3, 5 Stat. 544. The provision listed examples, including a design 'worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture' and a 'shape or configuration of any article of manufacture.' *Ibid.* A streamlined version enacted in 1902 protected 'any new, original, and ornamental design for an article of manufacture.' Ch. 783, 32 Stat. 193. The Patent Act of 1952 retained that language. *See* [sec] 171, 66 Stat. 813.''); *In re Schnell,* 46 F.2d 203, 209 (C.C.P.A. 1931); MPEP 1504.01.

[5] *Samsung Electronics Co.* v. *Apple Inc.,* 137 S. Ct. 429, 432 (2016) (citing *Gorham Co.* v. *White,* 81 U.S. 511, 525 (1871)).

[6] *Samsung Electronics Co.* v. *Apple Inc.,* 137 S. Ct. 429 (2016).

[7] *Id.* at 436.

[8] *Id.* at 434–435 (for ''article,'' citing J. Stormonth, A Dictionary of the English Language 53 (1885) and American Heritage Dictionary, at 101 (''[a]n individual thing or element of a class; a particular object or item'')); *id.* at 435 (for ''manufacture,'' citing Stormonth, at 589 and American Heritage Dictionary, at 1070 (''[t]he act, craft, or process of manufacturing products, especially on a large scale'' or ''[a] product that is manufactured'')).

[9] *Id.* at 435 (quoting 8 D. Chisum, Patents 23.03[2], pp. 23–12 to 23–13 (2014)); *see also In re Nuijten,* 500 F.3d 1346, 1356 (Fed. Cir. 2007) (determining that the Supreme Court's ''definitions address 'articles' of 'manufacture' as being tangible articles or commodities,'' and thus concluding that ''[a] transient electric or electromagnetic transmission does not fit within that definition'' because during transmission, ''energy embodying the claimed signal is fleeting and is devoid of any semblance of permanence,'' and does not meet the definitions of ''articles'' of ''manufacture''). Indeed, the *Nuijten* court noted the Supreme Court had defined ''manufacture'' in the context of utility patents as ''the production of *articles* for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.'' 500 F.3d at 1356 (quoting *Diamond* v. *Chakrabarty,* 447 U.S. 303, 308 (1980)). Note that this definition is similar to the ones for ''article,'' ''manufacture,'' and ''article of manufacture'' espoused by the Supreme Court in *Samsung* as applied to design patents.

[10] *Curver Luxembourg, SARL* v. *Home Expressions Inc.,* 938 F.3d 1334, 1340 (2019) (quoting *Gorham* v. *White,* 81 U.S. 511, 524–25 (1871) for this proposition). In *Gorham,* the Court discussed the reach of design protection as follows: ''The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, *not an abstract impression, or picture,* but an aspect given to those objects mentioned in the acts'' 81 U.S. at 524–25 (emphasis added). *See also* MPEP 1504.01.

[11] MPEP 1504.01. *see also Ex parte Strijland,* 26 U.S.P.Q.2d 1259, *4–5 (B.P.A.I. 1992).

[12] MPEP 1504.01. *see also supra* note 5; *Samsung,* 137 S. Ct. at 435 (citing *Application of Zahn,* 617 F.2d 261, 268 (C.C.P.A. 1980) (''Section 171 authorizes patents on ornamental designs for articles of manufacture. While the design must be embodied in some articles, the statute is not limited to designs for complete articles, or 'discrete' articles, and certainly not to articles separately sold

Guidelines for Computer-Generated Icons and Type Fonts

In 1995, the USPTO introduced examination guidelines for design patent applications claiming computer-generated icons.[13] These guidelines are based on the USPTO's understanding of the case law and the USPTO Appeal Board's decision in 1992 in *Ex parte Strijland* regarding a ''design for an information icon for the display screen of a programmed computer system.'' [14] To be eligible for protection, the USPTO currently requires that a design for a computer-generated icon be: (1) Embodied in a computer screen, monitor, other display panel, or portion thereof; (2) more than a mere picture on a screen; and (3) integral to the operation of the computer displaying the design.[15]

The guidance with respect to type fonts is different.[16] Examiners are instructed not to reject claims for type fonts under section 171 for failure to comply with the ''article of manufacture'' requirement on the basis that more modern methods of computer-generated fonts do not require physical printing blocks.[17]

Absence of Precedent Directly Addressing New Technologies

Recent technological advances have allowed the development of designs that are not applied to or embodied in a physical product but can perform a utilitarian function, such as controlling electronic devices rather than just serving as merely a displayed picture. Examples include virtual laser keyboards used in receiving key strokes and hand movements as inputs and projected images for an automobile or for augmented and virtual reality applications. The USPTO is not aware of any judicial decision that addresses whether a claimed design that lacks a static ''physical form'' but is used as an integral part of the function of a digital product satisfies section 171.

Global Trends

Other jurisdictions have updated their laws and practices to accommodate design protection for new technologies. For example, Singapore modified its law to eliminate a requirement that a design must be applied to a physical article in order to be protected. Its law now provides protection for both non-animated and animated graphical user interface (GUI) designs that are applied to an article or a ''non-physical product.'' [18] In defining a ''non-physical product,'' Singapore law recognizes ''anything that (a) does not have a physical form; (b) is produced by the projection of a design on a surface or into a medium (including air); and (c) has an intrinsic utilitarian function that is not merely to portray the appearance of the thing or to convey information.'' [19] Likewise, Japan modified its law to broaden the scope of subject matter for design protection to include digital images that are not displayed on an article, such as graphic designs viewed or provided through a computer network and projected images,[20] including images on screen, and images appearing through virtual and augmented reality.[21]

In addition, there have been discussions at the World Intellectual Property Organization (WIPO) about design protection for new technologies, and a summary of a WIPO questionnaire on the matter included the following observation:

> The majority of responding jurisdictions do not require a link between a GUI/icon design and an article as a prerequisite for registration. This is mainly because of the nature of new technological designs, which may be used in different articles/environments. In most of these jurisdictions, the indication of an article is optional. In all of them, a patent design/design registration can be obtained for a GUI/icon design per se if it is represented alone. In most of them, the patent design/design registration covers the use of the claimed GUI/icon design in any article/environment.[22]

Topics for Public Comment

The public is invited to submit comments on any topics related to 35 U.S.C. 171 that they deem relevant. The USPTO is particularly interested in receiving views and comments on the questions presented below. The tenor and substance of the questions should not be taken as an indication that the USPTO is predisposed to any particular views, positions, or actions. The USPTO also invites the public to share their views and insights on other aspects of section 171 that are not addressed in the questions.

To be eligible for patent protection, a design must comply with the ''article of manufacture'' requirement of section 171. The USPTO has interpreted the jurisprudence to require that designs for computer-generated icons meet the following criteria: (1) They must be embodied in a computer screen, monitor, other display panel, or portion thereof; (2) They must be more than a mere picture on a screen; and (3) They must be integral to the operation of the computer displaying the design. Some stakeholders have expressed that they are unable to obtain design protection for certain new and emerging technologies (*e.g.,* projections, holographic imagery, and virtual/augmented reality) because they do not meet the current criteria.

1. Please identify the types of designs associated with new and emerging technologies that are not currently eligible for design patent protection but that you believe should be eligible. For these types of designs, please explain why these designs should be eligible, how these designs satisfy the requirements of section 171, and how these designs differ from a mere picture or abstract design. In addition, if you believe that these types of designs

. . . ''); *Curver Luxembourg, SARL* v. *Home Expressions Inc.,* 938 F.3d 1334, 1340 (2019) (affirming this principle by relying on *In re Schnell,* 46 F.2d 203, 209 (C.C.P.A. 1931) (''[I]t is the *application of the design to an article of manufacture* that Congress wishes to promote, and an applicant has not reduced his invention to practice and has been of little help to the art if he does not teach the manner of applying his design.''), and *Ex Parte Cady,* 232 O.G. 619, 621–22 (Comm'r Pat. 1916) (''[a] disembodied design or a mere picture is not the subject of [design] patent'')).

[13] MPEP 1504.01(a)(I).

[14] *Ex parte Strijland,* 26 U.S.P.Q.2d 1259 (B.P.A.I. 1992).

[15] MPEP 1504.01(a)(I)(A); *Ex parte Strijland,* 26 U.S.P.Q.2d 1259, at *4–5 (B.P.A.I. 1992). Furthermore, section 1504.01(a)(I)(A) of the MPEP applies the holding in *In re Hruby,* 373 F.2d 997 (C.C.P.A. 1967) to icons, noting that ''the dependence of a computer-generated icon on a central processing unit and computer program for its existence itself is not a reason for holding that the design is not for an article of manufacture.'' However, section 1504.01(a)(IV) explains that computer-generated icons that include ''images that change appearance during viewing'' may be eligible for design patent protection, but ''no ornamental aspects are attributed to the process or period in which one image changes into another.''

[16] MPEP 1504.01(a)(III).

[17] *Id.* Traditionally, type fonts have been generated by solid blocks from which each letter or symbol was produced. Consequently, the USPTO has historically granted design patents drawn to type fonts. USPTO personnel should not reject claims for type fonts under 35 U.S.C. 171 for failure to comply with the ''article of manufacture'' requirement on the basis that more modern methods of typesetting, including computer generation, do not require solid printing blocks.

[18] *See* Intellectual Property Office of Singapore, Practice Direction No. 4 of 2018 (June 20, 2018); *cf.* Intellectual Property Office of Singapore, Practice Direction No. 4 of 2014 (Dec. 10, 2014).

[19] *Id.*

[20] *See* Ministry of Economy, Trade and Industry (METI), Cabinet Decision on the Bill for the Act of Partial Revision of the Patent Act (Mar. 1, 2019), *https://www.meti.go.jp/english/press/2019/0301_003.html* (last visited July 16, 2019).

[21] *Id.*

[22] WIPO, Analysis of the Returns to the Second Questionnaire on Graphical User Interface (GUI), Icon and Typeface/Type Font Designs, SCT/43/2, Feb. 5, 2020, at 37, available at *https://www.wipo.int/edocs/mdocs/sct/en/sct_43/sct_43_2.pdf.*

should be eligible, but a statutory change is necessary, please explain the basis for that view.

2. If the projection, holographic imagery, or virtual/augmented reality is not displayed on a computer screen, monitor, or other display panel but is integral to the operation of a device (*e.g.,* a virtual keyboard that provides input to a computer), is this sufficient to render the design eligible under section 171 in view of the current jurisprudence? If so, please explain how the article of manufacture requirement is satisfied and how these designs differ from a mere picture or abstract design. If you believe that these designs do not meet the requirements of section 171, please explain the basis for that view.

3. If the projection, holographic imagery, or virtual/augmented reality is not displayed on a computer screen, monitor, or other display panel but is interactive with a user or device (*e.g.,* a hologram moves according to a person's movement), is this sufficient to render a design eligible under section 171 in view of the current jurisprudence? If so, please explain how the article of manufacture requirement is satisfied and how these designs differ from a mere picture or abstract design. If you believe that these designs do not meet the requirements of section 171, please explain the basis for that view.

4. If the projection, holographic imagery, or image appearing through virtual/augmented reality is not displayed on a computer screen, monitor, or other display panel but is projected onto a surface or into a medium (including air) and is not otherwise integral to the operation of a device or interactive with a user or device (*e.g.,* is a static image), is this sufficient to render a design eligible under section 171 in view of the current jurisprudence? If so, please explain how the article of manufacture requirement is satisfied and how these designs differ from a mere picture or abstract design. If you believe that these designs do not meet the requirements of section 171, please explain the basis for that view.

5. Do you support a change in interpretation of the article of manufacture requirement in 35 U.S.C. 171? If so, please explain the changes you propose and your reasons for those proposed changes. If not, please explain why you do not support a change in interpretation.

6. Please provide any additional comments you may have in relation to section 171, interpretation or application of section 171, or industrial design rights in digital and new and emerging technologies.

Andrei Iancu,

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

[FR Doc. 2020–28110 Filed 12–18–20; 8:45 am]

BILLING CODE 3510–16–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2020–0027]

Agency Information Collection Activities; Proposed Collection; Comment Request; Warning Label Comprehension and Interpretation by Consumers for Children's Sleep Environments

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (CPSC) is announcing an opportunity for public comment on a new proposed collection of information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** for each proposed collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on a proposed survey to evaluate consumer awareness of infant sleep product warning labels. The Commission will consider all comments received in response to this notice before submitting this collection of information to the Office of Management and Budget (OMB) for approval.

DATES: Submit written or electronic comments on the collection of information by February 19, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2020–0027, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments. CPSC does not accept comments submitted by electronic mail (email), except through *https://www.regulations.gov.* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Mail/Hand Delivery/Courier Written Submissions: Submit comments by mail/hand delivery/courier to: Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7479; email: *cpsc-os@cpsc.gov.*

Instructions: All submissions must include the agency name and docket number for this notice. CPSC may post all comments received without change, including any personal identifiers, contact information, or other personal information provided, to: *https://www.regulations.gov.* Do not submit electronically: Confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier written submissions.

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov,* insert Docket No. CPSC–2020–0027 into the ''Search'' box, and follow the prompts. A copy of the proposed survey is available at *http://www.regulations.gov* under Docket No. CPSC–2020–0027, Supporting and Related Material.

FOR FURTHER INFORMATION CONTACT: Cynthia Gillham, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; (301) 504–7991, or by email to: *cgillham@cpsc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency proposed surveys. 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 before submitting the collection to OMB for approval. Accordingly, CPSC is publishing notice of the proposed collection of information set forth in this document.

A. Warning Label Comprehension Survey

CPSC is authorized under section 5(a) of the Consumer Product Safety Act (CPSA), 15 U.S.C. 2054(a), to conduct studies and investigations relating to the causes and prevention of deaths, accidents, injuries, illnesses, other health impairments, and economic losses associated with consumer products. Section 5(b) of the CPSA, 15 U.S.C. 2054(b), further provides that

CPSC may conduct research, studies, and investigations on the safety of consumer products, or test consumer products and develop product safety test methods and testing devices.

In 2019, the CPSC published the 2019 Nursery Product Annual Report, which reported injuries and deaths associated with nursery products among children younger than age 5.[1] That report identified 320 deaths related to nursery products from 2014 through 2016. Infant sleep products were associated with the most deaths: cribs/mattresses (33%), cradles/bassinets (18%), and playpens/play yards (20%). Also, in 2019, CPSC conducted a focus group of 48 participants to gather feedback from parents and grandparents (caregivers) on their beliefs, experience, and perceptions about infant sleeping practices and caregivers' compliance with safety messaging on nursery products. Caregiver responses in the focus group study indicated limited adherence to infant sleep safety warning messaging.[2] Some of the reasons for lack of adherence to safety warnings include caregiver perceptions that warning labels contain repetitive, non-specific information that fails to target the safety hazard. Additionally, caregivers are inundated with safety messaging that changes constantly, resulting in ambiguity about what messages are most relevant and current. Product marketing and the proliferation of new products may confuse caregivers as well. Caregivers often end up listening to friends and family, or relying on past experience, to decide what behaviors are safe for their child, rather than following the current guidelines recommended by experts. If caregivers are not attuned to the safety messaging on new products, they are more likely to use the products incorrectly.

Accordingly, CPSC seeks to learn more about consumers' understanding of specific warning labels related to products that may be used as a sleeping environment for infants and how those labels influence caregivers' behavior. In the proposed information collection, CPSC seeks to survey 650 caregivers to obtain information regarding the gap in consumer knowledge about product warning labels and consumer adherence to, and behaviors associated with, warning labels. The online survey will be conducted with caregivers age 18 and above, who are a parent or grandparent with a child/grandchild between 2 months to 11 months old.

CPSC has contracted with Fors Marsh Group, LLC, to develop and execute this project for CPSC. If CPSC can obtain information about caregiver perceptions and comprehension of warning label language through the survey, CPSC will be able to identify better which types of safety warning labels and safety messaging are unclear to the target audience, and that potentially serve as a barrier to safe sleep. Information obtained through this survey is not intended to be considered nationally representative. CPSC intends to use findings from this survey, in conjunction with findings from other research and activities, to assist with providing recommendations for refining and enhancing warning labels in the future.

B. Burden Hours

We estimate the number of respondents to the survey to be 650. The online survey for the proposed study will take approximately 15 minutes (0.25 hours) to complete. We estimate the total annual burden hours for respondents to be 162.50 hours. The monetized hourly cost is $36.22, as defined by total compensation for all civilian workers, U.S. Bureau of Labor Statistics, Employer Costs for Employee Compensation, as of March 2020. Accordingly, we estimate the total cost burden to be $5,885.75 (162.50 hours multi; $36.22). The total cost to the federal government for the contract to design and conduct the proposed survey is $150,987.

C. Request for Comments

CPSC invites comments on these topics:

- Whether the proposed collection of information is necessary for the proper performance of CPSC's functions, including whether the information will have practical utility;
- The accuracy of CPSC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2020–28078 Filed 12–18–20; 8:45 am]

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[1] *https://www.cpsc.gov/s3fs-public/Nursery%20Products%20Annual%20Report%20Dec2019_2.pdf? TkU_cVyVv69sq6Lpx0aSRjoLomqXWxRq.*

[2] *https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201909-3041-002&icID=234760.*

DEPARTMENT OF DEFENSE

Department of the Army

U.S. Army Science Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Army, DoD.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal Advisory Committee meeting of the U.S. Army Science Board (ASB). This meeting is open to the public.

DATES: Tuesday, January 5, 2021. Time: 9:30 a.m.–2:30 p.m. This meeting will be open but with required COVID–19 precautions.

ADDRESSES: The meeting will be held at Bell Textron, 2231 Crystal Drive, Suite 1010. Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Ms. Heather J. Gerard, (703) 545–8652, *heather.j.gerardi.civ@mail.mil* or Ms. Gloria Mudge at *gloria.l.mudge.civ@mail.mil.* Mailing address is Army Science Board, 2530 Crystal Drive, Suite 7098, Arlington, VA 22202. Website: *https://asb.army.mil/.*

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of the meeting is for ASB members to review, deliberate, and vote on the findings and recommendations presented for a Fiscal Year 2020 (FY20) ASB studies.

Agenda: The board will present findings and recommendations for deliberation and vote on the following FY20 study: ''An Independent Assessment of the 2040 Battlefield and its Implications for 5th Generation Combat Vehicle Technologies''. This study will be discussed from 10:00 a.m. to 11:30 a.m.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and subject to the availability of

space, this meeting is open to the public. Seating for this event is limited due to COVID–19 restrictions and reservations must be made in advance to attend this event. Send an email request to Ms. Gloria Mudge at *gloria.l.mudge.civ@mail.mil.* Advanced security and COVID–19 screening is required to attend this meeting. A photo ID is required to enter the facility. COVID–19 screening and questionnaire will be taken at the door, facemasks are required and social distancing is mandatory. Seating is therefore limited and on a first come, first served basis.

For additional information about public access procedures, contact the Alternate Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written statements to the ASB about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the ASB. All written statements must be submitted to the Designated Federal Officer (DFO) at the address listed above, and this individual will ensure that the written statements are provided to the membership for their consideration. Written statements not received at least 10 calendar days prior to the meeting may not be considered by the ASB prior to its scheduled meeting. After reviewing written comments, the DFO may choose to invite the submitter of the comments to orally present their issue during a future open meeting.

James W. Satterwhite Jr.,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 2020–28032 Filed 12–18–20; 8:45 am]

BILLING CODE 5061–AP–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0154]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Quarterly Budget and Expenditure Reporting Under CARES Act Sections 18004(a)(1) Institutional Portion, 18004(a)(2), and 18004(a)(3)

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 an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before January 20, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Jack Cox, (202) 453–6134.

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: Quarterly Budget and Expenditure Reporting under CARES Act Sections 18004(a)(1) Institutional Portion, 18004(a)(2), and 18004(a)(3).

OMB Control Number: 1840–0849.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 20,680.

Total Estimated Number of Annual Burden Hours: 41,360.

Abstract: Section 18004(a)(1) of the CARES Act, Public Law 116–136 (March 27, 2020), authorizes the Secretary of Education to allocate formula grant funds to participating institutions of higher educations (IHEs). Section 18004(c) of the CARES Act allows the IHEs to use up to one-half of the total funds received to cover any costs associated with the significant changes to the delivery of instruction due to the coronavirus (with specific exceptions). Section 18004(a)(2) of the CARES Act authorizes the Secretary to make awards under parts A and B of title III, parts A and B of title V, and subpart 4 of part A of title VII of the Higher Education Act of 1965, as amended (''HEA''), to address needs directly related to the coronavirus. These awards are in addition to awards made in Section 18004(a)(1) of the CARES Act. Section 18004(a)(3) of the CARES Act, Pub. authorizes the Secretary to allocate funds for part B of Title VII of the HEA, for IHEs that the Secretary determines have the greatest unmet needs related to coronavirus. This information collection request includes the quarterly budget and expenditure reporting form that will be used by grantees under these sections. This collection is currently approved under emergency processing; we are now requesting an extension of the approved collection under regular processing.

Dated: December 15, 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. 2020–28000 Filed 12–18–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Notice of Availability of Draft Versatile Test Reactor Environmental Impact Statement

AGENCY: Office of Nuclear Energy, Department of Energy.

ACTION: Notice of availability and public hearings.

SUMMARY: The U.S. Department of Energy (DOE) announces the availability of the *Draft Versatile Test Reactor Environmental Impact Statement* (VTR EIS) (DOE/EIS–0542). DOE is also announcing a public comment period and public hearings to receive comments on the Draft VTR EIS. DOE prepared the Draft VTR EIS to evaluate the potential environmental impacts of alternatives for constructing and operating a versatile test reactor (VTR), and the associated facilities for post-irradiation examination of test and experimental fuels and materials. The Draft VTR EIS also evaluates the potential environmental impacts of options for VTR driver fuel (the fuel that powers the reactor) fabrication and the management of spent nuclear fuel from the VTR.

DATES: Comments will be accepted during the comment period that will extend for 45 days after the date that the U.S. Environmental Protection Agency publishes its Notice of Availability in the **Federal Register** (expected to be December 31, 2020). DOE plans to hold two public hearings on the Draft VTR EIS. In light of ongoing public health concerns, DOE will host internet-based, virtual public hearings in place of in-person hearings. The dates of the hearing will be provided in a future notice posted on the following website: *https://www.energy.gov/ne/nuclear-reactor-technologies/versatile-test-reactor.* DOE will hold the hearings no earlier than 15 days from the posting of the notice.

ADDRESSES: DOE invites Federal and state agencies, state and local governments, Native American tribes, industry, other organizations, and members of the public to review and submit comments on the Draft VTR EIS. Written comments on the Draft VTR EIS should be sent to Mr. James Lovejoy, Document Manager, by mail at: U.S. Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS 1235, Idaho Falls, Idaho 83415; or by email to *VTR.EIS@nuclear.energy.gov.* The Draft VTR EIS is available for viewing or download at *https://www.energy.gov/nepa* or *https://www.energy.gov/ne/nuclear-reactor-technologies/versatile-test-reactor.*

FOR FURTHER INFORMATION CONTACT: For information regarding the VTR Project or the Draft VTR EIS, *visit https://www.energy.gov/ne/nuclear-reactor-technologies/versatile-test-reactor;* or contact Mr. James Lovejoy at the mailing address listed in **ADDRESSES**; or via email at *VTR.EIS@nuclear.energy.gov;* or call (208) 526–6805. For general information on DOE's NEPA process, contact Mr. Jason Sturm at the mailing address listed in ADDRESSES; or via email at *VTR.EIS@nuclear.energy.gov;* or call (208) 526–6805.

SUPPLEMENTARY INFORMATION:

Background

Part of the DOE mission is to ensure America's security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions. Many commercial organizations and universities are pursuing advanced nuclear energy fuels, materials, and reactor designs that complement the efforts of DOE and its laboratories in advancing nuclear energy. These designs include thermal and fast-spectrum [1] reactors targeting improved fuel resource utilization and waste management, and utilizing materials other than water for cooling. Their development requires an adequate infrastructure for experimentation, testing, design evolution, and component qualification. Existing irradiation test capabilities are aging, and some are over 50 years old. The existing capabilities are focused on testing of materials, fuels, and components in the thermal neutron spectrum and do not have the ability to support the testing needs for fast reactors. Only limited fast-neutron-spectrum-testing capabilities, with restricted availability, exist outside the United States. To meet its obligation to support advanced reactor technology development, DOE needs to develop the capability for large-scale testing, accelerated testing, and qualification of advanced nuclear fuels, materials, instrumentation and sensors. This testing capability is essential for the United States to modernize its nuclear energy infrastructure and for developing transformational nuclear energy technologies that re-establish the U.S. as a world leader in nuclear technology commercialization.

Recognizing that the United States does not have a dedicated fast-neutron-spectrum testing capability, DOE performed a mission needs assessment to assess current testing capabilities (domestic and foreign) against the required testing capabilities to support the development of advanced nuclear technologies. This needs assessment was consistent with the Nuclear Energy Innovation Capabilities Act (NEICA) (Pub. L. 115–248) passed in 2018, which directed DOE to assess the mission need for, and cost of, a versatile reactor-based fast-neutron source with a high neutron flux, irradiation flexibility, multiple experimental environment (*e.g.,* coolant) capabilities, and volume for many concurrent users. The needs assessment identified a gap between required testing needs and existing capabilities. That is, there currently is an inability to effectively test advanced nuclear fuels and materials in a fast-neutron spectrum irradiation environment at high neutron fluxes. Specifically, the DOE Office of Nuclear Energy (NE), Nuclear Energy Advisory Committee (NEAC) report, Assessment of Missions and Requirements for a New U.S. Test Reactor, confirmed that there was a need in the U.S. for fast-neutron testing capabilities, but that there is no facility that is readily available domestically or internationally. The NEAC study confirmed the conclusions of an earlier study, the Advanced Demonstration and Test Reactor Options Study. That study established the strategic objective that DOE ''provide an irradiation test reactor to support development and qualification of fuels, materials, and other important components/items (*e.g.,* control rods, instrumentation) of both thermal and fast neutron-based advanced reactor systems.''

Following establishment of the mission need described above, the VTR Project was formally launched in February 2019 as a part of the effort called for by Congress to modernize the nuclear energy research and development user facility infrastructure in the United States.

Alternatives

In addition to a No Action Alternative, the Draft VTR EIS evaluates potential environmental impacts of alternatives for constructing and operating a VTR. Under the action alternatives, the VTR would be a small (approximately 300 megawatt thermal) sodium-cooled, pool-type, metal-fueled reactor. DOE has completed a conceptual design of a fast-neutron-spectrum reactor based on the Power Reactor Innovative Small Module (PRISM) design from GE-Hitachi. In addition to constructing and operating the VTR, the action alternatives include the activities necessary to perform post-irradiation examination of test

[1] Fast neutrons are highly energetic neutrons (ranging from 0.1 to 10 million electron volts [MeV] and travelling at speeds of thousands to tens of thousands kilometers per second) emitted during fission. The fast-neutron spectrum refers to the range of energies associated with fast neutrons. By contrast, thermal neutrons, such as those typically associated in a commercial light-water reactor, are neutrons that are less energetic than fast neutrons (more than a million times less energetic [about 0.25eV] and travelling at speeds of less than 5 kilometers per second), having been slowed by collisions with other materials such as water. The thermal neutron spectrum refers to the range of energies associated with thermal neutrons.

specimens and for the management of driver fuel from the VTR. After irradiation in the VTR, test specimens/experimental cartridges would be transferred to post-irradiation examination facilities where they would be disassembled so that the specimens can undergo detailed evaluation. To the extent practical, DOE would make use of existing facilities to perform post-irradiation examination. Spent driver fuel would be removed from the VTR each year over its 60-year operating life. The fuel would be treated (to remove sodium that is used as a bonding material in fabrication of the fuel) and packaged in containers that are ready for transport to an offsite storage facility or repository. Pending shipment offsite, the packaged spent fuel would be stored at a facility provided by the VTR project. These activities would be part of each action alternative. The alternatives evaluated include establishing the VTR and support activities at Idaho National Laboratory (INL) or Oak Ridge National Laboratory (ORNL).

Idaho National Laboratory Versatile Test Reactor Alternative

Under the INL VTR Alternative, DOE would site the VTR adjacent to the Materials and Fuels Complex (MFC) at INL and use existing hot cell and other facilities at the MFC for post-irradiation examination. The MFC is the location of the Hot Fuel Examination Facility (HFEF), the Irradiated Materials Characterization Laboratory (IMCL), the Experimental Fuels Facility (EFF), and other laboratory facilities. Spent driver fuel would be treated at the Fuel Conditioning Facility (FCF) and stored at a facility constructed as part of the VTR project.

Oak Ridge National Laboratory Versatile Test Reactor Alternative

Under the ORNL VTR Alternative, the VTR would be sited at ORNL at a location about three quarters of a mile northeast of the High Flux Isotope Reactor. In addition to constructing the VTR and a facility to store spent driver fuel, DOE would also construct a new hot cell facility at this location. The hot cell facility would include capability and capacity for the initial post-irradiation disassembly and examination of test specimens and for the treatment of spent VTR driver fuel. Several existing facilities at ORNL would be used to provide additional post-irradiation examination capabilities. Hot cells in the Irradiated Fuels Examination Laboratory and the Irradiated Materials Examination and Testing Facility would augment the capabilities in the new hot cell facility. In addition, the Low Activation Materials Design and Analysis Laboratory would be used for testing low-dose samples that do not require the use of hot cells.

Reactor Fuel Production

The driver fuel for the VTR would be a metal alloy composed of uranium, plutonium, and zirconium. Activities to produce reactor fuel may include feedstock preparation and well as fuel fabrication. The Draft VTR EIS evaluates the potential environmental impacts of the feedstock preparation activities that would be used to remove contaminants from the plutonium (called polishing) and to convert plutonium oxides to metal that can be used in fuel fabrication. The fabrication steps include creating the alloy; casting the alloy to create fuel slugs; fabricating fuel pins, including establishing a sodium bond between the fuel slugs and the encasing tube; and assembling the tube bundles that would be placed in the reactor. DOE evaluates two options for each phase of reactor fuel production. The feedstock preparation could be performed at either INL or the Savanah River Site (SRS). Similarly, fuel fabrication activities could be performed at INL or SRS.

Under the options to perform feedstock preparation and fuel fabrication at INL, new and existing gloveboxes and equipment would be used in the Fuel Manufacturing Facility and the building that previously housed the Zero Power Physics Reactor. Under the options to perform feedstock preparation and fuel fabrication at SRS, new gloveboxes and equipment would be installed in a building that previously housed one of the SRS production reactors.

Preferred Alternative

DOE's Preferred Alternative is the INL VTR Alternative. DOE would build and operate the VTR at the INL Site adjacent to the existing MFC. Existing facilities within the MFC would be used for post-irradiation examination of test specimens. Post-irradiation examination would be performed in HFEF, IMCL, and other MFC facilities. Spent nuclear fuel (spent VTR driver fuel) would be treated to remove the sodium-bonded material at FCF (modifications to FCF may be required). The intent of this treatment is to condition and transform the spent nuclear fuel into a form that would meet the acceptance criteria for a future permanent repository. This treated fuel would be temporarily stored at a new VTR spent fuel pad at MFC.

DOE has no preferred options at this time for where it would perform driver fuel production (*i.e.,* feedstock preparation and driver fuel fabrication) for the VTR. DOE evaluated options for both processes at the INL Site and at SRS. DOE could choose to use either site or a combination of both sites to implement either option. DOE will state its preferred options for feedstock preparation and driver fuel fabrication in the Final VTR EIS, if preferred options are identified before issuance.

Webcast Public Hearings

DOE will host two interactive webcast public hearings during the public comment period. During the webcast public hearings, DOE will give a brief presentation on the Draft VTR EIS, followed by a period during which DOE will accept oral comments on the Draft VTR EIS. The comments will be transcribed. There will also be a phone line available to allow people who do not have an internet connection the opportunity to participate. Note that those desiring to provide oral comments will need to call in on the phone line. Written comments on the Draft VTR EIS may also be submitted during the public comment period as indicated under **ADDRESSES**. All comments, whether oral or written, will be considered by DOE as the VTR EIS is finalized. DOE will post information regarding the public hearings on the VTR Draft EIS website at *https://www.energy.gov/ne/nuclear-reactor-technologies/versatile-test-reactor.* The hearings will also be announced in newspapers near INL, ORNL, and SRS.

Signing Authority

This document of the Department of Energy was signed on December 15, 2020, by Robert Boston, DOE Idaho Operations Office Manager, Office of Nuclear 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 15, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–27951 Filed 12–18–20; 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 corporate filings:

Docket Numbers: EC21–34–000.
Applicants: Kings Point Wind, LLC, The Empire District Electric Company.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Kings Point Wind, LLC, et. al.
Filed Date: 12/14/20.
Accession Number: 20201214–5219.
Comments Due: 5 p.m. ET 1/4/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–54–000.
Applicants: PGR Lessee O, LLC.
Description: Self-Certification of exempt Wholesale Generator of PGR Lessee O, LLC.
Filed Date: 12/14/20.
Accession Number: 20201214–5161.
Comments Due: 5 p.m. ET 1/4/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2302–009.
Applicants: Public Service Company of New Mexico.
Description: Compliance filing: PNM Compliance Filing with November 13, 2020 Order to be effective 11/13/2020.
Filed Date: 12/14/20.
Accession Number: 20201214–5185.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: ER19–2674–002.
Applicants: New Mexico PPA Corporation.
Description: Compliance filing: MBR Filing in Compliance with November 13, 2020 Order to be effective 11/13/2020.
Filed Date: 12/14/20.
Accession Number: 20201214–5172.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: ER20–860–003.
Applicants: Green River Wind Farm Phase 1, LLC.
Description: Compliance filing: Reactive Power Compliance Filing to be effective 3/22/2020.
Filed Date: 12/15/20.
Accession Number: 20201215–5087.
Comments Due: 5 p.m. ET 1/5/21.

Docket Numbers: ER20–1890–003.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2020–12–15 Intertie Deviation Settlement—Compliance Filing to be effective 1/1/2021.
Filed Date: 12/15/20.
Accession Number: 20201215–5102.
Comments Due: 5 p.m. ET 1/5/21.

Docket Numbers: ER21–244–001.
Applicants: Duke Energy Carolinas, LLC.
Description: Tariff Amendment: Errata to Correct Location—DEC RS No. 318 Amendment 2021 to be effective 1/1/2021.
Filed Date: 12/14/20.
Accession Number: 20201214–5169.
Comments Due: 5 p.m. ET 12/21/21.

Docket Numbers: ER21–645–000.
Applicants: TransWest Express LLC.
Description: Application for authorization to sell transmission service rights at negotiated rates, request for approval of capacity allocation process, and request for waivers of TransWest Express LLC.
Filed Date: 12/11/20.
Accession Number: 20201211–5208.
Comments Due: 5 p.m. ET 1/4/21.

Docket Numbers: ER21–647–000.
Applicants: Arizona Public Service Company.
Description: § 205(d) Rate Filing: Rate Schedule No. 265, Amendment No. 3_PV—Morgan Joint Participation to be effective 2/15/2021.
Filed Date: 12/15/20.
Accession Number: 20201215–5083.
Comments Due: 5 p.m. ET 1/5/21.

Docket Numbers: ER21–648–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: Revisions to Bylaws and Membership Agreement Regarding Partial Terminations to be effective 3/1/2021.
Filed Date: 12/15/20.
Accession Number: 20201215–5099.
Comments Due: 5 p.m. ET 1/5/21.

Docket Numbers: ER21–649–000.
Applicants: California Independent System Operator Corporation.
Description: § 205(d) Rate Filing: 2020–12–15 Rate Schedule No. 50 COI–POA to be effective 1/1/2021.
Filed Date: 12/15/20.
Accession Number: 20201215–5103.
Comments Due: 5 p.m. ET 1/5/21.

Docket Numbers: ER21–650–000.
Applicants: Rail Splitter Wind Farm II LLC.
Description: Request for Prospective One-Time, Limited Waiver of Tariff Provisions, et al. of Rail Splitter Wind Farm II LLC.
Filed Date: 12/14/20.
Accession Number: 20201214–5241.
Comments Due: 5 p.m. ET 12/24/21.

Docket Numbers: ER21–651–000.
Applicants: The Connecticut Light and Power Company.
Description: § 205(d) Rate Filing: Eastern CT Resource Recovery Authority Small Generator Interconnection Agreement to be effective 12/15/2020.
Filed Date: 12/15/20.
Accession Number: 20201215–5139.
Comments Due: 5 p.m. ET 1/5/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28088 Filed 12–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–26–000]

New England Power Generators Association, Inc. v. ISO New England, Inc.; Notice of Complaint

Take notice that on December 11, 2020, pursuant to sections 206, 306, and 309 of the Federal Power Act, 16 U.S.C. 824e, 825e, 825h and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, New England Power Generators Association, Inc. (Complainant) filed a formal complaint against ISO New England, Inc., (Respondent) alleging that, Respondent has violated its tariff

and the filed-rate doctrine in recalculating and reviewing with the Complainants stakeholders a Net Cost of New Entry value for effect beginning with the sixteenth Forward Capacity Auction in a manner that violates the tariff on file with the Commission, and violates the filed rate doctrine, all as more fully explained in the complaint.

The Complainant certifies that copies of the complaint were served on the contacts listed for Respondent in the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov,* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 31, 2020.

Dated: December 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28085 Filed 12–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP16–121–000]

National Grid LNG LLC; Notice of Request for Extension of Time

Take notice that on December 8, 2020, National Grid LNG LLC (National Grid) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until October 17, 2022, to complete construction of, and place into service, its Fields Point Liquefaction Project located in Providence, RI as authorized in the October 17, 2018 Order Issuing Certificate (Certificate Order).[1] Ordering Paragraph B(1) of the Certificate Order required National Grid to complete the construction of the proposed Fields Point Liquefaction Project facilities [2] and make them available for service within three years from issuance, or by October 17, 2021.[3]

National Grid states that it has experienced equipment delays, and delays resulting from COVID–19 pandemic restrictions. As a result, National Grid now requests an additional one year, or until October 17, 2022, to complete the authorized construction at the LNG storage facility at Fields Point and make them available for service.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on National Grid's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10).[4]

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for Natural Gas Act facilities when such requests are contested before order issuance. For those extension requests that are contested,[5] the Commission will aim to issue an order acting on the request within 45 days.[6] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[7] The Commission will not consider arguments that re-litigate the issuance of the Certificate Order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.[8] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.[9] The OEP Director, or his or her designee, will act on those extension requests that are uncontested.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning COVID–19, issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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[1] *National Grid LNG LLC,* 165 FERC 61,031 (2018) (Certificate Order).

[2] The Fields Point Liquefaction Project consists of the construction of one (1) new 20 million cubic feet per day (MMcf/d) gas pretreatment and liquefaction system to convert natural gas delivered by pipeline into liquefied natural gas (LNG). The liquefaction facility is designed to enable National Gas to provide up to 20,600 dekatherms per day (Dth/day) liquefaction service at its existing LNG storage facility located in Providence, RI.

[3] *Id.* at ordering para. (B)(1).

[4] Only motions to intervene from entities that were party to the underlying proceeding will be accepted. *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 39 (2020).

[5] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1) (2020).

[6] *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 40 (2020).

[7] *Id.* P 40.

[8] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

[9] *Algonquin Gas Transmission, LLC,* 170 FERC 61,144, at P 40 (2020).

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFile link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern Time on December 30, 2020.

Dated: December 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28089 Filed 12–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP21–308–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate—CNG Amended NRA 510796 to be effective 12/15/2020.

Filed Date: 12/14/20.

Accession Number: 20201214–5065.

Comments Due: 5 p.m. ET 12/28/20.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: December 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28093 Filed 12–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP20–503–000]

Northern Natural Gas Company; Notice of Availability of the Environmental Assessment for the Proposed Northern Lights 2021 Expansion Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Northern Lights 2021 Expansion Project (Project), proposed by Northern Natural Gas Company (Northern) in the above-referenced docket. Northern requests authorization to construct the Project, which will consist of (1) an 0.80-mile-long extension of its 24-inch-diameter Willmar D Branch Line; (2) a 0.63-mile-long 24-inch-diameter Carlton Interconnect Loop; (3) replacement of the 0.08-mile-long 8-inch-diameter Viking Interconnect Branch Line with a 12-inch-diameter branch line of the same length; (4) a new compressor station (Hinckley Compressor Station); (5) modifications of the Pierz Compressor Station and Interconnect; and (6) additional above-grade facilities including a launcher, receiver, and valve setting. The Project facilities would be in Dakota, Scott, Carlton, Morrison, and Pine counties in Minnesota.

The EA assesses the potential environmental effects of the construction and operation of the Northern Lights 2021 Expansion Project in accordance with the requirements of the National Environmental Policy Act (NEPA). FERC staff concludes that approval of the proposed Project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The Commission mailed a copy of the *Notice of Availability* to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select General Search and enter the docket number in the Docket Number field, excluding the last three digits (*i.e.* CP20–503). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5:00 p.m. Eastern Time on January 14, 2021.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on eRegister. You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP20–503–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/ferc-online/ferc-online/how-guides.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: December 15, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28095 Filed 12–18–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Reauthorization of Permits, Maintenance, and Vegetation Management on Western Area Power Administration Transmission Lines on National Forest System Lands, Colorado, Nebraska, and Utah (DOE/EIS–0442)

AGENCY: Western Area Power Administration, DOE.

ACTION: Record of decision.

SUMMARY: The Western Area Power Administration (WAPA) has determined that it will implement the proposed action, or Project, as described in the *Reauthorization of Maintenance and Vegetation Management on Western Area Power Administration Transmission Lines on Forest Service Lands, Colorado, Nebraska, and Utah* final environmental impact statement (Final EIS) (DOE/EIS–0442). The proposed action includes changing WAPA's vegetation management and facility maintenance practices in some rights-of-way (ROWs) along approximately 273 miles of electrical transmission lines on National Forest System (NFS) lands in Colorado, Nebraska, and Utah. The U.S. Forest Service (USFS) was a joint lead agency on the EIS and proposes to authorize the changes through new Special Use Permits (SUPs) and Operations and Maintenance (O&M) Plans. This Record of Decision (ROD) was prepared in accordance with the requirements of the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations for implementing NEPA, and U.S. Department of Energy (DOE) NEPA regulations.

DATES: The ROD was effective when it was signed by WAPA's Administrator on December 8, 2020. All known interested parties, agencies, tribes, and the public will be notified of this ROD directly via the Project mailing list and via paid advertising, news releases, or other appropriate means.

ADDRESSES: The Final EIS, this ROD, and other Project documents are available on the Project website at *https://www.wapa.gov/transmission/EnvironmentalReviewNEPA/Pages/vegetation-management.aspx.*

FOR FURTHER INFORMATION CONTACT: For additional information on the Project, the EIS process or this ROD, please contact Ms. E. Lynn Burkett at Headquarters A9400, Western Area Power Administration, P.O. Box 281213, Lakewood, CO 80228–8213, email *burkett@wapa.gov,* telephone (720) 962–7000. For general information on the DOE NEPA review process, please contact Brian Costner, Office of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0119, email *AskNEPA@hq.doe.gov,* telephone (202) 586–4600 or (800) 472–2756, facsimile (202) 586–7031.

SUPPLEMENTARY INFORMATION: WAPA is a Federal power marketing administration within DOE that markets and delivers Federal wholesale electric power (principally hydroelectric power) to municipalities, rural electric cooperatives, public utilities, irrigation districts, Federal and State agencies, Native American tribes, and other wholesale customers in 15 western and central States. WAPA's Rocky Mountain Customer Service Region (RM) operates in Arizona, Colorado, most of Wyoming, and portions of Kansas, Nebraska, New Mexico, and Utah.

Background

On August 10, 1996, during a period of high temperatures and high electricity demand, a transmission line sagged into filbert trees near Portland, Oregon, leading to a cascade of power outages as far away as southern California. Executive Order 13212, Actions To Expedite Energy-Related Projects (May 18, 2001), declared the increased production and transmission of energy in a safe and environmentally sound manner to be essential to the well-being of the American people and called for the improvement and streamlining of cooperation among Federal agencies to expedite projects that would increase the production, transmission, or conservation of energy. In August 2003, the cascading results of another equipment failure led to an enormous power outage in the Northeast and Midwest, affecting approximately 45 million people in the United States and 10 million people in Ontario, Canada. The U.S.-Canada Power System Outage Task Force found that, again, transmission line sag into overgrown trees in rural Ohio sparked the outage.

In response to these outages, Congress added, as part of the Energy Policy Act of 2005 (Pub. L. 109–58), a new section 215 to the Federal Power Act. Among other things, the new section 215 authorized the Federal Energy Regulatory Commission (FERC) to certify an ''Electric Reliability Organization'' to create mandatory and enforceable reliability standards, subject to FERC review and approval. FERC certified the North American Electric

Reliability Corporation (NERC) as the Electric Reliability Organization. The Energy Policy Act of 2005 also requires Federal agencies to expedite approvals to allow owners or operators of transmission facilities access to the facilities to comply with applicable standards, including vegetation management standards.

FERC approved NERC's original Reliability Standard, FAC–003–1, ''Transmission Vegetation Management Program'' (NERC Standard) on March 16, 2007,[1] and the standard became mandatory and enforceable on June 18, 2007. The most recent version of the NERC Standard is FAC–003–4, ''Transmission Vegetation Management.'' The revised standard was approved on April 26, 2016,[2] and became mandatory and enforceable on October 1, 2016.

To enhance WAPA's compliance with NERC's Transmission Vegetation Management Reliability Standard, industry standards, and WAPA's policy and guidance, WAPA proposes to improve the way it manages vegetation along its ROWs on NFS lands in Colorado, Nebraska, and Utah. WAPA owns, operates, and maintains approximately 273 miles of transmission line ROWs on NFS lands in Colorado, Nebraska, and Utah. Specifically, the Project includes WAPA RM transmission facilities and access routes located on NFS lands managed by seven National Forests in the Rocky Mountain Region (Region 2) and one National Forest in the Intermountain Region (Region 4). These National Forests and Grasslands include the Arapahoe—Roosevelt; Ashley; Grand Mesa, Uncompahgre, and Gunnison; Medicine Bow—Routt; Pike—San Isabel; Samuel R. McKelvie; San Juan; and White River.

[1] Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 118 FERC ¶ 61,218, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[2] Letter Order Approving Reliability Standard FAC–003–4, FERC Docket No. RD16–4–000 (Apr. 26, 2016).

Purpose and Need for Agency Action

WAPA needs to improve the way it manages vegetation along its 273 miles of transmission line ROWs on NFS lands with the following purposes and objectives:

1. To ensure that WAPA can safely and reliably operate and maintain its existing electrical transmission facilities to deliver electrical power.
2. To further WAPA's compliance with NERC's Transmission Vegetation Management Reliability Standards, industry standards, and WAPA's policy and guidance.
3. To ensure that WAPA's transmission facilities remain operational for the useful life of the facilities.
4. To protect public and worker safety.
5. To reduce the risk of wildfires caused by transmission lines and the risk to the facilities from fire.
6. To control the spread of noxious weeds.
7. To maintain sound relationships with landowners and land managers.
8. To ensure that WAPA has access to its transmission facilities for maintenance and emergency response.
9. To ensure that the costs associated with maintaining the transmission system can be controlled following sound business principles, including achieving technical and economic efficiencies to minimize impacts on transmission line tariff costs and electrical power rates.
10. To allow flexibility to accommodate changes in transmission system operation and maintenance requirements.
11. To minimize impacts to environmental resources.

WAPA's Proposed Action—Proposed Project

WAPA proposes to change the way it manages vegetation in the ROWs for the transmission lines it owns, operates, or maintains. The proposed action would require the USFS to re-authorize and issue SUPs for each transmission line and authorize WAPA to manage vegetation along WAPA ROWs on NFS lands using an integrated vegetation management (IVM) approach, for which WAPA would develop new O&M Plans. This approach is based on the American National Standard Institute Tree, Shrub and Other Woody Plant Maintenance—Standard Practices (Integrated Vegetation Management, a. Electric Utility ROW (ANSI A300 (Part 7)–2006 IVM)). WAPA would control vegetation growth and fuel conditions that threaten transmission lines. The proposed action would balance the purpose of and need for agency action with the need to comply with environmental regulations and USFS requirements, address potential impacts to environmental resources, and incorporate public and agency comments. It incorporates the design features developed to protect environmental resources. It is important to note that vegetation management and maintenance of WAPA's transmission facilities has been ongoing for many years, so the proposed action merely makes these routine activities more proactive under the IVM approach.

The vegetation management proposal includes an initial treatment plan for areas that have been identified for treatment. The initial treatment would affect approximately 1,610 acres of the approximately 4,055 acres of transmission line ROWs on NFS lands.

In the EIS, WAPA identified six broad categories of existing conditions in the ROWs. The condition of the vegetation in the ROW determines whether the ROW would need to be treated soon, needs treatment over the longer term, or is unlikely to need treatment for some time. WAPA routinely monitors ROWs to determine vegetation conditions. The proposed action includes vegetation management options based on the conditions in the ROWs. Table ES–1 summarizes the six categories of ROW conditions and vegetation management.

TABLE ES–1—CATEGORIES OF RIGHT-OF-WAY CONDITIONS AND VEGETATION TREATMENT METHODS

Category	Vegetation	Examples	Frequency of treatment	Treatment methods
1	Compatible with the transmission line.	The lines span canyons and there will likely always be adequate clearance between vegetation and the transmission line conductors—even with larger mature trees; a vegetation community that is already a stable, low-growth one (*e.g.,* grasses, forbs, bushes, and shrubs) so that vegetation at mature height is not a threat to the transmission line.	None expected for the duration of the authorization, but ROW monitoring will be needed to ensure conditions have not changed.	None expected.
2	Fast-growing incompatible species that are presently not acceptable, and over the long term, the vegetation is likely to include incompatible vegetation types that would require monitoring and treatment.	Mature lodgepole pine, mature aspen, and other species on high-quality growth sites.	• Initial treatment expected within 1 to 5 years. • Maintenance treatments are expected to be relatively frequent (expected 2- to 6-year return intervals).	• Accessible sites would favor use of mechanized equipment and removal of salvageable material. • Inaccessible sites would favor use of hand felling.
3	Fast-growing incompatible species of trees that are in an acceptable condition, but over the long term, incompatible vegetation treatments would be needed.	Immature lodgepole pine and aspen. Other species on high-quality growth sites.	• Maintenance treatments are expected to be relatively frequent (expected 2- to 6-year return intervals, but this will vary depending on site conditions).	• Accessible sites would favor mechanized equipment, with removal of salvageable material. • Inaccessible sites would favor use of hand felling.
4	Slow-growing incompatible species of mature vegetation that is not acceptable, and over the long term, treatments for incompatible vegetation would be needed to control re-growth.	Mature spruce and fir. Other species on harsh sites.	• Initial treatment is expected within 2 to 5 years, depending on site conditions and vegetation growth. • Maintenance treatments are expected to be relatively infrequent on sites with incompatible species with slow growth rates, perhaps 5 or more years, depending on site conditions.	• On sites with good access, mechanized equipment would be favored, and salvageable material would be removed. • On sites with poor access, hand felling and other manual methods would typically be used.
5	These sites have slow-growing incompatible species, and the ROW is in an acceptable condition; but over the long term, the incompatible species would need to be monitored and treated.	Immature spruce and fir. Other incompatible species on harsh sites.	• Maintenance treatments are expected to be relatively infrequent, perhaps 5 years or longer, depending on site conditions.	• On sites with good access, mechanized equipment would be favored, and salvageable material would be removed. • On sites with poor access, hand felling and other manual methods would typically be used.
6	Treatments in these areas of ROW are driven largely by the conditions of the fuel load. Typically, they include areas with low-growing vegetation types characterized by having high fuel loads. Sites are characterized by dense, woody vegetation capable of high-intensity fire, with transmission lines having relatively low conductor-to-ground clearances.	Sagebrush, Gambel oak, dense lodgepole regeneration, and pinyon and juniper pine.	• Initial treatments are expected. This could include mechanical removal of vegetation near structures and from areas of the ROW. • Maintenance treatments as needed. Need is determined from ROW monitoring.	• In areas with good access, mechanized treatment such as mowing would be favored. • In areas with poor access, manual treatments would typically be used. • Gambel oak could be treated with herbicides.

These areas are proposed for mechanical treatment to remove incompatible tall-growth species, while addressing a buildup of fuels from several decades of previous vegetation management activities. Treatments could include logging, chipping, and grinding of trees and existing debris using mechanized equipment and other activities developed in coordination with the USFS. Following completion of the initial treatment in an area, the ROW would be maintained in a desired condition that is generally defined by a lack of incompatible vegetation species. The desired condition depends on the ROW conditions and incorporates design features that protect sensitive

resources. As a joint-lead agency, and in support of WAPA's proposed action, the USFS would re-authorize and issue SUPs for each transmission line and authorize WAPA to manage vegetation and conduct maintenance activities along WAPA ROWs on NFS lands. The USFS would permit these activities through new SUPs and O&M Plans. Each specific WAPA vegetation management or maintenance activity would be assessed by the USFS prior to initiation using a process defined in O&M Plans developed in conjunction with the SUPs.

Alternatives

WAPA and the USFS evaluated a no action alternative that would leave the existing WAPA vegetation management and maintenance activities in place under the existing USFS permits and O&M Plans. This alternative would not meet WAPA's purpose and need or the objectives given above. The environmentally-preferred and agency-preferred alternative is the proposed action. While initial treatment activities would cause higher impacts than no action, over the long term, after the desired conditions are achieved, the wildfire hazard would be much reduced and vegetation management activities would be less intensive and less frequent. Overall, resource impacts would be substantially lower compared with no action. All practicable means of avoiding or minimizing environmental impacts have been incorporated into the proposed action and its related standard maintenance practices, and specific additional resource protections may be included in the new SUPs, WAPA's O&M Plans, and individual action reviews.

WAPA and the USFS considered an option to remove all tall-growing trees from the ROWs to maximize transmission line reliability and minimize wildfire hazard. However, vegetation conditions and terrain vary, and not all areas require the same treatment efforts. Where conductor clearances allow, such as spanning a drainage, taller vegetation can be allowed to remain in the ROW. This approach is included in the proposed action, and reduces resource impacts, visual effects, wildlife habitat impacts, and vegetation management costs. Similarly, an option to prohibit the use of herbicides was considered. This option would reduce WAPA's ability to control incompatible vegetation and noxious weeds efficiently and effectively. Herbicide use can be done in an environmentally responsible way with minimal impact. Selective proper use of herbicides would reduce the number of vegetation management cycles and associated environmental impacts and allow the ROWs to reach the desired conditions more quickly.

Public Involvement

The Notice of Intent (NOI) was published in the **Federal Register** on April 8, 2010, launching the scoping process that extended through May 26, 2010. The NOI invited public participation in the EIS scoping process and solicited public comments on the scope and content of the EIS. WAPA and the USFS solicited comments from Federal, State, and local agencies; tribal governments; other organizations; and the public, and announced opportunities to comment in various local news media. Chapter Four of the Final EIS lists agencies, organizations, and people who received copies.

In April 2010, WAPA and the USFS hosted three public scoping meetings in Denver and Grand Junction, Colorado, and Vernal, Utah, which provided the public an opportunity to comment and ask questions about the Project and EIS development. Before each public meeting, WAPA and the USFS held interagency scoping meetings.

The Notice of Availability (NOA) for the Draft EIS was published in the **Federal Register** on September 27, 2013. One public meeting was held in Denver, Colorado, on October 23, 2013; there were no attendees. WAPA and the Forest Service received four comment letters; two of the letters expressed support for the Project. The U.S. Department of the Interior letter indicated no comments on the Project, and the Environmental Protection Agency letter indicated a rating of Lack of Objections (LO) for the Project. No comments were received from the general public or tribes.

The USFS has a pre-decisional objection process that follows the release of certain environmental documents, in this case the Final EIS. The objection filing period was 45 days, and no objections were filed during that time.

Decision

Informed by the analyses and environmental impacts documented in the Final EIS and related consultations, WAPA has selected the proposed action identified in the Final EIS as its decision for the Project. The proposed action will be the basis for the preparation of revised SUPs and associated O&M Plans.

This ROD was prepared in accordance with the requirements of the CEQ regulations for implementing NEPA (40 CFR parts 1500–1508) and the DOE NEPA regulations (10 CFR part 1021).

Signing Authority

This document of the Department of Energy was signed on December 8, 2020, by Mark A. Gabriel, Administrator, Western Area Power Administration, 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 15, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2020–28016 Filed 12–18–20; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[Region 4 Library; FRL–10017–91–Region 4]

Notice of Library Changes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Informational notice.

SUMMARY: The Environmental Protection Agency (EPA) is issuing this notice to advise the public of upcoming changes to the Region 4 Library. Region 4 will be reducing the size of its library space, decreasing the amount of print materials maintained in its collection, and ceasing all on-site library support services. The library will retain a small, targeted collection of reference material on-site which will be accessible by appointment only to EPA staff and the public (For appointments, see contact information below). In addition, EPA staff and the public will continue to have remote access to the full suite of library services available at EPA through the Andrew W. Breidenbach Environmental Research Center (AWBERC) Library, located in Cincinnati, Ohio. The AWBERC Library can be reached by email (*CI_AWBERC_Library@epa.gov*) or by phone (513–569–7703). For more information about the EPA National Library Network and

its information resources and services, visit *https://www.epa.gov/libraries.*

DATES: Region 4's Library changes will be effective February 1, 2021.

FOR FURTHER INFORMATION CONTACT: The Region 4 Federal Library Manager, Shayla Patillo at (404) 562–8385 or via electronic mail at *patillo.shayla@epa.gov.*

Dated: December 14, 2020.

Mary Walker,

Regional Administrator, Region 4.

[FR Doc. 2020–28102 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0466; FRL–10017–47]

Product Cancellation Order for Certain Pesticide; Amendment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA issued a notice in the **Federal Register** of April 13, 2018, concerning the cancellations voluntarily requested by the registrant and accepted by the Agency but that have not yet become effective. This notice is being issued to amend the cancellation order, as supported by the current registrant and requested by a distributor, by extending the effective date of the cancellation for the two spirodiclofen registrations (EPA Registration No. 264–830 and 264–831).

DATES: The **Federal Register** of April 13, 2018, announced the voluntary cancellation of two spirodiclofen registrations (EPA Registration No. 264–830 and 264–831) as requested by the registrant, effective December 31, 2020. The Agency is now amending the effective date of cancellation to December 31, 2021.

FOR FURTHER INFORMATION CONTACT: Veronica Dutch, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460–0001; telephone number: (703) 308–8585; email address: *dutch.veronica@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2017–0466, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave., NW, Washington, DC 20460–0001.

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

II. What Does this Amendment Do?

This notice is being issued to amend the effective date of cancellation for the two spirodiclofen registrations listed in Table 1B of the cancellation order published in the **Federal Register** on April 13, 2018 (83 FR 16076) (FRL–9975–97). The April 13, 2018 **Federal Register** Notice corrected an earlier cancellation order that was published in December 26, 2017 (80 FR 60985) (FRL–9971–10). After issuance of the cancellation order correction notice, a different company committed to develop required data and requested an extension of the effective date of cancellation for these products, with the intention of maintaining these spirodiclofen registrations. Bayer CropScience, the current registrant for the spirodiclofen products listed in Table 1B of the cancellation order, submitted a letter supporting the requested extension. Based on letters received from the California Walnut Commission (October 12, 2020) and the California Citrus Quality Council (October 16, 2020), spirodiclofen is an important control option for plant-feeding mites in these crops, where miticide resistance is a possibility and where spirodiclofen has continued to be a component of integrated pest management. With this Notice, the effective date for cancellation of EPA Registration No. 264–830 and 264–831 is established as December 31, 2021. Consistent with the previous order, the registrant would be prohibited from producing, selling, or distributing existing stocks of products containing spirodiclofen following the cancellation effective date. Other entities would be permitted to sell, distribute, and use stocks of spirodiclofen until stocks are exhausted. The cancellation of these two registrations would terminate the last spirodiclofen products registered for use in the United States.

Authority: 7 U.S.C. 136 *et seq.*

Dated: November 24, 2020.

Mary Reaves,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2020–28118 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10018–24–OAR]

Allocations of Cross-State Air Pollution Rule Allowances From New Unit Set-Asides for 2020 Control Periods

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of data availability (NODA).

SUMMARY: The Environmental Protection Agency (EPA) is providing notice of the availability of preliminary lists of units eligible for second-round allocations of emission allowances for the 2020 control periods from the new unit set-asides (NUSAs) established under the Cross-State Air Pollution Rule (CSAPR) trading programs. EPA has posted spreadsheets containing the lists on EPA's website. EPA will consider timely objections to the lists before determining the amounts of the second-round allocations.

DATES: Objections to the information referenced in this notice must be received on or before January 21, 2021.

ADDRESSES: Submit your objections via email to *CSAPR_NUSA@epa.gov.* Include ''2020 NUSA allocations'' in the email subject line and include your name, title, affiliation, address, phone number, and email address in the body of the email.

FOR FURTHER INFORMATION CONTACT: Questions concerning this action should be addressed to Jason Kuhns at (202) 564–3236 or *kuhns.jason@epa.gov* or Andrew Reighart at (202) 564–0418 or *reighart.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION: Under each CSAPR trading program where EPA is responsible for determining

emission allowance allocations, a portion of each state's emissions budget for the program for each control period is reserved in a NUSA (and in an additional Indian country NUSA in the case of states with Indian country within their borders) for allocation to certain units that would not otherwise receive allowance allocations. The procedures for identifying the eligible units for each control period and for allocating allowances from the NUSAs and Indian country NUSAs to these units are set forth in the CSAPR trading program regulations at 40 CFR 97.411(b) and 97.412 (NO_X Annual), 97.511(b) and 97.512 (NO_X Ozone Season Group 1), 97.611(b) and 97.612 (SO_2 Group 1), 97.711(b) and 97.712 (SO_2 Group 2), and 97.811(b) and 97.812 (NO_X Ozone Season Group 2). Each NUSA allowance allocation process involves up to two rounds of allocations to eligible units, termed ''new'' units, followed by the allocation to ''existing'' units of any allowances not allocated to new units.

This notice concerns EPA's preliminary identification of units eligible to receive allowances in the second round of NUSA allocations for the 2020 control periods. The units eligible for second-round allocations for a given control period are CSAPR-affected units that commenced commercial operation between January 1 of the year before that control period and November 30 of the year of that control period. In the case of the 2020 control periods, an eligible unit therefore must have commenced commercial operation between January 1, 2019 and November 30, 2020 (inclusive). Generally, where a unit is eligible to receive a second-round NUSA allocation under a given CSAPR trading program for a given control period, the unit's maximum potential second-round allocation equals the positive difference (if any) between the unit's emissions during the control period as reported under 40 CFR part 75 and any first-round NUSA allocation the unit received. If the total of such maximum potential allocations to all eligible units would exceed the total allowances remaining in the NUSA, the allocations are reduced on a pro-rata basis. EPA notes that under 40 CFR 97.406(c)(3), 97.506(c)(3), 97.606(c)(3), 97.706(c)(3), and 97.806(c)(3), a unit's emissions occurring before its monitor certification deadline are not considered to have occurred during a control period and consequently are not included in the emission amounts used to determine NUSA allocations.

The preliminary lists of eligible units are set forth in Excel spreadsheets titled ''CSAPR_NUSA_2020_NO_x_Annual_2nd_Round_Prelim_Data,'' ''CSAPR_NUSA_2020_NO_x_Ozone_Season_2nd_Round_Prelim_Data,'' and ''CSAPR_NUSA_2020_SO_2_2nd_Round_Prelim_Data'' available on EPA's website at *https://www.epa.gov/csapr/csapr-compliance-year-2020-nusa-nodas.* Each spreadsheet contains a separate worksheet for each state covered by that program showing each unit preliminarily identified as eligible for a second-round NUSA allocation. Each state worksheet also contains a summary showing (1) the quantity of allowances initially available in that state's 2020 NUSA, (2) the sum of the 2020 NUSA allowance allocations that were made in the first round to new units in that state, if any, and (3) the quantity of allowances in the 2020 NUSA available for second-round allocations to new units (or ultimately for allocations to existing units), if any.

Objections should be strictly limited to whether EPA has correctly identified the units eligible for second-round 2020 NUSA allocations according to the criteria established in the regulations and should be emailed to the address identified in **ADDRESSES**. Objections must include: (1) Precise identification of the specific data the commenter believes are inaccurate, (2) new proposed data upon which the commenter believes EPA should rely instead, and (3) the reasons why EPA should rely on the commenter's proposed data and not the data referenced in this notice.

EPA notes that an allocation or lack of allocation of allowances to a given unit does not constitute a determination that CSAPR does or does not apply to the unit. EPA also notes that under 40 CFR 97.411(c), 97.511(c), 97.611(c), 97.711(c), and 97.811(c), allocations are subject to potential correction if a unit to which NUSA allowances have been allocated for a given control period is not actually an affected unit as of the start of that control period.

(Authority: 40 CFR 97.411(b), 97.511(b), 97.611(b), 97.711(b), and 97.811(b).)

Dated: December 2, 2020.

Reid P. Harvey,

Director, Clean Air Markets Division, Office of Atmospheric Programs, Office of Air and Radiation.

[FR Doc. 2020–28115 Filed 12–18–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0716, 3060–0991 and 3060–1248; FRS 17318]

Information Collections 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 20, 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 Number: 3060–0716.

Title: Sections 73.88, 73.318 and 73.685, Blanketing Interference.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; and Not-for-profit institutions.

Number of Respondents and Responses: 21,000 respondents; 21,000 responses.

Estimated Time per Response: 1 to 2 hours.

Frequency of Response: Third party disclosure requirement.

Total Annual Burden: 41,000 hours.

Total Annual Cost: None.

Obligation To Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Section 154(i) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment(s): No impact(s).

Needs and Uses: The information collection requirements approved under this collection are contained under the following rule sections:

47 CFR 73.88 states that the licensee of each broadcast station is required to satisfy all reasonable complaints of blanketing interference within the 1V/m contour.

47 CFR 73.318(b) states that after January 1, 1985, permittees or licensees who either (1) commence program tests, (2) replace the antennas, or (3) request facilities modifications and are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one year period.

47 CFR 73.318(c) states that a permittee collocating with one or more existing stations and beginning program tests on or after January 1, 1985, must assume full financial responsibility for remedying new complaints of blanketing interference for a period of one year.

Under 47 CFR 73.88, and 73.685(d), the license is financially responsible for resolving complaints of interference within one year of program test authority when certain conditions are met. After the first year, a license is only required to provide technical assistance to determine the cause of interference.

OMB Control Number: 3060–0991.

Title: AM Measurement Data.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 1,800 respondents; 3,135 responses.

Estimated Hours per Response: 0.50–25 hours.

Frequency of Response: Recordkeeping requirement, Third party disclosure requirement, On occasion reporting requirement.

Total Annual Burden: 20,200 hours.

Total Annual Cost: $1,131,500.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 151, 152, 154(i), 303, and 307 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality treatment with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: In order to control interference between stations and assure adequate community coverage, AM stations must conduct various engineering measurements to demonstrate that the antenna system operates as authorized. The data is used by station engineers to correct the operating parameters of the antenna. The data is also used by FCC staff in field investigations to ensure that stations are in compliance with the technical requirements of the Commission's various rules.

OMB Control Number: 3060–1248.

Title: Transition from TTY to Real-Time Text Technology, CG Docket No. 16–145 and GN Docket No. 15–178.

Form Number: N/A.

Type of Review: Extension and update of collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents and Responses: 967 respondents; 5,235 responses.

Estimated Time per Response: 0.2 hours (12 minutes) to 60 hours.

Frequency of Response: Annual, ongoing, and semiannual reporting requirements; recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefit. The statutory authority can be found at sections 4(i), 225, 255, 301, 303(r), 316, 403, 715, and 716 of the Communications Act of 1934, as amended, and section 106 of the Twenty-First Century Communications and Video Accessibility Act of 2010, 47 U.S.C. 154(i), 225, 255, 301, 303(r), 316, 403, 615c, 616, 617; Public Law 111–260, 106, 124 Stat. 2751, 2763 (2010).

Total Annual Burden: 114,212 hours.

Total Annual Cost: No cost.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: This information collection does not affect individuals or households; therefore, the Privacy Act is not impacted.

Needs and Uses: Text telephone (TTY) technology provides the primary means for people with disabilities to send and receive text communications over the public switched telephone network (PSTN). Changes to communications networks, particularly ongoing technology transitions from circuit switched to IP-based networks and from copper to wireless and fiber infrastructure, have affected the quality and utility of TTY technology, prompting discussions on transitioning to an alternative advanced communications technology for text

communications. Accordingly, on December 16, 2016, the Commission released Transition from TTY to Real-Time Text Technology, Report and Order, document FCC 16–169, 82 FR 7699, January 23, 2017, amending its rules that govern the obligations of wireless service providers and manufacturers to support TTY technology to permit such providers and manufacturers to provide support for real-time text (RTT) over wireless IP-based networks to facilitate an effective and seamless transition to RTT in lieu of continuing to support TTY technology. In document FCC 16–169, the Commission adopted measures requiring the following:

(a) Each wireless provider and manufacturer that voluntarily transitions from TTY technology to RTT over wireless IP-based networks and services is encouraged to develop consumer and education efforts that include (1) the development and dissemination of educational materials that contain information pertinent to the nature, purpose, and timelines of the RTT transition; (2) internet postings, in an accessible format, of information about the TTY to RTT transition on the websites of covered entities; (3) the creation of a telephone hotline and an online interactive and accessible service that can answer consumer questions about RTT; and (4) appropriate training of staff to effectively respond to consumer questions. All consumer outreach and education should be provided in accessible formats including, but not limited to, large print, Braille, videos in American Sign Language and that are captioned and video described, emails to consumers who have opted to receive notices in this manner, and printed materials. Service providers and manufacturers are also encouraged to coordinate with consumer, public safety, and industry stakeholders to develop and distribute education and outreach materials. The information will inform consumers of alternative accessible technology available to replace TTY technology that may no longer be available to the consumer through their provider or on their device.

(b) Each wireless provider that requested or will request and receive a waiver of the requirement to support TTY technology over wireless IP-based networks and services must apprise its customers, through effective and accessible channels of communication, that (1) until TTY is sunset, TTY technology will not be supported for calls to 911 services over IP-based wireless services, and (2) there are alternative PSTN-based and IP-based accessibility solutions for people with disabilities to reach 911 services. These notices must be developed in coordination with public safety answering points (PSAPs) and national consumer organizations, and include a listing of text-based alternatives to 911, including, but not limited to, TTY capability over the PSTN, various forms of PSTN-based and IP-based TRS, and text-to-911 (where available). The notices will inform consumers on the loss of the use of TTY for completing 911 calls over the provider's network and alert them to alternatives service for which TTY may be used.

(c) Once every six months, each wireless provider that requests and receives a waiver of the requirement to support TTY technology must file a report with the Commission and inform its customers regarding its progress toward and the status of the availability of new IP-based accessibility solutions. Such reports must include (1) information on the interoperability of the provider's selected accessibility solution with the technologies deployed or to be deployed by other carriers and service providers, (2) the backward compatibility of such solution with TTYs, (3) a showing of the provider's efforts to ensure delivery of 911 calls to the appropriate PSAP, (4) a description of any obstacles incurred towards achieving interoperability and steps taken to overcome such obstacles, and (5) an estimated timetable for the deployment of accessibility solutions. The information will inform consumers of the progress towards the availability of alternative accessible means to replace TTY, and the Commission will be able to evaluate the reports to determine if any changes to the waivers are warranted or of any impediments to progress that it may be in a position to resolve.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–28022 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0848, FRS 17302]

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 might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

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.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before January 20, 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 Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@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 Nicole Ongele at (202) 418–2991. 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: 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 Number: 3060–0848.

Title: Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98–147.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 750 respondents; 9,270 responses.

Estimated Time per Response: 3.54 hours (average burden per response).

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 information collection is contained in 47 U.S.C. 201 and 251 of the Communications Act of 1934, as amended.

Total Annual Burden: 32,845 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information. Any respondent that submits information to the Commission that they believe is confidential may request confidential treatment of such information under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The information collection requirements implement sections 201 and 251 of the Communications Act of 1934, as amended, to provide for physical collocation on rates, terms and conditions that are just, reasonable and nondiscriminatory, and to promote deployment of advanced telecommunications services without significantly degrading the performance of other services. All of the requirements will be used by the Commission and competitive local exchange carriers (LECs) to facilitate the deployment of telecommunications services, including advanced telecommunications services.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–28021 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–XXXX; FRS 17319]

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 19, 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, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–XXXX.

Title: Compliance with the Non-IP Call Authentication Solution Rules; Robocall Mitigation Database; Certification to Verify Exemption from Caller ID Authentication Implementation Mandate.

Form Number: N/A.

Type of Review: New information collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 6,535 respondents; 6,535 responses.

Estimated Time per Response: 0.5 hours (30 minutes)–3 hours.

Frequency of Response: Recordkeeping requirement and on occasion reporting requirement.

Obligation to Respond: Mandatory and required to obtain or retain benefits. Statutory authority for these collections are contained in 47 U.S.C. 227b, 251(e), and 227(e) of the Communications Act of 1934.

Total Annual Burden: 15,520 hours.

Total Annual Cost: No Cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission will consider the potential confidentiality of any information submitted, particularly where public release of such information could raise security concerns (*e.g.,* granular location information). Respondents may request materials or information submitted to the Commission or to the Administrator be withheld from public inspection under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act directs the Commission to require, no later than 18 months from enactment, all voice service providers to implement STIR/SHAKEN caller ID authentication technology in the internet protocol (IP) portions of their networks and implement an effective caller ID authentication framework in the non-IP portions of their networks. Among other provisions, the TRACED Act also directs the Commission to create extension and exemption mechanisms for voice service providers. On September 29, 2020, the Commission adopted its *Call Authentication Trust Anchor Second Report and Order. See Call Authentication Trust Anchor,* WC Docket No. 17–97, Second Report and Order, FCC 20–136 (adopted Sept. 29, 2020). The *Second Report and Order* implemented section 4(b)(1)(B) of the TRACED Act, in part, by requiring a voice service provider maintain and be ready to provide the Commission upon request with documented proof that it is participating, either on its own or through a representative, including third party representatives, as a member of a working group, industry standards group, or consortium that is working to develop a non-internet Protocol caller identification authentication solution, or actively testing such a solution. The *Second Report and Order* also implemented the extension mechanisms in section 4(b)(5) by, in part, requiring voice service providers to certify that they have either implemented STIR/SHAKEN or a robocall mitigation program. And finally, the *Second Report and Order* completed the implementation of the exemption process of 4(b)(2) by requiring voice service providers file a second certification after June 30, 2021 to verify that they met the criteria to receive their exemption.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2020–28023 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[IB Docket No. 16–185; DA 20–1474; FRS 17332]

Third Meeting of the World Radiocommunication Conference Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the third meeting of the World Radiocommunication Conference Advisory Committee (WAC) will be held on February 23, 2021. Due to exceptional circumstances, the Advisory Committee meeting will be convened as a virtual meeting with remote participation only. This third meeting will consider status reports and recommendations from its Informal Working Groups (IWG) concerning preparation for the 2023 World Radiocommunication Conference (WRC–23).

DATES: February 23, 2021; 11:00 a.m. EST.

ADDRESSES: *www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Dante Ibarra, Designated Federal Official, World Radiocommunication Conference Advisory Committee, FCC International Bureau, Global Strategy and Negotiation Division, at *Dante.Ibarra@fcc.gov,* (202)-418–0610 or *WRC-23@fcc.gov.*

SUPPLEMENTARY INFORMATION: The FCC established the Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2023 World Radiocommunication Conference (WRC–23).

In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the third meeting of the Advisory Committee. Additional information regarding the Advisory Committee is available on the Advisory Committee's website, *www.fcc.gov/wrc-23.* The virtual meeting is open to the public. The meeting will be broadcast live with open captioning over the internet from the FCC Live web page at *www.fcc.gov/live.* There will be audience participation available; send live questions to *livequestions@fcc.gov* only during this meeting.

The proposed agenda for the third meeting is as follows:

Agenda

Third Meeting of the World Radiocommunication Conference Advisory Committee

Federal Communications Commission

February 23, 2021; 11:00 a.m. EST

1. Opening Remarks
2. Approval of Agenda
3. Approval of the Minutes of the First Meeting
4. IWG reports and Documents Relating to Preliminary Views
5. Future Meetings
6. Other Business

Federal Communications Commission.

Troy Tanner,

Deputy Chief, International Bureau.

[FR Doc. 2020–28077 Filed 12–18–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Notice of Meeting To Be Held With Less Than Seven Days Advance Notice

TIME AND DATE: 10:00 a.m. on Tuesday, December 15, 2020.

PLACE: The meeting was held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street, NW, Washington, DC.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the Government in the Sunshine Act, notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors met in open session at 10:00 a.m. on Tuesday, December 15, 2020, to consider the following matters:

Summary Agenda

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Final Rule on Revising the FDIC's Regulations Concerning Collection of Delinquent Civil Money Penalties.

Memorandum and resolution re: Notice of Proposed Rulemaking on Computer-Security Incident Notification.

Memorandum and resolution re: Notice of Proposed Rulemaking on Additional Exemptions to Suspicious Activity Report Requirements (12 CFR part 353).

Memorandum and resolution re: Final Rule on the Removal of Transferred OTS Regulations Regarding Application Processing Procedures for State Savings Associations and Conforming Amendments to Other Regulations (part 390, Subpart F).

Memorandum and resolution re: Final Rule on Rescission of Regulations Transferred from the Office of Thrift Supervision contained in 12 CFR part 390, subpart G, and Conforming Amendments to Existing FDIC Regulations.

Memorandum and resolution re: Final Rule on the Removal of Transferred OTS Regulations Regarding Subordinate Organizations (part 390, Subpart O).

Memorandum and resolution re: Final Rule on Removal of Transferred OTS Regulations Regarding Prompt Corrective Action Directives (part 390, Subpart Y) and Conforming Amendments to part 308, Subpart Q.

Report of actions taken pursuant to authority delegated by the Board of Directors.

Discussion Agenda:

Memorandum and resolution re: Combined Final Rule on Brokered Deposits and Interest Rate Restrictions.

Memorandum and resolution re: Final Rule on Parent Companies of Industrial Banks and Industrial Loan Companies.

Memorandum and resolution re: Proposed 2021 FDIC Operating Budget.

In calling the meeting, the Board determined, on motion of Director Brian P. Brooks (Acting Comptroller of the Currency), seconded by Director Kathleen Kraninger (Director, Consumer Financial Protection Bureau), concurred in by Director Martin J. Gruenberg, and Chairman Jelena McWilliams, that Corporation business required its consideration of the matters on less than seven days' notice to the public; and that no earlier notice of the meeting than that previously provided on December 11, 2020, was practicable.

Dated this the 15th day of December, 2020.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–27995 Filed 12–17–20; 11:15 am]

BILLING CODE 6714–01–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 January 5, 2021.

A. *Federal Reserve Bank of Dallas* (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Robert G. Good, Calvin J. Good, Hannah G. Good, all of Corrales, New Mexico; Cynthia Alysce Good, Robert A. Good, and Natalie G. Good, all of Arlington, Massachusetts;* to join the Graves-Good Family Group, a group acting in concert, to retain voting shares of Goldthwaite Bancshares, Inc., and thereby indirectly retain voting shares of MCBank, both of Goldthwaite, Texas.

Board of Governors of the Federal Reserve System, December 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–28109 Filed 12–18–20; 8:45 am]

BILLING CODE 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 January 5, 2021.

A. *Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Clarence J. Beard and Betty Beard, both of Lewellen, Nebraska;* to form the Lewellen Family Group, a group acting in concert, to acquire voting shares of Lewellen National Corp., and thereby indirectly acquire voting shares of Bank of Lewellen, both of Lewellen, Nebraska.

Board of Governors of the Federal Reserve System, December 16, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–28106 Filed 12–18–20; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of a Modified System of Records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to modify an existing system of records, entitled BGFRS–23, ''FRB—Freedom of Information Act and Privacy Act Case Tracking and Reporting System.'' The system, which the Board is proposing to rename as BGFRS–23, ''FRB—Freedom of Information Act and Privacy Act Case Automation System,'' contains tracking, reporting, and processing information for Freedom of Information Act (FOIA) and Privacy Act requests.

DATES: Comments must be received on or before January 20, 2021. This modified system of records will become effective January 20, 2021, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

ADDRESSES: You may submit comments, identified by *BGFRS–23: ''FRB-Freedom of Information Act and Privacy Act Case Automation System,''* by any of the following methods:

- *Agency Website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include SORN name and number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments will be made available on the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove sensitive personally identifiable information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays.

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

SUPPLEMENTARY INFORMATION: The Board is modifying this system of records to reflect the adoption of a cloud-based solution to automate the processing of FOIA and Privacy Act requests that also provides for the interoperability between the new National FOIA Portal and agency FOIA platforms consistent with federal mandates. Currently, the records in the system are stored on premises. The new system will improve the processing of requests as it not only allows Board staff, including staff responding to requests for records maintained for the Federal Open Market Committee (FOMC), to track requests but also allows staff to conduct business processes electronically within the system such as the transmittal of acknowledgment letters. The new system will also allow staff to store the responses and responsive documents within the system. Records will be stored both on the Board's premises and in the cloud solution managed by the vendor. The Board is also amending BGFRS–23 to reflect that, in connection with the processing of Privacy Act requests, the Board will also collect citizenship status, an additional category of record. In addition, because the records implicate the interests of entities other than federal agencies, the Board is also modifying an existing system-specific routine use to allow the Board also to share the information with state agencies and other entities that have a substantial interest in the determination of the request or may be appropriate for staff to consult with on the propriety of access to a record.

Accordingly, the Board is amending the system to reflect changes in the history section, the categories of records, the system manager to identify the responsible parties, the system location to update the physical location of the underlying records, and the policies and practices for retention and disposal of records to address physical paper records. The Board is also renaming the system name to account for the revised scope of records stored in the system.

SYSTEM NAME AND NUMBER:

BGFRS–23, ''FRB—Freedom of Information Act and Privacy Act Case Automation System.''

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

The Board maintains the records at the Board's central office, located at: Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551 and AINS, 806 W Diamond Ave, Gaithersburg, MD 20878.

SYSTEM MANAGER(S):

Candace Ambrose, Manager, Information Disclosure Section, Office of the Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551, 202–452–2407, or *candace.ambrose@frb.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Freedom of Information Act (5 U.S.C. 552), the Privacy Act of 1974 (5 U.S.C. 552a), and 12 CFR 261 and 261a.

PURPOSE(S) OF THE SYSTEM:

The records are collected and maintained in connection with the execution of Freedom of Information Act and Privacy Act responsibilities including the processing of FOIA and Privacy Act requests.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individual requesters who submit requests and administrative appeals pursuant to the provisions of the FOIA or Privacy Act; individual requesters whose FOIA or Privacy Act requests, appeals, or other records, have been referred to Board staff by other agencies; attorneys or other persons who are authorized to represent individuals submitting requests and appeals; and individuals who are the subject of FOIA requests or appeals.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system contain contact information on requesters and the attorneys/representatives of the requestors, including names, organizations, affiliations, addresses, email addresses, facsimile numbers, and telephone numbers. Privacy Act requests may include citizenship status. Records may also include the date the request was made, a description of the information requested, the staff assigned to process the request or appeal, the user name and password (for online requesters), financial information, fee information, employment records, medical records, legal documents (*e.g.,* enforcement records), investigatory documents, education records, documents that contain information about individuals that are required to fulfill the request, and communications (*e.g.,* emails and letters) to and from the requester, and documents that are responsive to the FOIA or Privacy Act request. The system may also include voluntarily submitted information, which staff have not requested, including but not limited to an individual's social security number and bank account or mortgage loan numbers. Board staff compile statistical and administrative data on the requests processed for reporting purposes, including annual FOIA reports to the Department of Justice, submitted in accordance with 5 U.S.C. 552(e).

RECORD SOURCE CATEGORIES:

Information is provided by the individual making the request or their representative, or by agencies referring requests for access to records that originated from the Board (including those maintained for the FOMC), and

staff engaged in processing or making determinations on the requests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

General routine uses C, D, G, I, and J apply to this system. These general routine uses are located at *https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf* and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). In addition, records may also be disclosed to:

1. A federal or state government agency, foreign government, institution, firm, or organization having a substantial interest in the determination of the request or for the purpose of consulting with that entity as to the propriety of access to the record in order to complete the processing of the request;

2. The National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures and compliance with the FOIA and to facilitate OGIS' offering of mediation services to resolve disputes between persons making FOIA requests and administrative agencies; and

3. The news media and the public, unless it is determined that release of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are stored on a secure server.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records can be retrieved by the name of the requester, tracking number assigned to the request, subject matter of the request, or any other field of information that is collected.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

The Board retains the records for the designated retention period, which ranges from six years after final agency action or three years after final adjudication by the courts, whichever is later, but longer retention is authorized if required for business use. Requests submitted in paper form are scanned as electronic records and the paper copies of the request are disposed in accordance with applicable procedures.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

The system has the ability to track individual user actions within the system. The audit and accountability controls are based on NIST and Board standards, which are based on applicable laws and regulations. The controls assist in detecting security violations and performance or other issues in the system. Access to the system is restricted to authorized users within the Board who require access for official business purposes. Users are classified into different roles and common access and usage rights are established for each role. User roles are used to delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to determine whether users still require access, have the appropriate role, and whether there have been any unauthorized changes.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) Contain a statement that it is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

Current or former Board employees may make a request for access by contacting the Board office that maintains the record. The Board handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records. You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington DC 20551.

You may also submit your Privacy Act request electronically through the Board's FOIA ''Electronic Request Form'' located here: *https://www.federalreserve.gov/secure/forms/efoiaform.aspx.*

CONTESTING RECORD PROCEDURES:

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a ''Privacy Act Amendment Request.'' You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) Provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

NOTIFICATION PROCEDURES:

Same as ''Access procedures'' above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

No exemptions are claimed for this system.

HISTORY:

This SORN was previously published in the **Federal Register** at 84 FR 71421 (December 27, 2019) and 73 FR 24984 at 25002 (May 6, 2008). The SORN was also amended to incorporate two new routine uses required by OMB at 83 FR 43872 (August 28, 2018).

Board of Governors of the Federal Reserve System.

Ann Misback,

Secretary of the Board.

[FR Doc. 2020–27990 Filed 12–18–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0200; Docket No. 2020–0053; Sequence No. 19]

Submission for OMB Review; Protecting Life in Global Health Assistance

AGENCY: Department of Defense (DOD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a new information collection requirement regarding documents, records, reports, and processes associated with determining compliance with FAR part 25, Protecting Life in Global Health Assistance.

DATES: Submit comments on or before January 20, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

Additionally submit a copy to GSA through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0200, Protecting Life in Global Health Assistance. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Email *FARPolicy@gsa.gov* or call 202–969–4075.

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s): 9000–0200, Protecting Life in Global Health.

B. Needs and Uses

The Secretary of State approved on May 9, 2017, a plan to implement the manner in which U.S. Government Departments and Agencies will apply the provisions of the ''Mexico City Policy,'' which was reinstated in the January 23, 2017 Presidential Memorandum, to foreign nongovernmental organizations (NGOs) that receive U.S. funding for global health assistance; this included the extension of the policy to Federal contracts. This clearance covers the information contractors must keep and make available to the Government to comply with the requirements of FAR clause 52.225–XX.

a. 52.225–XX(c)(2)(i) requires foreign prime contractors to allow authorized Government representatives to inspect documents and materials maintained or prepared by the Contractor in the usual course of its operations that describe the health activities implemented by the Contractor.

b. 52.225–XX(j)(1)(ii)(A) requires foreign subcontractors to allow authorized Government representatives to inspect documents and materials maintained or prepared by the subcontractor in the usual course of its operations that describe the health activities of the subcontractor.

c. 52.225–XX(e) requires the Contractor to provide the Contracting Officer a request for consent to subcontract if the contract includes the clause at FAR 52.244–2, Subcontracts.

d. 52.225–XX(g)(2) requires the Contractor to provide the Contracting Officer the results of a subcontractor review when the Government has reason to believe that a foreign subcontractor may have violated the requirements of this clause.

e. 52.225–XX(j)(2) and (j)(3) requires the Contractor to review the foreign subcontractor's health program to determine if a violation has occurred, and to consult with the Contracting Officer prior to terminating the subcontract or determining other corrective action is warranted.

C. Annual Burden

Respondents: 253.
Total Annual Responses: 1,089.
Total Burden Hours: 38,992.

D. Public Comment

A 60-day proposed rule was published within the proposed FAR rule (2018–002, Protecting Life in Global Health) in the **Federal Register** at 85 FR 56549, on September 14, 2020. Some comments regarding the Paperwork Reduction Burden were received; however, it did not change the estimate of the burden.

Comment: The proposed rule provided an estimate of the public reporting burden for required information collection of nearly 39,000 total response burden hours. Please provide the assumptions and methodology used in calculating this estimate.

Response: Requesters may obtain a copy of the supporting statement from GSA.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0200, Protecting Life in Global Health.

William F. Clark,

Director,Office of Governmentwide Acquisition Policy,Office of Acquisition Policy,Office of Governmentwide Policy.

[FR Doc. 2020–28152 Filed 12–18–20; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-21–21AC; Docket No. CDC–2020–0110]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled The GAIN (Greater Access and Impact with NAT) Study: Improving HIV Diagnosis, Linkage to Care, and Prevention Services with HIV Point-of-Care Nucleic Acid Tests (NATs). GAIN is an implementation study to compare a point-of-care nucleic acid HIV test (HIV RNA POC NAT) to standard lab-based HIV testing.

DATES: CDC must receive written comments on or before February 19, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0110 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for

Disease Control and Prevention, 1600 Clifton Road, NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road, NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7118; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

5. Assess information collection costs.

Proposed Project

The GAIN (Greater Access and Impact with NAT) Study: Improving HIV Diagnosis, Linkage to Care, and Prevention Services with HIV Point-of-Care Nucleic Acid Tests (NATs)—NEW—National Center for HIV/AIDS, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Current rapid point-of-care (POC) HIV testing technologies do not reliably detect the earliest HIV infections and lab-based testing can introduce delays while patients wait for test results. During this time, patients can drop out of care and remain at high-risk to acquire HIV. Direct molecular detection of HIV through nucleic acid tests (NATs) can identify early HIV infections, which have high potential for transmission. NATs that are used at the point-of-care (POC NAT) can provide results in 60 to 90 minutes. Obtaining timely molecular test results from a POC NAT in clinics or community settings can expand prevention as well as HIV treatment services, improve our reach into disproportionately affected populations, and provide opportunities to approach the goal of no new HIV infections. The purpose of this research is to develop feasible and effective models for using HIV POC NATs to: (1) Improve PrEP initiation, and duration of PrEP use, among persons at high-risk for acquiring HIV infection; and (2) reduce the time between testing in community-based and clinical-based settings and linkage to HIV care, ART initiation, and viral suppression.

GAIN is an implementation study to compare a point-of-care nucleic acid HIV test (HIV RNA POC NAT) to standard lab-based HIV testing. Study activities include: 1. Retrospective baseline data collection from clinical site electronic medical records. This will establish baseline PrEP and HIV care metrics for comparison after study implementation; 2. A longitudinal, prospective study of HIV-negative patients seeking HIV testing and/or PrEP services; 3. A longitudinal, prospective study of HIV-positive patients seeking STI testing; 4. An RCT of POC NAT or Standard of Care for HIV-positive patients; 5. A survey, interviews, and focus groups examining POC NAT acceptability among HIV-negative and HIV-positive patients; 6. A cross-sectional comparison of several point-of-care NATs among HIV-positive patients; 7. Acceptability/feasibility assessment among clinical and community providers and costing analyses. These data will be analyzed and disseminated to describe the real-world performance and clinical effects of HIV RNA POC NAT testing technology. This study will develop functional models to integrate HIV RNA POC NAT testing technology into HIV prevention and treatment services. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Participants in prospective study of HIV-negative patients seeking HIV testing and/or PrEP services.	Consent form	1150	1	30/60	575
	HIPPA form	1150	1	10/60	192
	Release of information form.	1150	1	10/60	192
	Study visit survey	1150	1	15/60	288
Participants in prospective study of HIV-positive patients seeking STI testing.	Consent form	125	1	30/60	63
	HIPPA form	125	1	10/60	21
	Release of information form.	125	1	10/60	21
	Study visit survey	125	1	15/60	31
Participants in RCT of POC NAT or Standard of Care for HIV-positive patients.	Consent form	250	1	30/60	125
	HIPPA form	250	1	10/60	42

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
	Release of information form.	250	1	10/60	42
	Study visit survey	250	1	15/60	63
Participants in survey group examining POC NAT acceptability.	POC NAT acceptability survey.	87	1	20/60	29
Participants in cross-sectional comparison of several point-of-care NATs.	Consent	250	1	30/60	125
	Release of information form.	250	1	10/60	42
	Study visit survey	250	1	15/60	63
Acceptability/feasibility assessment among clinical and community providers.	POC NAT acceptability survey, focus group, or interview.	25	1	1	25
Total					1,667

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–28113 Filed 12–18–20; 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); Correction

Notice is hereby given of a change in the meeting of the Advisory Committee on Immunization Practices (ACIP); December 11, 2020, 12:00 p.m.–5:00 p.m., EST; and December 13, 2020, 12:00 p.m.–4:00 p.m., EST (times subject to change, see the ACIP website for any updates: *http://www.cdc.gov/vaccines/acip/index.html*) which was published in the **Federal Register** on December 9, 2020, Volume 85, Number 237, pages 79814–79815.

The meeting dates and times should read as follows:

DATES:

The meeting will be held on December 11, 2020 from 12:00 p.m. to 5:00 p.m., EST and December 12, 2020 from 11:00 a.m. to 3:00 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.

The meeting is open to the public.

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.*

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. 2020–28091 Filed 12–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–21–20OJ]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled ''National YRBS Test-Retest Reliability Study'' to the Office of Management and Budget (OMB) for review and approval. CDC previously published a ''Proposed Data Collection Submitted for Public Comment and Recommendations'' notice on June 2, 2020 to obtain comments from the public and affected agencies. CDC received no comments to the 60 day **Federal Register** Notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) Minimize the burden of the collection of information on those who are to respond, including, through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. Comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Direct written comments and/or suggestions regarding

the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

The National YRBS Test-Retest Reliability Study—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The purpose of this request is to obtain OMB approval to conduct the National YRBS Test-Retest Reliability Study to establish the reliability of the National Youth Risk Behavior Survey (''YRBS'') questionnaire.

The YRBS assesses priority health risk behaviors related to the major preventable causes of mortality, morbidity, and social problems among both youth and young adults in the United States. Data on health risk behaviors of adolescents are the focus of approximately 65 national health objectives in Healthy People 2030, an initiative of the U.S. Department of Health and Human Services (HHS). The YRBS provides data to measure 13 of the proposed health objectives and one of the Leading Health Indicators currently under public comment to establish Healthy People 2030 objectives. In addition, the YRBS can identify racial and ethnic disparities in health risk behaviors. No other national source of data measures as many of the Healthy People 2030 objectives addressing adolescent health risk behaviors as the YRBS. The data also will have significant implications for policy and program development for school health programs nationwide. CDC seeks a one-year approval to conduct the National YRBS Test-Retest Reliability Study.

Between September and December of 2021, a sample of 2,000 students from 20 regular public secondary schools in the U.S. containing at least one of grades 9–12 will be selected in no more than 20 districts. This sample is expected to yield at least 1,000 participating students who completed both a Time 1 and Time 2 YRBS questionnaire. The table below reports the number of respondents annualized over the one-year project period. There are no costs to respondents except their time. The total estimated annualized burden hours are 1,540.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
District Administrators	District recruitment script	20	1	30/60
School Principals	School recruitment script	20	1	30/60
Classroom Teachers	Consent form checklist	80	1	15/60
Students	YRBS Questionnaire	1,000	2	45/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–28114 Filed 12–18–20; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Follow-up Study of Coaching Practices in Early Care and Education Settings (OMB #0970–0515)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: This is a primary data collection request for the Follow-up Study of Coaching Practices in Early Care and Education Settings (3), a follow-up to the previously approved Study of Coaching Practices in Early Care and Education Settings (SCOPE) survey (OMB #0970–0515). The study aims to examine, using surveys and qualitative interviews, the practice and processes of coaching and professional development in supporting early care and education (ECE) settings in their provision of care for preschool children and their families as COVID–19 has progressed. The study will focus on both centers and family child care (FCC) homes that serve low-income children, with a primary target of settings that serve children supported by Child Care and Development Fund subsidies or a Head Start grant.

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, the Administration for Children and Families 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 *OPREinfocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation, 330 C Street SW, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION: *Description:* Follow-up SCOPE will examine the practice of coaching and professional development more broadly provided in support of centers and FCC homes. The study will collect information on the following: How coaching and professional development are supporting centers and FCC homes; the perceived value and role of coaching, professional development, and quality improvement; the features of coaching and how they are delivered; and the role(s) of coaches and how they have been supported. The study will also examine the degree to which coaching has been sustained and/or changed compared to before COVID–19. In particular, there will be a focus on understanding the use of remote versus in-person strategies for coaching and professional development. This study aims to explore the implementation of coaching and professional development in ECE settings as COVID–19 has progressed. The study will not allow for statistical generalization to different sites or service populations.

Survey and interview questions will focus on the current status of these activities at the time of the data

collection, changes compared to before COVID–19 began, and what has been challenging or worked well. The study will use surveys and interviews with center directors, FCC providers, and coaches. The sample frame will be comprised of respondents to the 2019 survey.

Respondents: ECE center directors, coaches, and FCC providers who responded to 2019 SCOPE surveys.

Annual Burden Estimates

Data collection will be completed within a 1-year period.

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average Burden per response (in hours)	Total/Annual burden (in hours)
Coach Survey (Instrument 1)	100	1	.33	33
Center Director Survey (Instrument 2)	66	1	.33	22
FCC Provider Survey (Instrument 3)	38	1	.33	13
Coach Interview (Instrument 4)	12	1	.75	9
Center Director Interview (Instrument 5)	24	1	.75	18
FCC Provider Interview (Instrument 6): FCC providers	12	1	.75	9

Estimated Total Annual Burden Hours: 104.

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. 9858(a)(5), 42 U.S.C. 9835, and 42 U.S.C. 9844.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–28043 Filed 12–18–20; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0161]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Export of Food and Drug Administration-Regulated Products: Export Certificates

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by January 20, 2021.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0498. Also include the FDA docket number found in brackets in the heading of this document.

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, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Export of Food and Drug Administration-Regulated Products: Export Certificates

OMB Control Number 0910–0498—Extension

Sections 801(e) and 802 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 381(e) and 382) pertain to the export of FDA-regulated products and are intended to ease restrictions on exportation. The provisions also require the Agency to issue written export certifications within 20 days of any request. In January 2011, section 801(e)(4)(A) was amended by the FDA Food Safety Modernization Act (Pub. L. 111–353) to provide authorization for export certification for food and animal feed, as well as certain unapproved products. To offset Agency resource expenditures for processing certifications requests, the statute provides that FDA may charge firms a fee not to exceed $175.

There are four FDA forms (Form FDA 3613, 3613a, 3613b, and 3613c) related to exporting FDA-regulated products. A description of each form is provided below. To obtain a fillable PDF file of each form, visit *https://www.fda.gov/vaccines-blood-biologics/exporting-cber-regulated-products/fda-forms-certificates-exporting.* To learn more about how to complete these forms, visit *https://www.fda.gov/vaccines-blood-biologics/exporting-cber-regulated-products/how-complete-fda-export-certificate-forms.*

TABLE 1—CERTIFICATES AND USES

Type of certificate	Use
''Supplementary Information Certificate to Foreign Government Requests''.	For the export of products legally marketed in the United States.
''Exporter's Certification Statement Certificate to Foreign Government''.	
''Exporter's Certification Statement Certificate to Foreign Government (For Human Tissue Intended for Transplantation)''..	
''Supplementary Information Certificate of Exportability Requests''	For the export of products not approved for marketing in the United States (unapproved products) that meet the requirements of sections 801(e) or 802 of the FD&C Act.
Exporter's Certification Statement Certificate of Exportability''.	
''Supplementary Information Certificate of a Pharmaceutical Product'' ...	Conforms to the format established by the World Health Organization and is intended for use by the importing country when the product in question is under consideration for a product license that will authorize its importation and sale or for renewal, extension, amending, or reviewing a license.
''Exporter's Certification Statement Certificate of a Pharmaceutical Product''.	
''Supplementary Information Non-Clinical Research Use Only Certificate''.	For the export of a non-clinical research use only product, material, or component that is not intended for human use and which may be marketed in, and legally exported from the United States under the FD&C Act.
''Exporter's Certification Statement (Non-Clinical Research Use Only)''	

Appropriate centers within FDA review product information submitted by firms in support of the firms' certificate requests. We rely on respondents to certify their compliance with all applicable requirements of the FD&C Act both at the time the certification request is submitted to FDA and at the time the certification is submitted to the respective foreign government. Information regarding FDA's Export Certificates may be found on our website at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/fda-export-certificates.*

On September 16, 2020, we submitted an information collection request to the Office of Management and Budget (OMB) to revise certain data elements as may be applicable under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). Because Section 3856 of the CARES Act contained immediately effective provisions obligating FDA to review and process certification requests, we requested emergency processing by OMB under 5 CFR 1320.13 for the respective information collection. Our information collection request was granted by OMB on September 29, 2020. Therefore, in accordance with 5 CFR 1320.8(d)(1), we invite comment on the burden we attribute to the information collection, which we estimate as follows:

TABLE 2—ESTIMATED ANNUAL REPORTING BURDEN[1]

FDA center	Number of Respondents	Number of Responses per Respondent	Total Anual responses	Average burden per response	Total hours
Center for Biologics Evaluation and Research	2,651	1	2,651	1	2,651
Center for Devices and Radiological Health	11,175	1	11,175	2	22,350
Center for Drug Evaluation and Research	3,680	1	3,680	1	3,680
Center for Veterinary Medicine	1,925	1	1,925	1	1,925
Total	.....	.....	.....	.....	30,606

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on our current evaluation of the information collection, we have made no adjustments since our last request for OMB review and approval.

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28064 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2217]

Agency Information Collection Activities; Proposed Collection; Comment Request; New Animal Drugs for Investigational Use

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 reporting and recordkeeping requirements of our regulations concerning new animal drugs for investigational use.

DATES: Submit either electronic or written comments on the collection of information by February 19, 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 19, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 19, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–N–2217 for ''New Animal Drugs for Investigational Use.'' 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: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@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.

New Animal Drugs for Investigational Use—21 CFR Part 511

OMB Control Number 0910–0117—Extension

FDA has the authority under the Federal Food, Drug, and Cosmetic Act (FD&C Act) to approve new animal drugs. A new animal drug application (NADA) cannot be approved until, among other things, the new animal drug has been demonstrated to be safe and effective for its intended use(s). In order to properly test a new animal drug for an intended use, appropriate scientific investigations must be conducted. Under specific circumstances, section 512(j) of the FD&C Act (21 U.S.C. 360b(j)) permits the use of an investigational new animal drug to generate data to support a NADA approval. Section 512(j) of the FD&C Act authorizes us to issue regulations relating to the investigational use of new animal drugs.

Our regulations in part 511 (21 CFR part 511) set forth the conditions for investigational use of new animal drugs and require reporting and recordkeeping. The information collected is necessary to protect the

public health. We use the information to determine that investigational animal drugs are distributed only to qualified investigators, adequate drug accountability records are maintained, and edible food products from treated food-producing animals are safe for human consumption. We also use the information collected to monitor the validity of the studies submitted to us to support new animal drug approval.

Reporting: Our regulations require that certain information be submitted to us in a ''Notice of Claimed Investigational Exemption for a New Animal Drug'' (NCIE) to qualify for the exemption and to control shipment of the new animal drug and prevent potential abuse. The NCIE must contain, among other things, the following specific information: (1) Identity of the new animal drug, (2) labeling, (3) statement of compliance of any non-clinical laboratory studies with good laboratory practices, (4) name and address of each clinical investigator, (5) the approximate number of animals to be treated or amount of new animal drug(s) to be shipped, and (6) information regarding the use of edible tissues from investigational animals (§ 511.1(b)(4) (21 CFR 511.1(b)(4))). If the new animal drug is to be used in food-producing animals (*e.g.,* cattle, swine, chickens, fish, etc.), certain data must be submitted to us to obtain authorization for the use of edible food products from treated food-producing animals (§ 511.1(b)(5)). We require sponsors upon request to submit information with respect to the investigation to determine whether there are grounds for terminating the exemption (§ 511.1(b)(6)). We require sponsors to report findings that may suggest significant hazards pertinent to the safety of the new animal drug (§ 511.1(b)(8)(ii)). We also require reporting by importers of investigational new animal drugs for clinical investigational use in animals (§ 511.1(b)(9)). The information provided by the sponsor in the NCIE is needed to help ensure that the proposed investigational use of the new animal drug is safe and that any edible food will not be distributed without proper authorization from FDA. Information contained in an NCIE submission is monitored under our Bioresearch Monitoring Program. This program permits us to monitor the validity of the studies and to help ensure the proper use of the drugs is maintained by the investigators.

Recordkeeping: If the new animal drug is only for tests in vitro or in laboratory research animals, the person distributing the new animal drug must maintain records showing the name and post office address of the expert or expert organization to whom it is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery (§ 511.1(a)(3) and (b)(3)). We require complete records of the investigation, including records of the receipt and disposition of each shipment or delivery of the investigational new animal drug (§ 511.1(b)(7)). We also require records of all reports received by a sponsor from investigators to be retained for 2 years after the termination of an investigational exemption or approval of a new animal drug application (§ 511.1(b)(8)(i)).

Description of Respondents: Respondents to this collection of information are persons who use new animal drugs for investigational purposes. Investigational new animal drugs are used primarily by drug industry firms, academic institutions, and the government. Investigators may include individuals from these entities, as well as research firms and members of the medical professions.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section/activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
511.1(b)(4); submission of NCIE	279	5.94	1,657	1	1,657
511.1(b)(5); submission of data to obtain authorization for the use of edible food products	279	0.10	28	8	224
511.1(b)(6); submission of any additional information upon request of FDA	279	.001	0.28	1	0.28
511.1(b)(8)(ii); reporting of findings that may suggest significant hazards pertinent to the safety of the new animal drug	279	0.05	14	2	28
511.1(b)(9); reporting by importers of investigational new animal drugs for clinical investigational use in animals	279	0.05	14	8	112
Total			1,713		2,021

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section/activity	No. of recordkeepers	No. of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
511.1(a)(3); maintain records showing the name and post office address of the expert or expert organization to whom the new animal drug is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery	279	0.99	276	1	276
511.1(b)(3); maintain records showing the name and post office address of the expert or expert organization to whom the new animal drug or feed containing same is shipped and the date, quantity, and batch or code mark of each shipment and delivery for a period of 2 years after such shipment or delivery	279	5.94	1,657	1	1,657

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]—Continued

21 CFR section/activity	No. of record-keepers	No. of records per record-keeper	Total annual records	Average burden per recordkeeping	Total hours
511.1(b)(7); maintain records of the investigation, including records of the receipt and disposition of each shipment or delivery of the investigational new animal drug	279	5.94	1,657	3.5	5,800
511.1(b)(8)(i); maintain records of all reports received by a sponsor from investigators	279	5.94	1,657	3.5	5,800
Total			5,247		13,533

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimate of the time required for reporting requirements, record preparation, and maintenance for this collection of information is based on our informal communication with industry. Based on the number of sponsors subject to animal drug user fees, we estimate that there are 279 respondents. We use this estimate consistently throughout the table and calculate the ''number of responses per respondent'' by dividing the total annual responses by number of respondents. We note an apparent difference in the estimated number of respondents from the previous renewal issued in 2018. There was an error in calculating the number of sponsors subject to animal drug user fees in the 2018 renewal. When calculating the number of recordkeepers, we inadvertently used the number of sponsors that paid user fees (*i.e.,* those that did not qualify for user fee waivers) as opposed to the total number of sponsors subject to animal drug user fees. Both fee-paying and non-fee-paying sponsors are respondents with respect to this information collection.

Additional information needed to make a final calculation of the total burden hours (*i.e.,* the number of respondents, the number of recordkeepers, the number of NCIEs received, etc.) is derived from our records. There is a small increase in the total burden hours which we attribute to an increase in the number of annual responses and records.

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28068 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–P–1650]

Determination That DOBUTREX (Dobutamine Hydrochloride), Equivalent 12.5 Milligram Base/Milliliter, Was Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) has determined that DOBUTREX (dobutamine hydrochloride), equivalent (eq) 12.5 milligram (mg) base/milliliter (mL), was not withdrawn from sale for reasons of safety or effectiveness. This determination means that FDA will not begin procedures to withdraw approval of abbreviated new drug applications (ANDAs) that refer to this drug product, and it will allow FDA to continue to approve ANDAs that refer to the product as long as they meet relevant legal and regulatory requirements.

FOR FURTHER INFORMATION CONTACT: Jessica Tierney, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6213, Silver Spring, MD 20993–0002, 301–796–9120, *Jessica.Tierney@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Pub. L. 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA).

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is known generally as the ''Orange Book.'' Under FDA regulations, drugs are removed from the list if the Agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

A person may petition the Agency to determine, or the Agency may determine on its own initiative, whether a listed drug was withdrawn from sale for reasons of safety or effectiveness. This determination may be made at any time after the drug has been withdrawn from sale, but must be made prior to approving an ANDA that refers to the listed drug (§ 314.161 (21 CFR 314.161)). FDA may not approve an ANDA that does not refer to a listed drug.

DOBUTREX (dobutamine hydrochloride), eq 12.5 mg base/mL, is the subject of NDA 017820, held by Eli Lilly and Co., and initially approved on July 18, 1978. DOBUTREX is indicated for when parenteral therapy is necessary for inotropic support in the short-term treatment of adults with cardiac decompensation due to depressed contractility resulting either from organic heart disease or from cardiac surgical procedures. DOBUTREX (dobutamine hydrochloride), eq 12.5 mg base/mL, is currently listed in the ''Discontinued Drug Product List'' section of the Orange Book.

Cardinal Health submitted a citizen petition dated July 9, 2020 (Docket No. FDA–2020–P–1650), under 21 CFR 10.30, requesting that the Agency determine whether DOBUTREX

(dobutamine hydrochloride), eq 12.5 mg base/mL, was withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing Agency records and based on the information we have at this time, FDA has determined under § 314.161 that DOBUTREX (dobutamine hydrochloride), eq 12.5 mg base/mL, was not withdrawn for reasons of safety or effectiveness. The petitioner has identified no data or other information suggesting that this drug product was withdrawn for reasons of safety or effectiveness. We have carefully reviewed our files for records concerning the withdrawal of DOBUTREX (dobutamine hydrochloride), eq 12.5 mg base/mL, from sale. We have also independently evaluated relevant literature and data for possible postmarketing adverse events. We have reviewed the available evidence and determined that this drug product was not withdrawn from sale for reasons of safety or effectiveness.

Accordingly, the Agency will continue to list DOBUTREX (dobutamine hydrochloride), eq 12.5 mg base/mL, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. FDA will not begin procedures to withdraw approval of approved ANDAs that refer to this drug product. Additional ANDAs for this drug product may also be approved by the Agency as long as they meet all other legal and regulatory requirements for the approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the Agency will advise ANDA applicants to submit such labeling.

Dated: December 16, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28080 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–0417]

Request for Nominations of Voting Members on a Public Advisory Committee; National Mammography Quality Assurance Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting nominations for voting members to serve on the National Mammography Quality Assurance Advisory Committee in the Center for Devices and Radiological Health. Nominations will be accepted for upcoming vacancies effective February 1, 2021, with this notice. FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

DATES: Nominations received on or before February 19, 2021, will be given first consideration for membership on the National Mammography Quality Assurance Advisory Committee. Nominations received after February 19, 2021, will be considered for nomination to the committee as later vacancies occur.

ADDRESSES: All nominations for membership should be submitted electronically by logging into the FDA Advisory Nomination Portal at *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm* or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002. Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: *Regarding all nomination questions for membership:* Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993, 301–796–0400, *Aden.Asefa@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting members to fill upcoming vacancies on the National Mammography Quality Assurance Advisory Committee.

I. General Description of the Committee Duties

The National Mammography Quality Assurance Advisory Committee advises the Commissioner of Food and Drugs (the Commissioner) or designee on: (1) Developing appropriate quality standards and regulations for mammography facilities; (2) developing appropriate standards and regulations for bodies accrediting mammography facilities under this program; (3) developing regulations with respect to sanctions; (4) developing procedures for monitoring compliance with standards; (5) establishing a mechanism to investigate consumer complaints; (6) reporting new developments concerning breast imaging that should be considered in the oversight of mammography facilities; (7) determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; (8) determining whether there will exist a sufficient number of medical physicists after October 1, 1999; and (9) determining the costs and benefits of compliance with these requirements.

II. Criteria for Voting Members

The committee consists of a core of 15 members, including the Chair. Members and the Chair are selected by the Commissioner or designee from among physicians, practitioners, and other health professionals, whose clinical practice, research specialization, or professional expertise includes a significant focus on mammography. Almost all non-Federal members of this committee serve as Special Government Employees. Members will be invited to serve for terms of up to 4 years.

III. Nomination Procedures

Any interested person may nominate one or more qualified persons for membership on the advisory committee. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, including current business address, telephone number, and email address if available, and a signed copy of the Acknowledgement and Consent form available at the FDA Advisory Nomination Portal (see **ADDRESSES**). Nominations must specify the advisory committee for which the nominee is recommended. Nominations must also acknowledge that the

nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflict of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28054 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–1866]

Wockhardt Ltd., et al.; Withdrawal of Approval of Nine Abbreviated New Drug Applications; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice entitled ''Wockhardt Ltd., et al.; Withdrawal of Approval of Nine Abbreviated New Drug Applications'' that appeared in the **Federal Register** on October 9, 2020. The document announced the withdrawal of approval (as of November 9, 2020) of nine abbreviated new drug applications (ANDAs) from multiple applicants. The document indicated that FDA was withdrawing approval of the following ANDA after receiving a withdrawal request from VistaPharm, Inc., 7265 Ulmerton Rd., Largo, FL 33771: ANDA 077788, Albuterol Sulfate Syrup, Equivalent to 2 milligrams base/5 milliliters. Before FDA withdrew the approval of this ANDA, VistaPharm, Inc., informed FDA that it did not want the approval of the ANDA withdrawn. Because VistaPharm, Inc., timely requested that approval of this ANDA not be withdrawn, the approval of ANDA 077788 is still in effect.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1676, Silver Spring, MD 20993–0002, 240–402–6980, *Martha.Nguyen@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 9, 2020 (85 FR 64150), in FR Doc. 2020–22403, the following correction is made:

On page 64150, in the table, the entry for ANDA 077788 is removed.

Dated: December 16, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28081 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0001]

Scientific and Ethical Considerations for the Inclusion of Pregnant Women in Clinical Trials; Public Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing a public meeting that will be convened by Duke University's Robert J. Margolis Center for Health Policy and supported by a cooperative agreement with FDA. The meeting, entitled ''Scientific and Ethical Considerations for the Inclusion of Pregnant Women in Clinical Trials,'' is intended to gather industry, patient, clinician, researcher, institutional review board, ethicist, professional society and other stakeholder input on the scientific and ethical issues that surround the inclusion of pregnant women in clinical trials for drug development.

DATES: The public meeting will be held on February 2, 2021, from 12 p.m. to 4 p.m. Eastern Time and February 3, 2021, from 12 p.m. to 3 p.m. Eastern Time. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public meeting will be a Zoom virtual meeting.

FOR FURTHER INFORMATION CONTACT: Jasmine Smith, Office of New Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, at *ONDPublicMTGSupport@fda.hhs.gov* or 301–796–0621; or Catherine Sewell, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5360, Silver Spring, MD 20993–0002, Fax: 301–796–9897.

SUPPLEMENTARY INFORMATION:

I. Background

FDA endorses an informed and balanced approach to gathering data informing the safe and effective use of drugs and biological products in pregnancy through judicious inclusion of pregnant women in clinical trials and careful attention to potential fetal risk. Input from this meeting will help provide information on the development of therapies for pregnancy-specific conditions and for general medical conditions that occur in women of childbearing age and who require treatment during pregnancy. This meeting supports the objectives of The Task Force on Research Specific to Pregnant Women and Lactating Women, which was established by section 2041 of the 21st Century Cures Act (Pub. L. 114–255), to provide advice and guidance on activities related to identifying and addressing gaps in knowledge and research on safe and effective therapies for pregnant women and lactating women, including the development of such therapies and the collaboration on and coordination of such activities.[1] Input from this meeting may also help further inform the finalization of FDA's draft guidance entitled ''Pregnant Women: Scientific and Ethical Considerations for Inclusion in Clinical Trials'' (*https://www.fda.gov/media/112195/download,* also see 83 FR 15161 (April 9, 2018)).

II. Topics for Discussion at the Public Meeting

The meeting will allow participants (including industry, clinicians, patients, researchers, institutional review boards, ethicists, professional societies and other stakeholders) to provide input on key topics, including:

- Key areas of unmet needs for therapeutic development or clinical data in obstetrics
- The regulatory, scientific, and ethical considerations and challenges in the enrollment of pregnant women in clinical research

For more information on the meeting topics and discussion questions, visit *https://healthpolicy.duke.edu/events/scientific-and-ethical-considerations-inclusion-pregnant-women-clinical-trials.* FDA will publish a discussion guide outlining background information on the topic areas to this website approximately 2 weeks before the meeting date. FDA will also post the agenda and other meeting materials to this website approximately 5 business days before the meeting.

[1] *https://www.nichd.nih.gov/sites/default/files/2018-09/PRGLAC_Report.pdf.*

The format of the public meeting will consist of a series of presentations, panel discussions, and open discussion.

III. Participating in the Public Meeting

Registration: To register for the public meeting, please visit the following website: *https://healthpolicy.duke.edu/events/scientific-and-ethical-considerations-inclusion-pregnant-women-clinical-trials.* Please provide complete contact information for each attendee, including name, title, affiliation, address, email, and telephone.

Registration is free. Persons interested in attending this public meeting must register. Registrants will receive confirmation once they have been accepted. Registered participants will be sent technical system requirements in advance of the event. We recommend that you review these technical system requirements prior to joining the virtual public meeting. The meeting will be recorded, and the recording will be available after the meeting.

There will be live closed captioning for the event. If you need other special accommodations due to a disability, by January 25, 2021, please contact Jasmine Smith, Office of New Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, at *ONDPublicMTGSupport@fda.hhs.gov* or 301–796–0621; or Catherine Sewell, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 5360, Silver Spring, MD 20993–0002, Fax: 301–796–9897.

FDA has verified the website addresses in this document as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that transcripts of the public meeting will be available by February 8, 2021, at the event page *https://healthpolicy.duke.edu/events/scientific-and-ethical-considerations-inclusion-pregnant-women-clinical-trials.*

Dated: December 14, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28069 Filed 12–18–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Scientific Registry of Transplant Recipients; Information Collection Effort for Potential Donors for Living Organ Donation OMB No. 0906–0034—Extension

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than January 20, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation, OMB No. 0906–0034—Extension.

Abstract: The Scientific Registry of Transplant Recipients (SRTR) is administered under contract with HRSA, a sub agency of HHS. HHS is authorized to establish and maintain mechanisms to evaluate the long-term effects associated with living organ donations (42 U.S.C. 273a) and is required to submit to Congress an annual report on the long-term health effects of living donation (42 U.S.C. 273b). In 2018, the SRTR contractor implemented a pilot living donor registry in which transplant programs registered all potential living organ donors who provide informed consent to participate in the pilot registry. The SRTR's authority to collect information concerning potential living organ donors is set forth in the HHS organ procurement and transplantation network regulation, 42 CFR part 121, requiring organ procurement organizations and transplant hospitals to submit to the SRTR, as appropriate, information regarding ''donors of organs'' and ''other information that the Secretary deems appropriate'' (42 CFR 121.11(b)(2)).

In 2018, an updated version of the data collection instrument was approved. The data collection modifications improve the quality of the data and reduce the administrative burden for respondents.

A 60-day notice published in the **Federal Register** on September 8, 2020, vol. 85, No. 174; pp. 55464–65. There were no public comments.

Need and Proposed Use of the Information: The transplant programs submit health information collected at the time of donation evaluation through a secure web-based data collection tool developed by the contractor. The SRTR contractor maintains contact with registry participants and collects data on long-term health outcomes through surveys. The data collection includes outcomes of evaluation, including reasons for non-donation. The living donor registry is an ongoing effort, and the goal is to continue to collect data on living organ donor transplant programs in the United States over time. Monitoring and reporting of long-term health outcomes of living organ donors post-donation will continue to provide useful information to transplant programs in their future donor selection process and aid potential living organ donors in their decision to pursue living donation.

There were minor revisions to the burden per response as it has decreased from the current amount due to improvements to the efficiency of the processes used by programs for data submission, as well as the tools provided for program use by SRTR.

Likely Respondents: Potential living donors, transplant programs, medical

and scientific organizations, and public organizations.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Average number of responses per respondent	Total number of responses	Average burden per response (in minutes)	Total burden hours
Potential Living Donor Registration form	[a] 16	112	1,792	.27	484
Potential Living Donor Follow-up form	[b] 754	1	754	.50	377
Reasons Did not Donate form (liver or kidney)	[a] 16	106	1,696	.23	390
Total	786		4,242		1,251

[a] Number of respondents is based on the current number of transplant programs and is likely to increase as additional programs decide to participate.
[b] Number of living organ donor candidates submitting follow-up forms in 2019.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2020–28017 Filed 12–18–20; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the National Vaccine Advisory Committee

AGENCY: Office of Infectious Disease and HIV/AIDS Policy, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (HHS) is hereby giving notice that the National Vaccine Advisory Committee (NVAC) will hold a virtual meeting. The meeting will be open to the public and public comment will be heard during the meeting.

DATES: The meeting will be held February 4–5, 2021. The confirmed meeting times and agenda will be posted on the NVAC website at *http://www.hhs.gov/nvpo/nvac/meetings/index.html* as soon as they become available.

ADDRESSES: Instructions regarding attending this meeting will be posted online at: *http://www.hhs.gov/nvpo/nvac/meetings/index.html* at least one week prior to the meeting. Pre-registration is required for those who wish to attend the meeting or participate in public comment. Please register at *http://www.hhs.gov/nvpo/nvac/meetings/index.html.*

FOR FURTHER INFORMATION CONTACT: Ann Aikin, Acting Designated Federal Officer, at the Office of Infectious Disease and HIV/AIDS Policy, U.S. Department of Health and Human Services, Mary E. Switzer Building, Room L618, 330 C Street SW, Washington, DC 20024. Email: *nvac@hhs.gov.* Phone: 202–695–9742.

SUPPLEMENTARY INFORMATION: Pursuant to Section 2101 of the Public Health Service Act (42 U.S.C. 300aa–1), the Secretary of HHS was mandated to establish the National Vaccine Program to achieve optimal prevention of human infectious diseases through immunization and to achieve optimal prevention against adverse reactions to vaccines. The NVAC was established to provide advice and make recommendations to the Director of the National Vaccine Program on matters related to the Program's responsibilities. The Assistant Secretary for Health serves as Director of the National Vaccine Program.

During this NVAC meeting, NVAC will hear presentations on vaccine safety, communication activities for COVID–19 vaccines, and immunization equity. Please note that agenda items are subject to change, as priorities dictate. Information on the final meeting agenda will be posted prior to the meeting on the NVAC website: *http://www.hhs.gov/nvpo/nvac/index.html.*

Members of the public will have the opportunity to provide comment at the NVAC meeting during the public comment period designated on the agenda. Public comments made during the meeting will be limited to three minutes per person to ensure time is allotted for all those wishing to speak. Individuals are also welcome to submit written comments in advance. Written comments should not exceed three pages in length. Individuals submitting comments should email their written comments or their request to provide a comment during the meeting to *nvac@hhs.gov* at least five business days prior to the meeting.

Dated: October 27, 2020.

Ann Aikin,

Acting Designated Federal Official, Office of the Assistant Secretary for Health.

[FR Doc. 2020–28046 Filed 12–18–20; 8:45 am]

BILLING CODE 4150–44–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director Notice of Proposed Reorganization

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Division of Program Coordination, Planning, and Strategic Initiatives (DPCPSI) in the Office of the Director, National Institutes of Health (NIH) is seeking public comment regarding its proposal to transfer the Office of Nutrition Research (ONR) from the National Institute of Diabetes and Digestive and Kidney Diseases to DPCPSI in the Office of the Director, NIH. The program offices in DPCPSI share a common mission of identifying emerging scientific opportunities, rising public health challenges, or scientific knowledge gaps that deserve special emphasis. The proposed reorganization would align this important office with offices having similar trans-NIH functions.

DATES: Any interested person may file written comments by sending an email to *DPCPSIreorgcomments@nih.gov* by December 29, 2020. The statement should include the individual's name, and when applicable, professional affiliation.

ADDRESSES: The following email address has been established for comments on the reorganization: *DPCPSIreorgcomments@nih.gov.*

FOR FURTHER INFORMATION CONTACT: Robin I. Kawazoe, Deputy Director, DPCPSI, *DPCPSIreorgcomments@nih.gov,* 301–402–9852.

SUPPLEMENTARY INFORMATION: Pursuant to the NIH Reform Act of 2006 (42 U.S.C. Sec.281 (d)(4)), DPCPSI will launch public website information at *https://dpcpsi.nih.gov/proposed-reorg-ONR-transfer* to further encourage public discussion of the proposal to reorganize. The public is encouraged to email *DPCPSIreorgcomments@nih.gov* for comments and questions.

Dated: December 16, 2020.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

[FR Doc. 2020–28074 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel NIMH Instrumentation Program (S10) Review.

Date: January 11, 2021.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Nicholas Gaiano, Ph.D., Review Branch Chief, Division of Extramural Activities, National Institute of Mental Health, NIH Neuroscience Center/Room 6150/MSC 9606, 6001 Executive Boulevard, Bethesda, MD 20892–9606, 301–443–2742, *nick.gaiano@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: December 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28098 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; ApoE and Alzheimer's Disease.

Date: January 22, 2021.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Rajasri Roy, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6477, *rajasri.roy@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 15, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28005 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; ZDE1 NB 12 NIDCR New Investigator R03 Applications.

Date: February 12, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, 301–451–2405, *nisan_bhattacharyya@nih.gov.*

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel; NIDCR Clinical Studies SEP.

Date: February 25, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 670, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Yun Mei, MD, Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial, Research National Institutes of Health, 6701 Democracy Boulevard, Suite 670, Bethesda, MD 20892, (301) 827–4639, *yun.mei@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: December 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28097 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel; Institutional Network Applications for Promoting Kidney, Urologic, and Hematologic Research Training (U2C–TL1).

Date: March 9–10, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Video Meeting).

Contact Person: Jason D. Hoffert, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK National Institutes of Health, Room 7343, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 496–9010, *hoffertj@niddk.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 15, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28003 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the President's Cancer Panel.

The meeting will be held as a virtual meeting and open to the public. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting should notify the Contact Person listed below in advance of the meeting. The meeting can be accessed by clicking on the following link: *https://nci.rev.vbrick.com/#/webcasts/presidentscancerpanel.*

Name of Committee: President's Cancer Panel.

Date: February 11, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: Improving Resilience and Equity in Cancer Screening: Innovation to Increase Screening.

Place: National Institutes of Health 31 Center Drive, Building 31, Room 11A48, Rockville, MD 20850 (Virtual Meeting) Access to Meeting: *https://nci.rev.vbrick.com/#/webcasts/presidentscancerpanel*.

Contact Person: Maureen R. Johnson, Ph.D., Executive Secretary, President's Cancer Panel, Special Assistant to the Director, National Cancer Institute, NIH, 31 Center Drive, Room 11A48 MSC 2590, Bethesda, MD 20892, 240–781–3327, *johnsonr@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/pcp/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28100 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be held as a virtual meeting and is open to the public as indicated below. Individuals who plan to view the virtual meeting and need special assistance or other reasonable accommodations to view the meeting, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

A portion of the meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The intramural programs and projects as well as the grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with intramural programs and projects as well as the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: February 4, 2021.

Closed: 11:00 a.m. to 11:30 a.m.

Agenda: Presentation of the AABSC Report.

Closed: 11:30 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Open: 12:30 p.m. to 5:00 p.m.

Agenda: Presentations and other business of the Council.

Place: National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Abraham P. Bautista, Ph.D., Executive Secretary, National Advisory Council, Director, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 6700 B Rockledge Drive, Room 1458, MSC 6902 Bethesda, MD 20892 301–443–9737 *bautista@mail.nih.gov*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.niaaa.nih.gov/AboutNIAAA/AdvisoryCouncil/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: December 15, 2020.

Patricia B. Hansberger,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28099 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Kidney, Urologic and Hematologic Diseases D Subcommittee DDK–D.

Date: March 2–4, 2021.

Time: 5:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Video Meeting).

Contact Person: Jason D. Hoffert, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK National Institutes of Health, Room 7343, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 496–9010, *hoffertj@niddk.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 15, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28004 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Aging Studies Research Infrastructure Development R21/R33.

Date: February 25, 2021.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Carmen Moten, Ph.D., MPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg. 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 402–7703, *cmoten@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Mobilizing Health Systems to Socioeconomic Differences in Aging (PI: Jarrod Dalton).

Date: March 2, 2021.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Carmen Moten, Ph.D., MPH, Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Bldg., 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, (301) 402–7703, *cmoten@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 15, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28002 Filed 12–18–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLHQ310000.L13100000.PP0000; OMB Control No. 1004–0034]

Agency Information Collection Activities; Oil and Gas, or Geothermal Resources: Transfers and Assignments

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the Bureau of Land Management (BLM) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 19, 2021.

ADDRESSES: Send your written comments on this information collection request (ICR) by mail to Darrin King, Information Collection Clearance Officer, U.S. Department of the Interior, Bureau of Land Management, Attention PRA Office, 440 W 200 S #500, Salt Lake City, UT 84101; or by email to *BLM_HQ_PRA_Comments@blm.gov.* Please reference Office of Management and Budget (OMB) Control Number 1004–0034 in the subject line of your comments. Please note that due to COVID–19, the

electronic submission of comments is recommended.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Jennifer Spencer by email at *j35spenc@blm.gov,* or by telephone at 307–775–6261. Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance. You may also view the ICR at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. 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.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: This collection of information enables the BLM to process assignments of record title interest and transfers of operating rights in a lease for oil and gas or geothermal resources. Each assignment or transfer is a contract between private parties but, by law, must be approved by the Secretary. The BLM uses information about assignments and transfers to prevent unlawful extraction of mineral resources, to ensure prompt payment of rentals and royalties for the rights obtained under a Federal lease, and to ensure that leases are not encumbered with agreements that cause the minerals to be uneconomical to produce, resulting in lost revenues to the Federal Government. The information also enables the BLM to ensure the assignee or transferee is in compliance with the bonding requirements, when necessary, before approval of the transfer or assignment.

Title of Collection: Oil and Gas, or Geothermal Resources: Transfers and

Assignments (43 CFR Subparts 3106, 3135, and 3216).

OMB Control Number: 1004–0034.

Form Number: 3000–003; 3000–003a.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Assignors and assignees of record title interest in a lease for oil and gas or geothermal resources; and transferors and transferees of operating rights (sublease) in a lease for oil and gas or geothermal resources.

Total Estimated Number of Annual Respondents: 17,626.

Total Estimated Number of Annual Responses: 17,626.

Estimated Completion Time per Response: 30 minutes.

Total Estimated Number of Annual Burden Hours: 8,814.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Estimated Annual Nonhour Burden Cost: $1,674,470.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Darrin A. King,

Information Collection Clearance Officer.

[FR Doc. 2020–28062 Filed 12–18–20; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

[RR04093000, XXXR4081X3, RX.05940913.FY19400]

Public Meeting of the Glen Canyon Dam Adaptive Management Work Group

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the Bureau of Reclamation (Reclamation) is publishing this notice to announce that a Federal Advisory Committee meeting of the Glen Canyon Dam Adaptive Management Work Group (AMWG) will take place.

DATES: The meeting will be held virtually on Wednesday, February 10, 2021, from 9:30 a.m. to approximately 5:00 p.m. (MST); and Thursday, February 11, 2021, from 9:30 a.m. to approximately 4:00 p.m. (MST).

ADDRESSES: The meeting will be held virtually for Wednesday, February 10 at *https://bor.webex.com/bor/j.php?MTID=m6513447f6eb67d4cb453d7da63567e84,* Meeting Number: 199 831 1809, Password: AMWG1.

The meeting will be held virtually for Thursday, February 11 at *https://bor.webex.com/bor/j.php?MTID=md00e5758d11f9cd0ad3e39d4a5f6709d,* Meeting Number: 199 461 4466, Password: AMWG2.

FOR FURTHER INFORMATION CONTACT: Ms. Lee Traynham, Bureau of Reclamation, telephone (801) 524–3752, email at *ltraynham@usbr.gov.*

SUPPLEMENTARY INFORMATION: The Glen Canyon Dam Adaptive Management Program (GCDAMP) was implemented as a result of the Record of Decision on the Operation of Glen Canyon Dam Final Environmental Impact Statement to comply with consultation requirements of the Grand Canyon Protection Act (Pub. L. 102–575) of 1992. The AMWG makes recommendations to the Secretary of the Interior concerning Glen Canyon Dam operations and other management actions to protect resources downstream of Glen Canyon Dam, consistent with

the Grand Canyon Protection Act. The AMWG meets two to three times a year.

Agenda: The AMWG will meet to receive updates on: (1) Current basin hydrology and water year 2021 operations; (2) non-native fish issues; (3) tribal liaison report; and (4) science results from Grand Canyon Monitoring and Research Center staff. The AMWG will also discuss other administrative and resource issues pertaining to the GCDAMP. To view a copy of the agenda and documents related to the above meeting, please visit Reclamation's website at *https://www.usbr.gov/uc/progact/amp/amwg.html.*

Meeting Accessibility/Special Accommodations: The meeting is open to the public. Individuals requiring special accommodations to access the public meeting should contact Ms. Lee Traynham (see **FOR FURTHER INFORMATION CONTACT**) at least (5) business days prior to the meeting so appropriate arrangements can be made.

Public Disclosure of Comments: Time will be allowed on both days for any individual or organization wishing to make extemporaneous and/or formal oral comments. To allow for full consideration of information by the AMWG members, written notice should be provided to Ms. Lee Traynham (see **FOR FURTHER INFORMATION CONTACT**) prior to the meeting. Depending on the number of persons wishing to speak, and the time available, the time for individual comments may be limited. Any written comments received will be provided to the AMWG members.

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.

Authority: 5 U.S.C. Appendix 2.

Lee Traynham,

Chief, Adaptive Management Work Group, Resources Management Division, Upper Colorado Basin—Interior Region 7.

[FR Doc. 2020–27998 Filed 12–18–20; 8:45 am]

BILLING CODE 4332–90–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1467 (Final)]

Fluid End Blocks From India; Termination of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: On December 11, 2020, the Department of Commerce published notice in the **Federal Register** of a negative final determination of sales at less than fair value in connection with the subject investigation concerning India. Accordingly, the antidumping duty investigation concerning fluid end blocks from India (Investigation No. 731–TA–1467 (Final)) is terminated.

DATES: December 11, 2020.

FOR FURTHER INFORMATION CONTACT: Kristina Lara (202–205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

Authority: This investigation is being terminated under authority of title VII of the Tariff Act of 1930 and pursuant to section 207.40(a) of the Commission's Rules of Practice and Procedure (19 CFR 207.40(a)). This notice is published pursuant to section 201.10 of the Commission's rules (19 CFR 201.10).

By order of the Commission.

Issued: December 16, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–28108 Filed 12–18–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1184]

Certain Shaker Screens for Drilling Fluids, Components Thereof, and Related Marketing Materials; Notice of Request for Submissions on the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that on November 19, 2020, the presiding administrative law judge (''ALJ'') issued an Initial Determination on granting summary determination of Violation of Section 337. The ALJ also issued a Recommended Determination on remedy and bonding should a violation be found in the above-captioned investigation. The Commission is soliciting submissions on public interest issues raised by the recommended relief should the Commission find a violation. This notice is soliciting comments from the public only. Parties are to file public interest submissions.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–5453. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: Section 337 of the Tariff Act of 1930 provides that, if the Commission finds a violation, it shall exclude the articles concerned from the United States:

> unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. 1337(d)(1). A similar provision applies to cease and desist orders. 19 U.S.C. 1337(f)(1).

The Commission is soliciting submissions on public interest issues

raised by the recommended relief should the Commission find a violation, specifically: A Ugeneral exclusion order directed to certain shaker screens for drilling fluids, components thereof, and related marketing materials imported, sold for importation, and/or sold after importation to the United States.

The Commission is interested in further development of the record on the public interest in this investigation. Accordingly, members of the public are invited to file submissions of no more than five (5) pages, inclusive of attachments, concerning the public interest in light of the ALJ's Recommended Determination on Remedy and Bonding issued in this investigation on November 19, 2020. Comments should address whether issuance of the recommended remedial orders in this investigation, should the Commission find a violation, would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the recommended remedial orders are used in the United States

(ii) identify any public health, safety, or welfare concerns in the United States relating to the recommended orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third-party suppliers have the capacity to replace the volume of articles potentially subject to the recommended orders within a commercially reasonable time; and

(v) explain how the recommended orders would impact consumers in the United States.

Written submissions must be filed no later than by close of business on January 15, 2021.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (''Inv. No. 337–TA–1184'') in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

This action is taken under the authority of 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 15, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–28028 Filed 12–18–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed eCollection of eComments Requested; New Information Collection; Licensing Questionnaire—ATF Form 8620.44

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 19, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments regarding the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact: Lakisha Gregory, Chief, Personnel Security Division, either by mail at 99 New York Avenue NE, Washington, DC 20226, by email at *Lakisha.Gregory@atf.gov,* or by telephone at 202–648–9260.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

— Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

— Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

— Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

— Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

1. *Type of Information Collection (*check justification or form 83): New collection.

2. *The Title of the Form/Collection:* Licensing Questionnaire.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): ATF Form 8620.44.*Component:* Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other (if applicable): None.

Abstract: The Licensing Questionnaire—ATF Form 8620.44 will be used to determine if a candidate for Federal or contractor employment at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), or his/her spouse, or minor child, holds a financial interest in the alcohol, tobacco, firearms, or explosives industries.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 2,000 respondents will use the form annually, and it will take each respondent approximately 5 minutes to complete their responses.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 167 hours, which is equal to 2,000 (# of responses) * .0833333 (5 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 16, 2020.

Melody Braswell,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2020–28124 Filed 12–18–20; 8:45 am]

BILLING CODE 4410–14–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On December 15, 2020, the Department of Justice lodged a proposed consent decree with the United States District Court for the Central District of California in the lawsuit entitled *United States* v. *Parker-Hannifin Corp.,* Civil Action No. 2:20–cv–11332.

The United States filed this lawsuit under the Clean Water Act. The United States' complaint seeks injunctive relief and civil penalties for violations of pretreatment standards that govern wastewater discharges to a publicly owned treatment works at the defendant's membrane and filter manufacturing facility in Oxnard, California. The consent decree requires the defendant to perform injunctive relief and pay a $390,000 civil penalty.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Parker-Hannifin Corp.,* D.J. Ref. No. 90–5–1–1–12081. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General, U.S. DOJ—ENR, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $8.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Lori Jonas,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2020–28045 Filed 12–18–20; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (OJJDP) Docket No. 1787]

Meeting of the Federal Advisory Committee on Juvenile Justice

AGENCY: Office of Juvenile Justice and Delinquency Prevention, Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention has scheduled a meeting of the Federal Advisory Committee on Juvenile Justice (FACJJ).

DATES: Thursday, January 14th, 2021 at 1:00 p.m.–3:00 p.m. ET.

ADDRESSES: This meeting will be a virtual meeting. To register for the meeting, please visit the Registration website. The registration link will also be posted on the FACJJ website, *www.facjj.ojp.gov.*

FOR FURTHER INFORMATION CONTACT: Visit the website for the FACJJ at *www.facjj.ojp.gov* or contact Keisha Kersey, Designated Federal Official (DFO), OJJDP, OJJDP, by telephone (202) 532–0124, email at *keisha.kersey@ojp.usdoj.gov;* or Maegen Barnes, Program Manager/Federal Contractor, by telephone (732) 948–8862, email at *Maegen.barnes@bixal.com.* Please note that the above phone numbers are not toll free.

SUPPLEMENTARY INFORMATION: The Federal Advisory Committee on Juvenile Justice (FACJJ), established pursuant to Section 3(2)A of the Federal Advisory Committee Act (5 U.S.C. App.2), will meet to carry out its advisory functions under Section 223(f)(2)(C–E) of the Juvenile Justice and Delinquency Prevention Act of 2002. The FACJJ is composed of representatives from the states and territories. FACJJ member duties include: reviewing Federal policies regarding juvenile justice and delinquency prevention; advising the OJJDP Administrator with respect to particular functions and aspects of OJJDP; and advising the President and Congress with regard to State perspectives on the operation of OJJDP and Federal legislation pertaining to juvenile justice and delinquency prevention. More information on the FACJJ may be found at *www.facjj.ojp.gov* .

FACJJ meeting agendas are available on *www.facjj.ojp.gov.* Agendas will generally include: (a) Opening remarks and introductions; (b) Presentations and discussion; and (c) member announcements.

Should issues arise with online registration, or to register by email, the public should contact Maegen Barnes, Program Manager/Federal Contractor (see above for contact information). If submitting registrations via email, attendees should include all of the following: Name, Title, Organization/Affiliation, Full Address, Phone Number, Fax and Email. The meeting will also be available to join online via the WebEx platform, to register please visit, Registration website. Registration for this is also found online at *www.facjj.ojp.gov.*

Interested parties may submit written comments and questions in advance for

the FACJJ to Keisha Kersey (DFO) at the contact information above. All comments and questions should be submitted no later than 5:00 p.m. ET on Monday, January 4th, 2021.

The FACJJ will limit public statements if they are found to be duplicative. Written questions submitted by the public while in attendance will also be considered by the FACJJ.

Keisha Kersey,

Designated Federal Official, Office of Juvenile Justice and Delinquency Prevention.

[FR Doc. 2020–28096 Filed 12–18–20; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2020–0010]

Maritime Advisory Committee on Occupational Safety and Health (MACOSH): Charter Renewal: Notice of Corrections

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice of corrections to MACOSH charter.

SUMMARY: OSHA is issuing corrections to the renewal and expiration dates of the MACOSH charter.

FOR FURTHER INFORMATION CONTACT: *Press inquiries:* Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General information: Ms. Amy Wangdahl, Director, Office of Maritime and Agriculture, Directorate of Standards and Guidance; telephone; (202) 693–2066; email: *wangdahl.amy@dol.gov.*

SUPPLEMENTARY INFORMATION: On December 8, 2020, OSHA published a notice announcing the renewal of the MACOSH charter (85 FR 79041). That notice incorrectly stated that the Secretary of Labor renewed the MACOSH charter on December 8, 2020, and that the renewed charter would expire on December 8, 2022. This corrections notice is to correct the renewal and expiration dates of the current MACOSH charter. The correct date of the charter's renewal by the Secretary of Labor was December 11, 2020, and the charter will expire on December 11, 2022.

Authority and Signature: Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice pursuant to 29 U.S.C. 653, 655, and 656, Secretary's Order 8–2020 (85 FR 58393; Sept. 18, 2020), and FACA, as amended (5 U.S.C. App. 2), the implementing regulations (41 CFR part 102–3), Department of Labor Manual Series Chapter 1–900 (August 31, 2020), and 29 CFR part 1912.

Signed at Washington, DC, on December 16, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020–28070 Filed 12–18–20; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0064]

Forging Machines; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the collections of information contained in the Forging Machines Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by February 19, 2021.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* 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–2011–0064, 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 the OSHA docket number (OSHA–2011–0064) for the Information Collection Request (ICR). Because of security-related procedures, submissions by regular mail may result in a significant delay in receipt.

All comments, including any personal information you provide, such as social security number and date of birth, 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 through 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 (202) 693–2222 to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Theda Kenney or Seleda Perryman, 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 collection of information in accordance with the Paperwork Reduction Act (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 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).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is to reduce employees' risk of death or serious injury by ensuring that forging machines used by them are in safe operating condition, and that employees are able to clearly and properly identify manually operated valves and switches.

Inspection of Forging Machines, Guards, and Point-of-Operation Protection Devices (paragraphs (a)(2)(i) and (a)(2)(ii)). Paragraph (a)(2)(i) requires employers to establish periodic and regular maintenance safety checks, and to develop and maintain a certification record of each inspection. The certification record must include the date of inspection, the signature of the person who performed the inspection, and the serial number (or other identifier) of the forging machine inspected. Under paragraph (a)(2)(ii), employers are to schedule regular and frequent inspections of guards and point-of-operation protection devices, and prepare a certification record of each inspection that contains the date of the inspection, the signature of the person who performed the inspection, and the serial number (or other identifier) of the equipment inspected. These inspection certification records provide assurance to employers, employees, and OSHA compliance officers that forging machines, guards, and point-of-operation protection devices have been inspected, and will operate properly and safely, to prevent impact injury and death to employees during forging operations. These records also provide the most efficient means for the compliance officers to determine that an employer is complying with the Standard.

Identification of Manually Controlled Valves and Switches (paragraphs (c), (h)(3), (i)(1) and (i)(2)). These paragraphs require proper and clear identification of manually operated valves and switches on presses, upsetters, boltheading equipment, and rivet-making machines, respectively. Marking valves and switches provide information to employees to ensure that they operate the forging machines correctly and safely. The agency determined that it is usual and customary for manufacturers to mark (for example, ''On'' and ''Off,'' and ''Open'' and ''Close,'' etc.) all manually controlled valves and switches to meet the requirements of the American National Standards Institute's (ANSI) standards. Therefore, OSHA is taking no burden hours or cost for these paperwork requirements.

Disclosure of Records. OSHA determined that employers disclosing information to OSHA during an inspection is outside the scope of the PRA because OSHA would only review records in the context of an open investigation of a particular employer to determine compliance with the Standard. See 5 CFR 1320.4(a)(2).

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

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Forging Machines Standard (29 CFR 1910.218). The agency is requesting an adjustment increase in the number of burden hours from 192,053 hours to 384,106.67 hours, a total increase of 192,953.67 burden hours. The increase is primarily due to a review of the previously approved ICR showing an error in burden calculations.

The agency will summarize any comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements contained in the Standard.

Type of Review: Extension of a currently approved collection.

Title: Forging Machines (29 CFR 1910.218).

OMB Number: 1218–0228.

Affected Public: Business or other for-profits.

Number of Respondents: 27,700.

Total Responses: 1,440,400.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 384,106.67.

Estimated Cost (Operation and Maintenance): $0.

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 COVD–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 (Docket No. OSHA–2011–064) for the ICR. 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.

Due to 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 commenters about submitting personal information such as social security numbers and dates 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. 5–2007 (72 FR 31159).

Signed at Washington, DC, on December 16, 2020.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2020–28067 Filed 12–18–20; 8:45 am]

BILLING CODE 4510–26–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 30–10716; NRC–2020–0214]

Sigma-Aldrich Company; Fort Mims Site

AGENCY: Nuclear Regulatory Commission.

ACTION: License amendment request; opportunity to provide comment, request a hearing, and petition for leave to intervene.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to NRC Materials License No. 24–16273–01, issued to Sigma-Aldrich Company (the licensee), for possession of byproduct material incident to radiological survey, storage of waste awaiting disposal, and decontamination and remediation of the Fort Mims Site. The proposed amendment is to revise the decommissioning plan and terminate the license for the licensee's Fort Mims Site in Maryland Heights, Missouri.

DATES: Submit comments by January 20, 2021. Request for a hearing or petition for leave to intervene must be filed by February 19, 2021.

ADDRESSES: You may submit comments by any of the following methods: (unless this document describes a different method for submitting comments on a specific subject); however, the NRC encourages electronic comment submission through the Federal Rulemaking website:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0214. 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.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: George Alexander, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington DC 20555–0001; telephone: 814–415–6755; email: *George.Alexander@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0214 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0214.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The license amendment requests to revise the decommissioning plan, dated August 22, 2019 and supplemented on October 19, 2020, and to terminate the license, dated April 27, 2020, are available in ADAMS under Accession Nos. ML19273A163, ML20294A191, and ML20120A544, respectively.
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *PDR.Resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0214 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Introduction

The NRC received, by letters dated August 22, 2019, as supplemented on October 19, 2020, and April 27, 2020, an application to amend Sigma-Aldrich's decommissioning plan and terminate NRC Materials License No. 24–16273–01, respectively. In its revised decommissioning plan (ADAMS Accession No. ML19273A160), the licensee requests the option to perform direct dose assessment of residual radioactivity, in addition to using derived concentration guideline levels (DCGLs), to demonstrate compliance with the license termination criteria in section 20.1402 of title 10 of the *Code of Federal Regulations* (10 CFR), at the Fort Mims Site in Maryland Heights, Missouri. Under Sigma-Aldrich's license, the licensee shall conduct its decommissioning program in accordance with its decommissioning plan. This decommissioning plan, dated October 22, 2008 (ADAMS Accession No. ML083010187), states that the licensee will rely on the screening values in Appendix H of NUREG–1757, Volume 2, Revision 1 (ADAMS Accession No. ML063000252) to demonstrate that the Fort Mims Site meets the release criteria for unrestricted use specified in 10 CFR 20.1402. By letter dated May 12, 2009

(ADAMS Accession No. ML091330309), the NRC approved Sigma-Aldrich's decommissioning plan, which does not include the use of a dose assessment approach to demonstrate compliance. The licensee's commitments in its current decommissioning plan include remediating all residual activity to levels below approved screening values. The NRC guidance in NUREG–1757, Volume 2, Revision 1 allows for the use of either the DCGL or dose assessment approach to demonstrate compliance with 10 CFR 20 1402. NRC staff is reviewing the license amendment requests to revise the decommissioning plan and terminate the license concurrently because, if the staff approves the revised decommissioning plan and determines that the site meets the radiological criteria for unrestricted use under 10 CFR 20.1402, the license can be terminated without additional site characterization or soil remediation.

The NRC staff found the application for the license amendment acceptable for a technical review (ADAMS Accession No. ML20213C693). Prior to approving the licensee's requested actions to amend the decommissioning plan and terminate Materials License No. 24–16273–01, the NRC will need to make the safety and environmental findings required by the Atomic Energy Act of 1954, as amended (the Act), and the NRC's regulations. The NRC's findings will be documented in a safety evaluation report and an environmental assessment. The environmental assessment will be the subject of a subsequent notice in the **Federal Register**.

III. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC's regulations are accessible electronically from the NRC Library on the NRC's website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner's right to be made a party to the proceeding; (3) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner's interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party's admitted contentions, including the opportunity to present evidence, consistent with the NRC's regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document.

A State, local governmental body, Federally recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the ''Electronic Submissions (E-Filing)'' section of this document, and should meet the requirements for petitions set forth in this section. Alternatively, a State, local governmental body, Federally recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a petition is submitted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

IV. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at *https://www.nrc.gov/site-help/e-submittals.html.* Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the

participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals/getting-started.html.* Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at *https://www.nrc.gov/site-help/electronic-sub-ref-mat.html.* A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the ''Contact Us'' link located on the NRC's public website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866–672–7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *https://adams.nrc.gov/ehd,* unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click ''cancel'' when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

For further details with respect to this action, see the application for license amendment to revise the decommissioning plan, dated August 22, 2019 and supplemented on October 19, 2020, and to terminate the license, dated April 27, 2020.

Attorney for licensee: Leigh Davidson, Corporate Counsel, Milliporesigma (Sigma Aldrich MFG), 3050 Spruce Street, St. Louis, MO 63103.

NRC Branch Chief: Bill Von Till.

Dated: December 16, 2020.

For the Nuclear Regulatory Commission.

Randolph W. Von Till,

Chief, Uranium Recovery and Materials Decommissioning Branch, Division of Decommissioning, Uranium Recovery and Waste Programs, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2020–28065 Filed 12–18–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of December 14, 21, 28, 2020, January 4, 11, 18, 25, 2021.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public.

MATTERS TO BE CONSIDERED:

Week of December 14, 2020

Thursday, December 17, 2020

2:30 p.m. Affirmation Session (Public Meeting) (Tentative)

a. Interim Storage Partners, LLC (WCS Consolidated Interim Storage Facility), Appeals of LBP–19–7: Fasken Proposed New Contention Based on Draft Environmental Impact Statement (Tentative)

(Contact: Denise McGovern: 301–415–0681)

Additional Information: Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live via teleconference. Details for joining the teleconference in listen only mode can be found at *https://www.nrc.gov/pmns/mtg.*

b. Interim Storage Partners, LLC (WCS Consolidated Interim Storage Facility), Sierra Club Appeal of LBP–19–9 (Denying Motion to

Amend and Granting Motion to Dismiss), LBP–19–7 (Denial of Contentions) (Tentative)

(Contact: Denise McGovern: 301–415–0681)

Additional Information: By a vote of 5–0 on December 15, 2020, the Commission determined pursuant to 5 U.S.C. 552b(e)(1) and 10 CFR 9.107 that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting will be held on December 17, 2020. Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live via teleconference. Details for joining the teleconference in listen only mode can be found at *https://www.nrc.gov/pmns/mtg.*

c. Nuclear Development LC (Bellefonte Nuclear Plant, Units 1 and 2), Request for Hearing in License Transfer Proceeding (Tentative)

(Contact: Denise McGovern: 301–415–0681)

Additional Information: By a vote of 5–0 on December 17, 2020, the Commission determined pursuant to 5 U.S.C. 552b(e)(1) and 10 CFR 9.107 that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting will be held on December 17, 2020. Due to COVID–19, there will be no physical public attendance. The public is invited to attend the Commission's meeting live via teleconference. Details for joining the teleconference in listen only mode can be found at *https://www.nrc.gov/pmns/mtg.*

Week of December 21, 2020—Tentative

There are no meetings scheduled for the week of December 21, 2020.

Week of December 28, 2020—Tentative

There are no meetings scheduled for the week of December 28, 2020.

Week of January 4, 2021—Tentative

There are no meetings scheduled for the week of January 4, 2021.

Week of January 11, 2021—Tentative

There are no meetings scheduled for the week of January 11, 2021.

Week of January 18, 2021—Tentative

There are no meetings scheduled for the week of January 18, 2021.

Week of January 25, 2021—Tentative

There are no meetings scheduled for the week of January 25, 2021.

CONTACT PERSON FOR MORE INFORMATION: For more information or to verify the status of meetings, contact Denise McGovern at 301–415–0681 or via email at *Denise.McGovern@nrc.gov.* The schedule for Commission meetings is subject to change on short notice.

The NRC Commission Meeting Schedule can be found on the internet at: https://www.nrc.gov/public-involve/public-meetings/schedule.html.

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.,* braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at *Anne.Silk@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301–415–1969), or by email at *Tyesha.Bush@nrc.gov.* The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: December 17, 2020.

For the Nuclear Regulatory Commission.

Denise L. McGovern,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2020–28181 Filed 12–17–20; 11:15 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2020–183; CP2020–190; MC2021–47 and CP2021–49]

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 23, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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.

[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).

1. *Docket No(s).:* CP2020–183; *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 1 Negotiated Service Agreement; *Filing Acceptance Date:* December 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 23, 2020.

2. *Docket No(s).:* CP2020–190; *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 Contract 6 Negotiated Service Agreement; *Filing Acceptance Date:* December 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 23, 2020.

3. *Docket No(s).:* MC2021–47 and CP2021–49; *Filing Title:* USPS Request to Add International Priority Airmail, International Surface Air Lift, Commercial ePacket, Priority Mail Express International, Priority Mail International & First-Class Package International Service Contract 1 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* December 23, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–28133 Filed 12–18–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90682; File No. SR–NASDAQ–2020–062]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Listing Rules Applicable to Special Purpose Acquisition Companies Whose Business Plan Is To Complete One or More Business Combinations

December 16, 2020.

I. Introduction

On September 3, 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 amend its listing rules to permit companies whose business plan is to complete one or more business combinations (''SPACs'' or ''Acquisition Companies'') 15 calendar days following the closing of a business combination to demonstrate that the SPAC has satisfied the applicable round lot shareholder requirement. The proposed rule change was published for comment in the **Federal Register** on September 22, 2020.[3] On November 4, 2020, pursuant to Section 19(b)(2) of the Exchange 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 to December 21, 2020.[5] The Commission has received no comment letters on the proposed rule change. The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

A SPAC is a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specific period of time.[7] Nasdaq listing rules, among other things, require a SPAC to keep at least 90% of the proceeds from its initial public offering in an escrow account,[8] and to complete one or more business combinations having an aggregate fair market value of at least 80% of the value of the escrow account within a specified period of time.[9] Following each business combination, the combined company must meet the requirements for initial listing on Nasdaq.[10] If the combined company does not meet the initial listing requirements following a business combination, Nasdaq staff will issue a Staff Delisting Determination under Nasdaq Rule 5810.[11]

In its proposal, Nasdaq acknowledges that its existing rules require that, ''following each business combination'' with a SPAC, the resulting company must satisfy all initial listing requirements. Nasdaq asserts, however, that the rule does not provide a timetable for the company to demonstrate that it satisfies those requirements. Accordingly, Nasdaq proposes to modify the rule to specify if the SPAC demonstrates that it will satisfy all requirements except the applicable round lot shareholder requirement, then the SPAC will receive 15 calendar days following the closing to demonstrate that it satisfied the applicable round lot shareholder requirement immediately following the transaction's closing.[12]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89897 (September 16, 2020), 85 FR 59574.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 90340, 85 FR 71704 (November 10, 2020).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (adopting the predecessor to IM–5101–2).

[8] *See* Nasdaq IM–5101–2(a).

[9] *See* Nasdaq IM–5101–2(b).

[10] *See* Nasdaq IM–5101–2(d). If a shareholder vote on the business combination is held, public shareholders voting against a business combination must have the right to convert their shares of common stock into a pro rata share of the aggregate amount then in the escrow account (net of taxes payable and amounts distributed to management for working capital purposes) if the business combination is approved and consummated. *Id.* If a shareholder vote on the business combination is not held, the company must provide all shareholders with the opportunity to redeem their shares for cash equal to their pro rata share of the aggregate amount then in the deposit account (net of taxes payable and amounts distributed to management for working capital purposes). *See* Nasdaq IM–5101–2(e).

[11] *See* Nasdaq IM–5101–2(d).

[12] Nasdaq has three listing tiers, each of which require, among other things, a company to have a minimum number of shareholders in order to initially list on the Exchange. *See* Nasdaq Rule 5315(f)(1) (on Global Select, an issuer must have at least 550 Total Holders with a minimum average monthly trading volume over the prior 12 months, 2,200 Total Holders, or 450 Round Lot Holders with 50% of holders holding Unrestricted Securities); Nasdaq Rule 5405(a)(3) (on Global, an issuer must have at least 400 Round Lot Holders with 50% of holders holding Unrestricted Securities); and

Continued

Nasdaq states that it ordinarily determines compliance with the round lot shareholder requirement at the time of a business combination by reviewing a company's public disclosures and information provided by the company about the transaction.[13] According to Nasdaq, if it cannot determine compliance using public information, it will typically request the company to provide additional information such as registered shareholder lists from the company's transfer agent, data from Cede & Co. about shares held in street name, or data from broker-dealers and third parties that distribute information such as proxy materials for the broker-dealers. If the company can provide information demonstrating compliance before the business combination closes, Nasdaq states that no further information would be required.

However, Nasdaq asserts that it has observed that in some cases it can be difficult for a company to obtain evidence demonstrating the number of shareholders that it has or will have following a business combination. Nasdaq notes that shareholders in a SPAC may redeem or tender their shares until just before the time of the business combination, and the SPAC may not know how many shareholders will choose to redeem until very close to the consummation of the business combination.[14] Nasdaq states that this could impact its ability to determine compliance before the business combination closes, in cases where the number of round lot shareholders is close to the applicable requirement.

Accordingly, for a SPAC that has demonstrated that it will satisfy all of the initial listing requirements except for the round lot shareholder requirement before consummating the business combination, Nasdaq proposes to allow the SPAC 15 calendar days after the closing of the business combination, if necessary, to demonstrate that it also complied with the round lot requirement at the time of the business combination. Nasdaq stresses that the SPAC must still demonstrate that it satisfied the round lot shareholder requirement immediately following the business combination, and that the proposal merely would give the SPAC 15 calendar days to provide evidence that it did. Nasdaq believes that the proposal ''balances the burden placed on the Acquisition Company to obtain accurate shareholder information for the new entity and the need to ensure that a company that does not satisfy the initial listing requirements following a business combination enters the delisting process promptly.'' [15] Nasdaq notes that if the company does not evidence compliance within the proposed time period, Nasdaq staff would issue a delisting determination, which the company could then appeal to an independent hearings panel.[16]

III. Proceedings To Determine Whether To Approve or Disapprove SR–NASDAQ–2020–062 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [17] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved.

Pursuant to Section 19(b)(2)(B) of the Act,[18] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.'' [19]

The Commission has consistently recognized the importance of the minimum number of holders and other similar requirements in exchange listing standards. Among other things, such listing standards help ensure that exchange listed securities have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[20]

As discussed above, the Exchange is proposing to provide a SPAC 15 calendar days following the closing of a business combination to demonstrate that it satisfied the applicable round lot holder requirement immediately following the closing. The Exchange asserts that it can be difficult for a SPAC to obtain evidence demonstrating the number of holders it will have following the business combination because SPAC shareholders have the right to redeem or tender their shares until just before the time of such business combination. The Exchange, however, has provided no data or other evidence to support its position that SPACs have particular difficulties demonstrating compliance with the minimum number of holders requirements. For example, the Exchange has not provided any data showing the extent to which SPACs have been unable to meet the applicable minimum number of holders requirement immediately following the business combination, or the extent to which this was due to last minute redemptions by SPAC shareholders. The Exchange also has provided no data or other evidence showing how long it has taken SPACs that have been unable to meet the applicable minimum number of holders requirement, whether or not due to last minute shareholder redemptions, to come into compliance with such requirements.

Further, the Exchange has not explained how providing a SPAC an additional 15 days following the closing of the business combination simply to demonstrate that it complied with the applicable minimum number of holders requirement immediately following the closing, would address the substantive compliance concerns associated with

Nasdaq Rule 5505(a)(3) (on Capital, an issuer must have at least 300 Round Lot Holders with at least 50% of holders holding Unrestricted Securities.

[13] Nasdaq states, for example, that the merger agreement may result in the Acquisition Company issuing a round lot of shares to more than 300 holders of the target of the business combination at closing.

[14] The Exchange notes that SPACs are unlike other newly listing companies which do not face redemptions and are not already listed and trading at the time they must demonstrate compliance.

[15] The Exchange also takes the position that shareholders of the SPAC would be harmed if Nasdaq issued a delisting determination at a time when the company did, in fact, satisfy all initial listing requirements but could not yet provide proof.

[16] The Exchange has also proposed to eliminate a duplicative paragraph and add a new subsection enumeration to its existing rule.

[17] 15 U.S.C. 78s(b)(2)(B).

[18] *Id.*

[19] 15 U.S.C. 78f(b)(5).

[20] *See, e.g.,* Securities Exchange Act Release Nos. 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008) (SR–NYSE–2008–17) (stating that the distribution standards, which includes exchange holder requirements ''. . . should help to ensure that the [SPAC's] securities have sufficient public float, investor base, and liquidity to promote fair and orderly markets''); 58228 (July 25, 2008), 73 FR 44794 (July 31, 2008) (SR–Nasdaq–2008–013) (approving a proposal to adopt listing standards for SPACs); and 86117 (June 14, 2018), 84 FR 28879 (June 20, 2018) (SR–NYSE–2018–46) (disapproving a proposal to reduce the minimum number of public holders continued listing requirement applicable to SPACs from 300 to 100).

last minute shareholder redemptions by SPACs that are close to the minimum requirement. The Exchange also has not addressed the risk that, by waiting for SPACs to demonstrate compliance with the minimum number of holders requirements until after the closing of the business combination, non-compliant companies could be listed on the Exchange despite not meeting initial listing standards, and have their securities continue to trade until the delisting process has been completed. As a result, a SPAC could complete a business combination and very soon thereafter be subject to delisting proceedings, and during such time its securities may trade with a number of holders that is substantially less than the required minimum. The Exchange has not addressed the impact this could have on SPAC shareholders and other market participants, or explained why subjecting them to these risks is consistent with the protection of investors and the public interest, and the other requirements of Section 6(b)(5) of the Act.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [21] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[22]

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[23]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by January 11, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by January 25, 2021. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–062 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–062. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–062 and should be submitted by January 11, 2021. Rebuttal comments should be submitted by January 25, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28066 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

[21] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[22] *See id.*

[23] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[24] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90676; File No. SR–CBOE–2020–114]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

December 15, 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 December 1, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend certain routing fees in connection with routed Customer orders in ETF and equity options, effective December 1, 2020.

The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share.[3] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange. The Exchange notes too that other options exchanges currently approximate routing fees in a similar manner as the Exchange's current approach to assessing approximate routing fees, as discussed below.[4]

The Exchange assesses fees in connection with orders routed away to various exchanges. Currently, under the Routing Fees table of the Fee Schedule, fee codes RD, RE, RF, RG, RH and RI are appended to certain Customer orders in ETF and Equity options, as follows:

- Fee code RD is appended to Customer orders in ETF/Equity options[5] for greater than or equal to 100 contracts routed to NYSE American (''AMEX''), BOX Options Exchange (''BOX''), Nasdaq BX Options (''BX''), Cboe EDGX Exchange, Inc. (''EDGX''), ISE Mercury, LLC (''MERC''), MIAX Options Exchange (''MIAX'') or Nasdaq PHLX LLC (''PHLX''), and assesses a charge of $0.33 per contract;
- fee code RE is appended to Customer orders in ETF/Equity options for less than 100 contracts routed to AMEX, BOX, BX, EDGX, MERC, MIAX or PHLX, and assesses a charge of $0.15 per contract;
- fee code RF is appended to Customer orders in ETF/Equity, Penny options for greater than or equal to 100 contracts routed to NYSE Arca, Inc (''ARCA''), Cboe BZX Exchange, Inc. (''BZX''), Cboe C2 Exchange, Inc. (''C2''), Nasdaq ISE (''ISE''), ISE Gemini, LLC (''GMNI''), MIAX Emerald Exchange (''EMLD''), MIAX Pearl Exchange (''PERL'') or Nasdaq Options Market LLC (''NOMX), and assesses a charge of $0.83 per contract;
- fee code RG is appended to Customer orders in ETF/Equity, Non-Penny options for greater than or equal to 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX, and assesses a charge of $1.18 per contract;
- fee code RH is appended to Customer orders in ETF/Equity, Penny options for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX, and assesses a charge of $0.65 per contract; and
- fee code RI is appended to Customer order in ETF/Equity, Non-Penny options for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX, and assesses a charge of $1.00 per contract.

The Exchange proposes to remove fee codes RE, RG and RH and amend fee codes RD, RF and RI by removing the 100-contract size limit from each and updating the fees assessed to $0.25 per contract, $0.75 per contract and $1.25 per contract, respectively. The Exchange believes that eliminating fee codes RE, RG and RH and the 100-contract contingency currently applicable to orders that yield fee codes RD, RF and RI will simplify and streamline the System's billing process for routed Customer orders in ETF and equity options. By removing the size contingency, orders to which RE, RG and RH are currently applicable may then be absorbed into orders to which RD, RF and RI are currently applicable and the routing fees for Customer orders in ETF and equity options may be billed as one of three fee codes, instead of six. For example, fee code RG would, prior to this proposal, be appended to Customer orders in ETF/Equity Non-Penny options for 100 contracts or more routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX. However, without the size contingency, RI will now be appended to all Customer orders in ETF/Equity Non-Penny options routed to the same away exchanges. Regarding the proposed rate changes for the remaining Customer ETF/Equity routing fee codes (RD, RF and RI), the Exchange notes that its current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as a flat $0.15 assessment that covers costs to the Exchange for routing (*i.e.,* clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, ''Routing Costs''). The Exchange then monitors

[3] *See* Cboe Global Markets U.S. Options Monthly Market Volume Summary (November 23, 2020), available at *https://markets.cboe.com/us/options/market_statistics/*.

[4] *See e.g.,* NYSE Arca Options Fees and Charges, ''Routing Fees'', which provides routing fees of ''$0.11 per contract on orders routed and executed on another exchange, plus (i) any transaction fees assessed by the away exchange (calculated on an order-by-order basis since different away exchanges charge different amounts) or (ii) if the actual transaction fees assessed by the away exchange(s) cannot be determined prior to the execution, the highest per contract charge assessed by the away exchange(s) for the relevant option class and type of market participant (*e.g.,* Customer, Firm, Broker/Dealer, Professional Customer or Market Maker).''

[5] The Exchange also updates fee codes RD and RF to make clear that ''equity'' options are included in the description. The System currently applies the applicable routing fee codes (RD, RE, RF, RG and RH) to both ETF and equity options.

the fees charged as compared to the costs of its routing services and adjusts its routing fees and/or sub-categories to ensure that the Exchange's fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. As a result, the Exchange believes the proposed amended rates for RD, RF and RI are adjusted to reflect an appropriate, current approximation of the routing costs to the applicable sub-category group of away exchanges for ETF/Equity options of any order size, and these routing fee codes will absorb the orders to which RE, RG and RH are currently appended. The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options.

The Exchange also proposes to update routing fee codes RD and RF in the Routing Fees table of the Fees Schedule connection with routed Customer orders in SPY options to Nasdaq PHLX LLC (''PHLX''). As described above, routing fee code RD is appended to Customer orders in ETF/Equity options routed to AMEX, BOX, BX, EDGX, MERC, MIAX or PHLX and assesses a charge of $0.25 per contract (as proposed), and routing fee code RF is appended to Customer orders in ETF options in Penny classes routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, NOMX or PHLX and assesses a charge of $0.75 per contract (as proposed). Currently, PHLX assesses a charge of $0.42 per contract for Customer orders in SPY options that remove liquidity.[6] As described above, the Exchange currently assesses a routing fee of $0.33 per contract for Customer orders routed to PHLX which yield fee code RP. This structure does not currently take into account, and approximately cover, the $0.42 per contract fee assessed by PHLX for Customer orders in SPY options. Therefore, in order to assess fees more in line with the Exchange's current approach to routing fees, that is, in a manner that approximates the cost of routing Customer orders in SPY options to PHLX, along with other away options exchanges, based on the general cost of transaction fees assessed by the sub-category of away options exchanges for such orders (as well as the Exchange's routing costs), the Exchange proposes to exclude Customer orders is SPY options routed to PHLX from orders that yield fee code RD and are assessed a charge of $0.25 per contract (as proposed) and, instead, add Customer orders routed to PHLX in SPY options only to orders that yield fee code RF[7] and are assessed a charge of $0.75 per contract (as proposed).

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[9] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[10] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes that the proposed rule change to remove fee codes RE, RG and RH and remove the size contingency for fee codes RD, RF and RI is reasonable in that it is reasonably designed to simplify and streamline the System's billing process for routed Customer orders in ETF and equity options. By removing the size contingency, orders to which fee codes RE, RG and RH are currently applicable may then be absorbed into the orders to which fee codes RD, RF and RI are applicable and the routing fees for Customer orders in ETF and equity options may be billed as one of three fee codes, instead of six. The Exchange also believes that it is reasonable to amend the rates that correspond to fee codes RD, RF and RI because the proposed rates are aligned with the Exchange's current approach to approximating the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as the Exchange's Routing Cost. The Exchange believes the proposed amended rates for orders that yield fee codes RD, RF and RI are adjusted to reasonably reflect an appropriate, current approximation of the routing costs for ETF/Equity options of any order size to the sub-category group of away exchanges, and these routing fee codes will absorb the orders to which fee codes RE, RG and RH are currently appended. For example, routed Customer orders in ETF/Equity Non-Penny options that yield fee code RG (greater than or equal to 100 contracts) are currently assessed a routing fee of $1.18 per contract, while routed Customer orders in ETF/Equity Non-Penny options that yield fee code RH (less than 100 contracts) are currently assessed a routing fee of $1.00. However, upon the removal of fee code RG, those routed Customer orders in ETF/Equity Non-Penny options will yield fee code RH, which will assess a proposed fee of $1.25, which the Exchange believes is appropriately adjusted to reflect the current approximate cost of routing Customer orders in ETF/Equity Non-Penny options of all sizes to the same sub-category group of away exchanges. The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options in the same sub-category group of away exchanges as they currently may choose to route. The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because TPHs' routed Customer orders in ETF/Equity options will continue to be automatically and uniformly assessed the applicable routing charges.

The Exchange believes the proposed rule change to amend fee codes RD and RF to account for PHLX's current assessment of fees for Customer orders in SPY options is reasonable because it is reasonably designed to assess routing fees in line with the Exchange's current approach to routing fees. That is, the proposed rule change is intended to include Customer orders in SPY options routed to PHLX in the most appropriate sub-category of fees that approximates the cost of routing to a group of away options exchanges (including PHLX) based on the cost of transaction fees assessed by each venue as well as Routing Costs to the Exchange. The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all TPHs' Customer orders in SPY routed to PHLX will automatically yield fee code RQ

[6] *See* Nasdaq Phlx Options 7 Pricing Schedule, Section 3 ''Rebates and Fees for Adding and Removing Liquidity in SPY'', Part A.

[7] The Exchange notes that SPY options are part of the Penny Program.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78f(b)(4).

and uniformly be assessed the corresponding fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange does not believe the proposed rule change to remove certain routing fee codes and to update other routing fee codes accordingly to apply instead, will impose any burden on intramarket competition because all TPHs' routed Customer orders in ETF/Equity options will continue to be able to route to the same sub-category group of away exchanges and will automatically and uniformly be assessed the applicable routing fees. Likewise, all TPH's Customer orders in SPY options routed to PHLX will automatically yield fee code RF and uniformly be assessed the corresponding fee.

The Exchange does not believe that the proposed rule changes in connection with routing fees will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, as previously discussed, the Exchange operates in a highly competitive market. The Exchange notes that other options exchanges approximate routing costs in a similar manner as the Exchange's current approach.[11] Also, the Exchange notes that, in addition to Cboe Options, TPHs have numerous alternative venues that they may participate on and director their order flow, including 15 other options exchanges, as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options exchange has more than 16% of the market share of executed volume of options trades.[12] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [13] The fact that this market is competitive has also long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [14] Accordingly, the Exchange does not believe its proposed changes to the incentive programs impose 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) of the Act [15] and paragraph (f) of Rule 19b–4 [16] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2020–114 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2020–114. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2020–114 and should be submitted on or before January 11, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28009 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

[11] *See supra* note 4.

[12] *See* supra note 3.

[13] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[14] NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90677; File No. SR–NYSE–2020–96]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending Its Rules Establishing Maximum Fee Rates To Be Charged by Member Organizations for Forwarding Proxy and Other Materials to Beneficial Owners

December 15, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 2, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules establishing maximum fee rates to be charged by member organizations for forwarding proxy materials to beneficial owners. 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.

[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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Rule 451 requires NYSE member organizations that hold securities for beneficial owners in street name to solicit proxies from, and deliver proxy and issuer communication materials to, beneficial owners on behalf of issuers.[4] For this service, issuers reimburse NYSE member organizations for out-of-pocket, reasonable clerical, postage and other expenses incurred for a particular distribution. This reimbursement structure stems from SEC Rules 14b–1 and 14b–2 under the Act,[5] which impose obligations on companies and nominees to ensure that beneficial owners receive proxy materials and are given the opportunity to vote. These rules require companies to send their proxy materials to nominees, *i.e.,* broker-dealers or banks that hold securities in street name, for forwarding to beneficial owners and to pay nominees for reasonable expenses, both direct and indirect, incurred in providing proxy information to beneficial owners. The Commission's rules do not specify the fees that nominees can charge issuers for proxy distribution; rather, they state that issuers must reimburse the nominees for ''reasonable expenses'' incurred.[6]

Currently, the Supplementary Material to NYSE Rules 451 and 465 establish the fee structure for which a NYSE member organization may be reimbursed for expenses incurred in connection with distributing proxy materials to beneficial shareholders. This fee structure is also replicated in Section 402.10 of the NYSE Listed Company Manual. The NYSE fee structure represents the maximum approved rates that an issuer can be billed for proxy distribution services absent prior notification to and consent of the issuer.

All the SROs whose member organizations hold securities on behalf of street name holders have rules requiring their member organizations to forward proxy materials and other distributions on behalf of companies to street name account holders. The rules of all other exchanges simply provide that member organizations must undertake this activity if they receive ''reasonable'' reimbursement, without specifying any schedule of maximum permitted charges.[7] By contrast, FINRA includes a specific schedule of maximum charges that is substantively identical to that of the NYSE.[8]

Given the significant evolution of the securities industry during the period in which the NYSE has taken the lead in establishing proxy distribution reimbursement rates, the NYSE does not believe that it is best positioned to retain this responsibility going forward. All the NYSE member organizations that are subject to the NYSE fee schedule are also members of FINRA. In addition, all of the brokers who are not NYSE members but who hold shares on behalf of street name account holders are also FINRA members. Furthermore, a large percentage of the affected listed issuers are listed on Nasdaq, CBOE or other non-NYSE Group exchanges or are not listed on any national securities exchange, while the development of the

[4] The ownership of shares in street name means that a shareholder, or ''beneficial owner,'' has purchased shares through a broker-dealer or bank, also known as a ''nominee.'' In contrast to direct ownership, where shares are directly registered in the name of the shareholder, shares held in street name are registered in the name of the nominee, or in the nominee name of a depository, such as the Depository Trust Company. For more detail regarding share ownership, *see* Securities Exchange Act Release No. 62495 (July 14, 2010), 75 FR 42982 (July 22, 2010) (Concept Release on the U.S. Proxy System) (''Proxy Concept Release'').

[5] 17 CFR 240.14b–1; 17 CFR 240.14b–2.

[6] In adopting the direct shareholder communications rules in the early 1980s, the Commission left the determination of reasonable costs to the self-regulatory organizations (''SROs'') because they were deemed to be in the best position to make fair evaluations and allocations of costs associated with these rules. *See* Securities Exchange Act Release No. 20021 (July 28, 1983), 48 FR 35082 (August 3, 1983); *see also* Securities Exchange Act Release No. 45644 (March 25, 2002), 67 FR 15440, 15440 n.8 (April 1, 2002).

[7] *See, e.g.,* BZX Exchange, Inc. Rule 13.3; *see also* Investors Exchange Rulebook 6.130.

[8] *See* FINRA Rule 2251. The Exchange notes that FINRA Rule 2251 differs from Rule 451 in one respect. Section 5 (Notice and Access Fees) of Supplementary Material .90 of Rule 451 provides that the Notice and Access fees set forth therein will also be charged with respect to the distribution of investment company shareholder reports pursuant to any ''notice and access'' rules adopted by the SEC in relation to such distributions and that such fee will not be charged for any account with respect to which an investment company pays a Preference Management Fee in connection with a distribution of investment company shareholder reports. It further provides that, in calculating the rates at which the issuer will be charged Notice and Access fees for investment company shareholder report distributions, all accounts holding shares of any class of stock of the applicable issuer eligible to receive the same distribution will be aggregated in determining the appropriate pricing tier under this Section 5 (Notice and Access Fees) of Supplementary Material .90 of Rule 451. FINRA has not adopted this text as part of FINRA Rule 2251. Pursuant to Rule 30e–3 under the Investment Company Act of 1940, the SEC has adopted a ''notice and access'' rule for investment companies. Investment companies that have met the requirements of Rule 30e–3(i)(1)(i) are permitted to utilize this ''notice and access'' approach for distributions to beneficial owners beginning January 1, 2021. *See also* Rule 30e–3(i)(1)(ii) for other transition period requirements.

mutual fund industry has led to the existence of a huge number of issuers who must pay these costs but have no relationship with any listing exchange.

The current fee schedule has been in place since 2013 [9] and a comprehensive review of fee levels may be necessary in the near future to respond to the continuing evolution in both technology and the securities ownership patterns of investors since that time. All of the brokers who hold shares on behalf of street name account holders are FINRA members, while only a subset of them are members of the NYSE. Furthermore, a large and increasing number of the affected issuers are listed on Nasdaq, CBOE or other non-NYSE Group exchanges or are traded solely over the counter, while the development of the mutual fund industry has led to the existence of a huge number of issuers who are not listed on any exchange.

In response to the developments described above. the NYSE proposes to amend Rule 451 by deleting the fee schedule and replacing it with text comparable to that of other exchanges providing that member organizations are entitled to receive fair and reasonable rates of reimbursement for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with proxy solicitations and the processing of proxy and other material required under Rule 451. In addition, the amended rule text will provide that member organizations must comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member. As all NYSE member organizations subject to the NYSE fee schedule are also members of FINRA, this provision will effectively require member organizations to comply with the fee schedule set forth in FINRA Rule 2551.

The Exchange proposes to delete Section 402.10 of the Manual in its entirety as it is identical to provisions with respect to issuers other than mutual funds as set forth in Rule 451 and is therefore redundant.

Rule 465 governs the role of NYSE member organizations in distributing on behalf of issuers interim reports and other materials to ''street name'' account holders. Supplementary Material .20 to Rule 465 specifies that these distributions are subject to the fee schedule set forth in Supplementary Material 90–95 to Rule 451. The Exchange proposes to delete the current text of Supplementary Material .20 to Rule 465 and replace it with a paragraph that parallels the proposed new form of Supplementary Material .90 to Rule 451, providing that, in determining fair and reasonable rates of reimbursement for all out-of-pocket expenses, including reasonable clerical expenses, incurred in connection with copies of interim reports of earnings or other material being sent to stockholders pursuant to Rule 465, member organizations must comply with any schedule of approved charges set forth in the rules of any other national securities exchange or association of which such member organization is a member.

The Exchange notes that this proposal is in no way intended to take a position on the appropriateness of the fee schedules for proxy and other distributions currently set forth in Rules 451 and 465 or in the rules of any other national securities exchange or national securities association. The sole purpose of this proposal is obtain approval to delete the fee schedules from the NYSE rules and establish in their place a requirement to comply with the fee provisions set forth in the rules of any other national securities organization or national securities association of which an NYSE member organization is a member.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act'') generally.[10] Section 6(b)(4) [11] requires that exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using the facilities of an exchange. Section 6(b)(5) [12] requires, among other things, that exchange rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect the public interest and the interests of investors, promote just and equitable principles of trade and that they are not designed to permit unfair discrimination between issuers, brokers or dealers. Section 6(b)(8) [13] prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposal is consistent with Sections 6(b)(4) and 6(b)(5) of the Act as it will not result in any substantive change in the reimbursement rates received by member organizations for proxy and other document distributions on behalf of issuers, as all NYSE member organizations are also subject to the fee schedule set forth in FINRA rules.

The Exchange believes that the proposal is also consistent with Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, perfect the mechanism of a free and open market and promote just and equitable principles of trade. The maximum reimbursement rates brokers receive for making distributions of proxies and other materials on behalf of issuers will continue to be determined by FINRA, the self-regulatory organization of which all affected brokers are members.

As discussed above, all NYSE member organizations subject to these rules are also members of FINRA and, consequently, subject to the fee schedule set forth in FINRA Rule 2251. As the schedule set forth in FINRA Rule 2251 is substantively identical to the NYSE's current fee schedule, there will be no substantive change in the maximum rates NYSE member organizations may charge as a result of the proposed amendments.

All of the brokers who hold shares on behalf of street name account holders are FINRA members, while only a subset of them are also members of the NYSE. Furthermore, a large and increasing number of the affected issuers are listed on Nasdaq, CBOE or other non-NYSE Group exchanges or are traded solely over the counter, while the development of the mutual fund industry has led to the existence of a huge number of issuers who must pay these costs but have no relationship with any listing exchange. Notably, while mutual funds are not listed on any exchange, they are all held primarily in ''street name'' accounts at brokers that are members of FINRA.

The Exchange believes that the proposal is consistent with Section 6(b)(8), as it does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. All of the NYSE member organizations that are subject to the fee schedule in the current forms of Rules 451 and 465 are also subject to the identical provisions of FINRA Rule 2251. Consequently, the proposed rule change will have no effect

[9] *See* Securities Exchange Act Release No. 70720 (October 18, 2013), 78 FR 63530 (October 24, 2013) (SR–NYSE–2013–07) (order approving the most recent comprehensive amendments to the NYSE fee schedule).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78f(b)(8).

on competition among brokers, as they will all continue to be subject to the same maximum fee schedule. For the same reason there will be no effect on the competition among issuers resulting from the proposed rule change, as all issuers will remain subject to the same maximum fee schedule as applied under the FINRA rule. As all of the issuers listed on all of the national securities exchanges are currently obligated to pay the same maximum fees under the current NYSE rules and FIRNA Rule 2251, the proposal will also have no effect on the competition for listings among the national securities exchanges. For the foregoing reasons, the Exchange believes that the proposal does not impose any burden on competition that that is not necessary or appropriate in furtherance of the purposes of the Act.

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. All of the NYSE member organizations that are subject to the fee schedule in the current forms of Rules 451 and 465 are also subject to the identical provisions of FINRA Rule 2251. Consequently, the proposed rule change will have no effect on competition among brokers, as they will all continue to be subject to the same maximum fee schedule. For the same reason there will be no effect on the competition among issuers resulting from the proposed rule change, as all issuers will remain subject to the same maximum fee schedule as applied under the FINRA rule. As all of the issuers listed on all of the national securities exchanges are currently obligated to pay the same maximum fees under the current NYSE rules and FIRNA Rule 2251, the proposal will also have no effect on the competition for listings among the national securities exchanges. For the foregoing reasons, the Exchange believes that the proposal does not impose any burden on competition that 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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–96 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2020–96. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–96 and should be submitted on or before January 11, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90675; File No. SR–NYSEArca–2020–54]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 5.3–E To Exempt Registered Investment Companies That List Certain Categories of the Securities Defined as Derivative and Special Purpose Securities Under NYSE Arca Rules From Having To Obtain Shareholder Approval Prior to the Issuance of Securities in Connection With Certain Acquisitions of the Stock or Assets of an Affiliated Company

December 15, 2020.

I. Introduction

On August 28, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 5.3–E (Corporate Governance and Disclosure Policies) to exempt certain categories of derivative and special purpose securities from the requirement to obtain shareholder approval prior to the issuance of securities in connection with certain acquisitions of the stock or assets of another company. The

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposed rule change was published for comment in the **Federal Register** on September 17, 2020.[3] On October 30, 2020, pursuant to Section 19(b)(2) of the Exchange 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 December 1, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded the proposed rule change as originally filed.[6] The Commission has received no comments on the proposed rule change. The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. The Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE Arca Rule 5.3–E(d)(9) requires issuers to obtain shareholder approval in connection with the acquisition of the stock or assets of another company, in the following circumstances:

(i) If any director, officer, or substantial shareholder of the listed company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the transaction (or series of related transactions) and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more; or

(ii) where the present or potential issuance of common stock, or securities convertible into or exercisable for common stock (other than in a public offering for cash), could result in an increase in outstanding common shares of 20% or more or could represent 20% or more of the voting power outstanding before the issuance of such stock or securities.

The Exchange proposes to exempt issuers of certain categories of derivative and special purpose securities[8] from having to comply with this requirement when they issue securities in connection with the acquisition of the stock or assets of an affiliated company. In general, the requirement to obtain shareholder approval prior to the issuance of securities in connection with certain acquisitions of the stock or asset of another company is designed to give existing shareholders a vote on the issuance of stock that may dilute their voting or economic rights. The Exchange notes that NYSE Arca Rule 5.3–E(d)(9) is also intended to give shareholders a vote on transactions where a director, officer, or substantial shareholder of the listed company has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Due to the unique nature of 1940 Act Securities as well as Rule 17a–8[9] (Mergers of affiliated companies) under the 1940 Act (''Rule 17a–8''), the Exchange believes that these concerns are limited with respect to the holders of such securities. Therefore, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from having to obtain shareholder approval under Exchange rules which can be both time consuming and expensive.

The Exchange believes that the potential economic dilution concerns sometimes associated with a large share issuance are unlikely to be present when an issuer of a 1940 Act Security issues shares in connection with the acquisition of the stock or assets of an affiliated company. As described above, the proposed exemption will only apply to issuers of derivative and special purpose securities organized under the 1940 Act.[10] Rule 17a–8 exempts such issuers from prohibitions under the 1940 Act on certain transactions with affiliated persons, provided that, in connection with the merger with an affiliated investment company, the board of directors, including a majority of the directors that are not interested persons, affirmatively determine that (i) participation in the merger is in the best interest of their respective investment company, and (ii) the interests of their shareholders will not be diluted as a result of the transaction.[11] Because the board of directors must make an affirmative determination that the merger is not dilutive to existing shareholders, the shares issued by the acquiring investment company are issued at a price equal to the fund's net asset value.[12] While the Exchange notes that the shares are issued at a fund's net asset value when the fund is registered, the requirements of Rule 17a–8 also protect against dilution when the fund to be acquired is unregistered. Specifically, Rule 17a–8(a)(2)(iii) requires that where a fund is acquiring

[3] *See* Securities Exchange Act Release No. 89834 (September 11, 2020), 85 FR 58090 (''Original Proposal'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 90297, 85 FR 70701 (November 5, 2020). The Commission designated December 16, 2020, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] In Amendment No. 1, the Exchange: (1) Removed from the proposed rule text a condition that the proposed exemption from the Exchange's shareholder approval requirement would apply only to a transaction that does not require shareholder approval under Rule 17a–8 (as defined herein); (2) removed the related discussion in the proposed rule change about why the Exchange believed it would have been appropriate to only exempt transactions that do not require shareholder approval under Rule 17a–8; (3) removed statements in its purpose section that incorrectly stated that Rule 17a–8 exempts the acquiring company from obtaining shareholder approval under certain conditions; (4) supplemented its discussion of why the Exchange believes it is appropriate *to exempt* an issuer of 1940 Act Securities (as defined herein) from obtaining shareholder approval in the context of a merger of affiliated companies in light of its revised discussion of Rule 17a–8's shareholder approval requirements; and (5) made other clarifications, corrections, and technical changes. Amendment No. 1 is available on the Commission's website at *https://www.sec.gov/rules/sro/nysearca.htm.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The Exchange proposes to exempt the following categories of derivative and special purpose securities: securities listed pursuant to Rules 5.2–E(h) (Unit Investment Trusts), 5.2–E(j)(3) (Investment Company Units), 5.2–E(j)(8) (Exchange-Traded Fund Shares), 8.100–E (Portfolio Depositary Receipts), 8.600–E (Managed Fund Shares), 8.601–E (Active Proxy Portfolio Shares) and 8.900–E (Managed Portfolio Shares) (collectively, the ''1940 Act Securities''). Each of the aforementioned categories of derivative and special purpose securities are issued by an entity organized under the Investment Company Act of 1940 (the ''1940 Act'').

[9] 17 CRF 270.17a–8.

[10] Approximately 88% of securities listed on the Exchange are issued by investment companies registered under the 1940 Act.

[11] 17 CRF 270.17a–8.

[12] The Exchange notes that the proposing releases for Rule 17a–8 specifically contemplated that, in certain circumstances, the price paid may deviate from a fund's net asset value due to adjustments for tax purposes. *See* Investment Company Act Release No. 25259 at Footnote 26.

the assets of an unregistered fund, the board have procedures in place for the valuation of assets. Such procedures must include procedures that provide for a report to be prepared by an independent evaluator to provide a valuation for assets to be acquired.

The Exchange believes that the same provisions of Rule 17a–8 that protect against economic dilution also provide safeguards for existing shareholders when the transaction involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Because the board must make an affirmative decision that the transaction is in the best interest of its shareholders and that the transaction will not result in economic dilution for existing shareholders, there is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

Under Rule 17a–8 shareholders of funds being acquired by an affiliated company have the opportunity to vote on the proposed merger unless certain conditions are met. However, Rule 17a–8 does not require the acquiring fund (*i.e.,* the fund issuing shares in the merger) to obtain the approval of its shareholders. When the Securities and Exchange Commission (the ''Commission'') proposed amendments to Rule 17a–8, it specifically sought comment on whether the outstanding voting securities of the fund that will survive the merger should also be required to approve the merger.[13] Importantly, the Commission ultimately did not include a requirement of approval of shareholders of an acquiring fund in its final rule.

Given that the Commission's rules do not require an issuer of 1940 Act Securities to obtain shareholder approval in the context of a merger of affiliated companies, the Exchange believes it is appropriate to exempt such issuers of 1940 Act Securities from having to comply with NYSE Arca Rule 5.3–E(d)(9).

As described above, the Exchange only proposes to exempt issuers of 1940 Act Securities from having to comply with NYSE Arca Rule 5.3–E(d)(9) if they are issuing shares to acquire the stock or assets of an affiliated company. Notwithstanding the proposed exemption, the Exchange notes that other provisions of Exchange rules or the 1940 Act may require shareholder approval and will still apply.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Exchange Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Exchange Act,[15] in particular in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendment is consistent with the protection of investors, as the unique nature of 1940 Act Securities, as well as protections afforded by Rule 17a–8, means that (i) there is little risk of economic dilution to existing shareholders as a result of an issuance of shares by an issuer of 1940 Act Securities in connection with the acquisition of the stock or assets of an affiliated company, and (ii) existing shareholders are unlikely to be disenfranchised as a result of a Rule 17a–8-compliant transaction that involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid.

The Exchange further believes its proposal is consistent with the protection of investors because its proposal is limited to issuers of derivative and special purpose securities that are organized under the 1940 Act. In the case of a merger of affiliated investment companies, the board of directors of each investment company, including a majority of the directors that are not interested persons of the respective investment company, must affirmatively determine that (i) participation in the merger is in the best interest of their respective investment company, and (ii) the interests of their shareholders will not be diluted as a result of the transaction. Because the interests of shareholders in such a transaction cannot be diluted, shares issues by one investment company to acquire the stock or assets of an affiliated investment company are issued at a price equal to the acquiring fund's net asset value. Because of the safeguards embedded in Rule 17a–8, as described above, the Exchange also believes that there are reduced concerns about economic dilution when the transaction involves a merger with an affiliate unregistered fund.

The Exchange believes that the same provisions of Rule 17a–8 that protect against economic dilution also provide safeguards for existing shareholders when the transaction involves a director, officer, or substantial shareholder of the listed company that has a significant interest in the company or assets to be acquired or the consideration to be paid and therefore may benefit from the transaction. Because the board must make an affirmative decision that the transaction is in the best interest of its shareholders and that the transaction will not result in economic dilution for existing shareholders, the is reduced concern that existing shareholders will be disenfranchised as a result of the Exchange's proposed exemption.

Rule 17a–8 proscribes when shareholder approval is required in the context of a merger of affiliated companies. Although shareholders of the company being acquired have a right to vote on the merger under certain circumstances, Rule 17a–8 does not require the shareholders of the acquiring company to approve the transaction. Accordingly, the Exchange believes it is appropriate to exempt issuers of 1940 Act Securities from the requirements of NYSE Arca Rule 5.3–E(d)(9) in this same limited circumstance.

Notwithstanding the proposed exemption described above, the Exchange notes that other provisions of Exchange rules or the 1940 Act may require shareholder approval and will still apply.

The Exchange believes it is not unfairly discriminatory to offer the exemption only to issuers of 1940 Act Securities completing a merger with an affiliated company, as opposed to all issuers of derivative and special purpose securities, because only 1940 Act Securities are subject to the requirements of the 1940 Act which offer the protections against dilution and self-dealing described herein.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed amendment will not impose

[13] *See* Investment Company Act Release No. 25259 at Section II(A)(2)(a): ''Should the outstanding voting securities of the fund that will survive the merger also be required to approve the merger?''

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

any burden on competition, as they simply propose to offer 1940 Act Securities a limited exemption for the Exchange's shareholder approval rule in a specific circumstance where the Exchange believes there is a low risk of dilution to existing shareholders.

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. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2020–54, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act [16] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,[17] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with the Exchange Act, and, in particular, with Section 6(b)(5) of the Exchange Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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.[18]

As discussed above, the Exchange is proposing to exempt issuers of registered investment companies that list certain categories of derivative and special purpose securities, including ETFs, from the requirement to obtain shareholder approval prior to substantial issuances of securities in connection with the acquisition of stock or assets of an affiliated company. The Exchange conditions its proposed exemption on, among other things, the transaction complying with Rule 17a–8 under the Investment Company Act of 1940, which requires that the board of directors of each company participating in such a merger determine that participation in the merger is in the best interests of the company and that the interests of the company's shareholders will not be diluted as a result of the merger. In its Original Proposal, however, the Exchange erroneously described Rule 17a–8 as exempting an acquiring company from its shareholder approval requirements subject to certain conditions, when in fact that provision only applies to the non-surviving acquired company, and the Exchange justified its proposal in part on that misunderstanding. On December 1, 2020, the Exchange filed Amendment No. 1 that replaced and superseded its Original Proposal, and attempted to correct the erroneous description of Rule 17a–8.[19] The Exchange also made related changes to its proposed rule text and justification. Given the filing of this recent amendment, the Commission is seeking additional public comment on the proposed rule change in order to determine whether it is consistent with the requirements of Section 6(b)(5) of the Act.

The Commission notes that, under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [20] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[21] and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rule and regulations.[22]

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act [23] to determine whether the proposal should be approved or disapproved.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[24]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by January 11, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by January 25, 2021.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in Amendment No. 1,[25] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2020–54 on the subject line.

[16] 15 U.S.C. 78s(b)(2)(B).

[17] *Id.*

[18] 15 U.S.C. 78f(b)(5).

[19] *See supra* note 6.

[20] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[21] *See id.*

[22] *See id.*

[23] 15 U.S.C. 78s(b)(2)(B).

[24] Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[25] *See supra* note 6.

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–2020–54. 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–2020–54 and should be submitted on or before January 11, 2021. Rebuttal comments should be submitted by January 25, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28008 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12) and 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting; Cancellation

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 85 FR 81258, December 15, 2020.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Thursday, December 17, 2020 at 3:00 p.m.

CHANGES IN THE MEETING: The Closed Meeting scheduled for Thursday, December 17, 2020 at 3:00 p.m., has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

Dated: December 17, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–28243 Filed 12–17–20; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90668; File No. SR–NYSEARCA–2020–107]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Equities Fees and Charges

December 15, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 3, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (''Fee Schedule'') to adjust the credits applicable to a step up tier for ETP Holders adding liquidity in Round Lots and Odd Lots in Tapes A, B and C securities with a per share price below $1.00. The Exchange proposes to implement the fee changes effective December 3, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to adjust the credits applicable to a step up tier for ETP Holders[4] adding liquidity in Round Lots and Odd Lots in Tapes A, B and C securities with a per share price below $1.00.

The proposed changes are intended to address an inadvertent mistake regarding the level of credits applicable to the step up tier adopted by the Exchange in August 2020.[5]

The Exchange proposes to implement the fee changes effective December 3, 2020.

Background

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[6]

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

[4] All references to ETP Holders in connection with this proposed fee change include Market Makers.

[5] *See* Securities Exchange Act Release No. 89607 (August 18, 2020), 85 FR 52179 (August 24, 2020) (SR–NYSEArca–2020–75).

[6] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7–10–04) (Final Rule) (''Regulation NMS'').

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.'' [7] Indeed, equity trading is currently dispersed across 16 exchanges,[8] numerous alternative trading systems,[9] and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 18% market share.[10] Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 10% market share of executed volume of equities trading.[11]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide liquidity on an Exchange against which market makers can quote, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

In response to the competitive environment described above, the Exchange has established incentives for ETP Holders who submit orders that provide liquidity on the Exchange. The proposed fee change is designed to attract additional order flow to the Exchange by offering increased credits for executing Round Lots and Odd Lots in Tapes A, B and C securities with a share price of less than $1.00 (''Sub-Dollar Securities'').

Proposed Rule Change

The Exchange's Fee Schedule currently provides for tiered credits to ETP Holders adding liquidity in Sub-Dollar Securities. Specifically, ETP Holders who have an Adding ADV of 1 million shares with a per share price below $1.00 (''Sub-Dollar Adding Orders''), and who directly execute providing volume in Sub-Dollar Adding Orders equal to at least 0.20% of the US Consolidated ADV (''CADV'') [12] with a per share price below $1.00 (''Sub-Dollar CADV'') over the ETP Holder's July 2020 Sub-Dollar Adding ADV taken as a percentage of Sub Dollar CADV (''Sub-Dollar Baseline''), receive a credit for orders that provide liquidity to the Book in Sub-Dollar Adding Orders, as follows:

- 0.0005% of the total dollar value for an increase of at least 0.20% more but less than 0.50% of Sub-Dollar CADV over the Sub-Dollar Baseline;
- 0.0010% of the total dollar value for an increase of at least 0.50% more but less than 0.75% of Sub-Dollar CADV over the Sub-Dollar Baseline;
- 0.00125% of the total dollar value for an increase of at least 0.75% more but less than 1.0% of Sub-Dollar CADV over the Sub-Dollar Baseline; and
- 0.0015% of the total dollar value for an increase of at least 1.0% more of Sub-Dollar CADV over the Sub-Dollar Baseline.

When the Exchange originally filed in August 2020 to adopt the step up tier for Sub-Dollar Securities, it inadvertently included two additional zeroes in the level of the credit. With this proposed rule change, the Exchange proposes to adjust the level of each of the above credits on the Exchange's Fee Schedule to the following:

- 0.05% of the total dollar value for an increase of at least 0.20% more but less than 0.50% of Sub-Dollar CADV over the Sub-Dollar Baseline;
- 0.10% of the total dollar value for an increase of at least 0.50% more but less than 0.75% of Sub-Dollar CADV over the Sub-Dollar Baseline;
- 0.125% of the total dollar value for an increase of at least 0.75% more but less than 1.0% of Sub-Dollar CADV over the Sub-Dollar Baseline; and
- 0.15% of the total dollar value for an increase of at least 1.0% more of Sub-Dollar CADV over the Sub-Dollar Baseline.

The Exchange believes these levels of credit for Sub-Dollar Securities will continue to incentivize ETP Holders to increase the liquidity-providing orders in Sub-Dollar Securities they send to the Exchange, and would support the quality of price discovery on the Exchange while also providing additional liquidity for incoming orders. The credits offered by the Exchange for adding liquidity in Sub-Dollar Securities are intended to increase order flow that would interact with liquidity present on the Exchange.

As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. Because the step up tier requires an ETP Holder to increase the volume of its trades in orders that add liquidity over that ETP Holder's July 2020 baseline, the Exchange believes that these credits provide an added incentive for all ETP Holders to send additional liquidity to the Exchange.

The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. The Exchange believes the credits it offers for adding liquidity in Sub-Dollar Securities should serve as an incentive for ETP Holders to direct more of their orders in these securities to the Exchange. However, without having a view of ETP Holders' activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder directing orders to the Exchange in order to qualify for the pricing tier. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity, but additional liquidity-providing orders would benefit all market participants because it would provide greater execution opportunities on the Exchange.

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

[7] *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).

[8] *See* Cboe Global Markets, U.S Equities Market Volume Summary, available at *https://markets.cboe.com/us/equities/market_share. See generallyhttps://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.*

[9] *See* FINRA ATS Transparency Data, *available at https://otctransparency.finra.org/otctransparency/AtsIssueData.* A list of alternative trading systems registered with the Commission is *available at https://www.sec.gov/foia/docs/atslist.htm.*

[10] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, available at *http://markets.cboe.com/us/equities/market_share/.*

[11] *See id.*

[12] US CADV means the United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape, excluding odd lots through January 31, 2014 (except for purposes of Lead Market Maker pricing), and excludes volume on days when the market closes early and on the date of the annual reconstitution of the Russell Investments Indexes. Transactions that are not reported to the Consolidated Tape are not included in US CADV. *See* Fee Schedule, footnote 3.

Section 6(b) of the Act,[13] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[14] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Fee Change Is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [15]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders that provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange.

The Exchange believes the proposal to adjust the level of credits under the step up tier for adding liquidity in Sub-Dollar Securities is reasonable as it would continue to serve as an incentive to ETP Holders to send orders in Sub-Dollar Securities directly to NYSE Arca and therefore provide liquidity that supports the quality of price discovery and promotes market transparency. The Exchange believes the pricing tier for Sub-Dollar Securities is reasonable because it allows ETP Holders to receive increased credits commensurate with their trading on the Exchange. *i.e.,* the more they trade in Sub-Dollar Securities, the higher the credit they receive. Moreover, the pricing tier benefits market participants whose increased order flow provides meaningful added levels of liquidity thereby contributing to the depth and market quality on the Exchange.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges,[16] including the Exchange,[17] and are reasonable, equitable and non-discriminatory because they are open to all ETP Holders on an equal basis and provide additional credits that are reasonably related to the value to an exchange's market quality and associated higher levels of market activity.

Against the backdrop of the competitive environment in which the Exchange currently operates, the proposed rule change is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange's market share relative to its competitors.

The Proposed Fee Change Is an Equitable Allocation of Fees and Credits

The Exchange believes its proposal equitably allocates its fees among its market participants by fostering liquidity provision and stability in the marketplace.

The Exchange believes the proposed rule change is equitable because it allows ETP Holders to receive increased credits for providing liquidity in Sub-Dollar Securities. Moreover, the step up pricing tier is intended to benefit market participants whose order flow in Sub-Dollar Securities would provide meaningful added levels of liquidity thereby contributing to the depth and market quality on the Exchange. There are a number of ETP Holders that currently qualify for the step up pricing tier and would continue to qualify under the proposed rule change if they maintain their level of trading in Sub-Dollar Securities on the Exchange. However, without having a view of ETP Holders' activity on other markets and on off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any additional ETP Holders qualifying for this tier. The Exchange believes the current pricing tier, which requires an ETP Holder to increase the volume of its trades in orders that add liquidity over that ETP Holder's July 2020 baseline, provides an incentive for ETP Holders to continue to submit liquidity-providing order flow, which promotes price discovery and increases execution opportunities for all ETP Holders. The increased credits the Exchange provides therefore encourages the submission of additional liquidity in Sub-Dollar Securities to a national securities exchange, thus promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders from the substantial amounts of liquidity present on the Exchange, which benefits all market participants on the Exchange.

The Exchange believes that offering higher step up credits for providing liquidity if the step up requirements for Sub-Dollar securities are met, will continue to attract increased order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not qualify for the adding liquidity credits by increasing order flow and liquidity, the proposal will not adversely impact their existing pricing or their ability to qualify for other credits provided by the Exchange.

The Proposed Fee Change Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The proposal is also not unfairly discriminatory because it neither targets nor will it have a disparate impact on any particular category of market participant.

The Exchange believes it is not unfairly discriminatory to provide incrementally higher credits in Sub-Dollar Securities because the higher credits would encourage all ETP Holders to provide additional liquidity on the Exchange in Sub-Dollar Securities. The current pricing tier also

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) and (5).

[15] *See* Regulation NMS, 70 FR at 37499.

[16] *See e.g.,* Cboe BZX U.S. Equities Exchange (''BZX'') Fee Schedule, Footnote 1, Add Volume Tiers which provide enhanced rebates between $0.0028 and $0.0032 per share for displayed orders where BZX members meet certain volume thresholds. For Sub-Dollar Securities, BZX provides a base credit of $0.00009 per share, and provides additional credits of up to $0.0006 per share under its Lead Market Maker pricing tier. *See* BZX Fee Schedule, Add Volume Tiers under Lead Market Maker Pricing.

[17] *See e.g.,* Fee Schedule, Step Up Tier, Step Up Tier 2, Step Up Tier 3 and Step Up Tier 4, which provide enhanced rebates between $0.0025 and $0.0033 per share in Tape A Securities, between $0.0022 and $0.0034 per share in Tape B Securities, and between $0.0025 and $0.0033 per share in Tape C Securities for orders that provide displayed liquidity where ETP Holders meet certain volume thresholds.

serves as an incentive to ETP Holders to increase the number of orders in Sub-Dollar Securities sent directly to NYSE Arca in order to qualify for, and receive, increased credits. The Exchange believes that the proposed rule change provides an incentive for ETP Holders to send additional liquidity to the Exchange in order to qualify for increased credits. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume.

The Exchange believes that the proposed rule change is not unfairly discriminatory because maintaining or increasing the proportion of Sub-Dollar Securities that are executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) contributes to investors' confidence in the fairness of their transactions and benefits all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection. Finally, the submission of orders in Sub-Dollar Securities to the Exchange is optional for ETP Holders in that they can choose whether and to what extent to submit such orders to the Exchange.

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,[18] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [19]

Intramarket Competition. The proposed changes are designed to respond to the current competitive environment and to attract additional order flow to the Exchange. The Exchange believes that the proposed changes would continue to incentivize market participants to direct order flow 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, which benefits all market participants on the Exchange. The credits for trading 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 amendments to its Fee Schedule would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange's market share of intraday trading (*i.e.,* excluding auctions) is currently less than 10%. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [20] of the Act and subparagraph (f)(2) of Rule 19b–4 [21] 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) [22] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2020–107 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEARCA–2020–107. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

[18] 15 U.S.C. 78f(b)(8).

[19] *See* Regulation NMS, 70 FR at 37498–99.

[20] 15 U.S.C. 78s(b)(3)(A).

[21] 17 CFR 240.19b–4(f)(2).

[22] 15 U.S.C. 78s(b)(2)(B).

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–2020–107 and should be submitted on or before January 11, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28014 Filed 12–18–20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90665; File No. SR–NYSEArca–2020–104]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To List and Trade Shares of the Stance Equity ESG Large Cap Core ETF Under NYSE Arca Rule 8.601–E

December 15, 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 30, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following under NYSE Arca Rule 8.601–E: Stance Equity ESG Large Cap Core ETF. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange has adopted NYSE Arca Rule 8.601–E for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges (''UTP''), of Active Proxy Portfolio Shares, which are securities issued by an actively managed open-end investment management company.[4] Commentary .01 to Rule 8.601–E requires the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Active Proxy Portfolio Shares on the Exchange. Therefore, the Exchange is submitting this proposal in order to list and trade shares (''Shares'') of Active Proxy Portfolio Shares of the Stance Equity ESG Large Cap Core ETF (the ''Fund'') under Rule 8.601–E.

Key Features of Active Proxy Portfolio Shares

While funds issuing Active Proxy Portfolio Shares will be actively-managed and, to that extent, will be similar to Managed Fund Shares, Active Proxy Portfolio Shares differ from Managed Fund Shares in the following important respects. First, in contrast to Managed Fund Shares, which are actively-managed funds listed and traded under NYSE Arca Rule 8.600–E[5] and for which a ''Disclosed Portfolio'' is required to be disseminated at least once daily,[6] the portfolio for an issue of Active Proxy Portfolio Shares will be publicly disclosed within at least 60 days following the end of every fiscal quarter in accordance with normal disclosure requirements otherwise applicable to open-end management investment companies registered under the Investment Company Act of 1940 (the ''1940 Act'').[7] The composition of

[23] 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.

[4] *See* Securities Exchange Act Release No. 89185 (June 29, 2020), 85 FR 40328 (July 3, 2020) (SR–NYSEArca–2019–95). Rule 8.601–E(c)(1) provides that ''[t]he term ''Active Proxy Portfolio Share'' means a security that (a) is issued by a investment company registered under the Investment Company Act of 1940 (''Investment Company'') organized as an open-end management investment company that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a specified minimum number of shares, or multiples thereof, in return for a deposit by the purchaser of the Proxy Portfolio and/or cash with a value equal to the next determined net asset value (''NAV''); (c) when aggregated in the same specified minimum number of Active Proxy Portfolio Shares, or multiples thereof, may be redeemed at a holder's request in return for the Proxy Portfolio and/or cash to the holder by the issuer with a value equal to the next determined NAV; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.'' Rule 8.601–E(c)(2) provides that ''[t]he term ''Actual Portfolio'' means the identities and quantities of the securities and other assets held by the Investment Company that shall form the basis for the Investment Company's calculation of NAV at the end of the business day.'' Rule 8.601–E(c)(3) provides that ''[t]he term ''Proxy Portfolio'' means a specified portfolio of securities, other financial instruments and/or cash designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares as provided in the exemptive relief pursuant to the Investment Company Act of 1940 applicable to such series.''

[5] The Commission has previously approved listing and trading on the Exchange of a number of issues of Managed Fund Shares under NYSE Arca Rule 8.600–E. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR–NYSEArca–2009–55) (order approving listing of Dent Tactical ETF); 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR–NYSEArca–2010–118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF). The Commission also has approved a proposed rule change relating to generic listing standards for Managed Fund Shares. Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016 (SR–NYSEArca–2015–110) (amending NYSE Arca Equities Rule 8.600 to adopt generic listing standards for Managed Fund Shares).

[6] NYSE Arca Rule 8.600–E(c)(2) defines the term ''Disclosed Portfolio'' as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. NYSE Arca Rule 8.600–E(d)(2)(B)(i) requires that the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time.

[7] A mutual fund is required to file with the Commission its complete portfolio schedules for the second and fourth fiscal quarters on Form N–CSR

Continued

the portfolio of an issue of Active Proxy Portfolio Shares would not be available at commencement of Exchange listing and trading. Second, in connection with the creation and redemption of Active Proxy Portfolio Shares, such creation or redemption may be exchanged for a Proxy Portfolio with a value equal to the next-determined NAV. A series of Active Proxy Portfolio Shares will disclose the Proxy Portfolio on a daily basis, which, as described above, is designed to track closely the daily performance of the Actual Portfolio of a series of Active Proxy Portfolio Shares, instead of the actual holdings of the Investment Company, as provided by a series of Managed Fund Shares.

The Shares of the Fund will be issued by The RBB Fund, Inc. (the ''Issuer''), a corporation organized under the laws of the State of Maryland and registered with the Commission as an open-end management investment company.[8] Red Gate Advisers, LLC (the ''Adviser'') will be the investment adviser to the Fund. Stance Capital, LLC and Vident Investment Advisory, LLC will be the sub-advisers (the ''Sub-Advisers'') for the Fund. U.S. Bank, N.A. will serve as the Fund's custodian (the ''Custodian''). U.S. Bancorp Fund Services, LLC will serve as the Fund's transfer agent (the ''Transfer Agent''). Herald Investment Marketing, LLC will act as the distributor and principal underwriter (the ''Distributor'') for the Fund.

Commentary .04 to NYSE Arca Rule 8.601–E provides that, if the investment adviser to the Investment Company issuing Active Proxy Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, with respect to access to information concerning the composition and/or changes to such Investment Company's Actual Portfolio and/or Proxy Portfolio. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's Actual Portfolio and/or Proxy Portfolio or has access to non-public information regarding the Investment Company's Actual Portfolio and/or Proxy Portfolio or changes thereto must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Actual Portfolio and/or Proxy Portfolio or changes thereto. Commentary .04 is similar to Commentary .03(a)(i) and (iii) to NYSE Arca Rule 5.2–E(j)(3); however, Commentary .04, in connection with the establishment of a ''fire wall'' between the investment adviser and the broker-dealer, reflects the applicable open-end fund's portfolio, not an underlying benchmark index, as is the case with index-based funds.[9] Commentary .04 is also similar to Commentary .06 to Rule 8.600–E related to Managed Fund Shares, except that Commentary .04 relates to establishment and maintenance of a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliate, as applicable, applicable to an Investment Company's Actual Portfolio and/or Proxy Portfolio or changes thereto, and not just to the underlying portfolio, as is the case with Managed Fund Shares.

In addition, Commentary .05 to Rule 8.601–E provides that any person or entity, including a custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company's Actual Portfolio or the Proxy Portfolio or changes thereto, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company Actual Portfolio or the Proxy Portfolio or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company Actual Portfolio or Proxy Portfolio.

The Adviser is not registered as a broker-dealer but is affiliated with a broker-dealer. The Adviser has implemented and will maintain a ''fire wall'' with respect to such broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the Fund's Actual Portfolio and/or Proxy Portfolio. The Sub-Advisers are not registered as broker-dealers and are not affiliated with a broker-dealer.

In the event (a) the Adviser or Sub-Adviser(s) becomes registered as a broker-dealer or becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser is a registered broker-dealer, or becomes affiliated with a broker-dealer, it will implement and maintain a ''fire wall'' with respect to its relevant personnel or its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's Actual Portfolio and/or Proxy Portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's Actual Portfolio and/or Proxy Portfolio or changes thereto. Any person related to the Adviser, Sub-Adviser(s), or the Fund who makes decisions pertaining to the Fund's Actual Portfolio or the Proxy Portfolio or has access to non-public information regarding the Fund's Actual Portfolio and/or the Proxy Portfolio or changes thereto are subject to procedures reasonably designed to prevent the use and dissemination of

under the 1940 Act. Information reported on Form N–PORT for the third month of a fund's fiscal quarter will be made publicly available 60 days after the end of a fund's fiscal quarter. Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a series of Active Proxy Portfolio Shares' Statement of Additional Information (''SAI''), its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A series of Active Proxy Portfolio Shares' SAI and Shareholder Reports will be available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

[8] The Issuer is registered under the 1940 Act. On November 23, 2020, the Issuer filed a registration statement on Form N–1A under the Securities Act of 1933 (the ''1933 Act'') (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 033–20827 and 811–05518) (the ''Registration Statement''). The Issuer filed an Application for an Order under Section 6(c) of the 1940 Act for exemptions from various provisions of the 1940 Act and rules thereunder (File No. 812–15165), dated September 28, 2020 (the ''Application''). The description of the operation of the Fund herein is based, in part, on the Registration Statement and the Application. The Exchange will not commence trading in Shares of the Fund until the Commission has issued an order granting the exemptions requested in the Application.

[9] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a result, the Adviser and Sub-Advisers and their related personnel will be subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violations, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

material non-public information regarding the Fund's Actual Portfolio and/or the Proxy Portfolio or changes thereto.

In addition, any person or entity, including any service provider for the Fund, who has access to non-public information regarding the Fund's Actual Portfolio or the Proxy Portfolio or changes thereto, will be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the Fund's Actual Portfolio and/or the Proxy Portfolio or changes thereto. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity has erected and will maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to the Fund's Actual Portfolio and/or Proxy Portfolio.

Description of the Fund

According to the Registration Statement, the Adviser will identify its ''Portfolio Reference Basket'' [10] for the Fund, which is designed to closely track the daily performance of the Fund but is not the Fund's Actual Portfolio. The Portfolio Reference Basket is comprised of all of the names of the securities in the Actual Portfolio, and only the securities that are in the Actual Portfolio (unless cash or cash equivalents are included). The Portfolio Reference Basket will have a minimum weightings overlap of 90% with the Actual Portfolio at the beginning of each trading day. The Adviser will publish a new Portfolio Reference Basket for the Fund before the commencement of trading of the Fund's Shares on each ''Business Day,'' [11] and the Adviser will not make intra-day changes to the Portfolio Reference Basket except to correct errors in the published Portfolio Reference Basket.

In addition, on each Business Day, before commencement of trading of Shares, the Fund will publish the ''Guardrail Amount,'' which is the maximum deviation between the weightings of the specific securities in the Portfolio Reference Basket and the weightings of those specific securities in the Actual Portfolio, as well as between the weighting of the respective cash positions. The Guardrail Amount is designed to help evaluate the risk of tracking error, which is the difference in the performance of the Portfolio Reference Basket from the performance of the Actual Portfolio.

Stance Equity ESG Large Cap Core ETF

The Fund's holdings will conform to the permissible investments as set forth in the Application, and the holdings will be consistent with all requirements in the Application.[12] Any foreign common stocks held by the Fund will be traded on an exchange that is a member of the Intermarket Surveillance Group (''ISG'') or with which the Exchange has in place a comprehensive surveillance sharing agreement.

According to the Registration Statement, the Fund's investment objective is to seek long-term capital appreciation. The Fund will invest primarily in exchange-traded equity securities of U.S. large capitalization issuers. The Fund will also seek to achieve its investment objectives by investing mainly in companies that meet environmental, social, and governance standards, as determined by Stance Capital, LLC.

Investment Restrictions

The Shares of the Fund will conform to the initial and continued listing criteria under Rule 8.601–E. The Fund's holdings will be limited to and consistent with permissible holdings as described in the Application and all requirements in the Application.[13]

The Fund's investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).[14]

Creations and Redemptions of Shares

According to the Registration Statement, the Issuer will issue and sell Shares of the Fund only in specified minimum size ''Creation Units'' on a continuous basis through the Distributor at their NAV next determined after receipt of an order, on any Business Day, in proper form. The NAV of the Fund's Shares will be calculated each Business Day as of the close of regular trading on the Exchange, ordinarily 4:00 p.m. Eastern Time (''E.T.'').

According to the Registration Statement, Shares will be purchased and redeemed in Creation Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments''). The composition of the instruments that constitute the Deposit Instruments and the Redemption Instruments for the Fund (collectively, the ''Creation Basket'') will be the same as the Fund's Portfolio Reference Basket, except to the extent purchases and redemptions are made entirely or in part on a cash basis.

Creation Units of the Fund may be purchased and/or redeemed entirely for cash. When full or partial cash purchases of Creation Units are available or specified for the Fund, they will be effected in essentially the same manner as in-kind purchases thereof. The Fund may determine, upon receiving a purchase or redemption order from an Authorized Participant, to have the purchase or redemption, as applicable, be made entirely or in part in cash.[15]

If there is a difference between the NAV attributable to a Creation Unit and the aggregate market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will also pay to the other an amount in cash equal to that difference (the ''Cash Amount'').

[10] The ''Portfolio Reference Basket'' is the Proxy Portfolio for purposes of Rule 8.601–E(c)(3).

[11] ''Business Day'' is defined to mean any day that the Exchange is open, including any day when the Fund satisfies redemption requests as required by Section 22(e) of the 1940 Act.

[12] Pursuant to the Application, the permissible investments for the Fund include only the following instruments: ETFs traded on a U.S. exchange, exchange-traded notes (''ETNs'') traded on a U.S. exchange, U.S. exchange-traded common stocks, U.S. exchange-traded preferred stocks, U.S. exchange-traded American Depositary Receipts (''ADRs''), U.S. exchange-traded real estate investment trusts, U.S. exchange-traded commodity pools, U.S. exchange-traded metals trusts, U.S. exchange-traded currency trusts, and U.S. exchange-traded futures; common stocks listed on a foreign exchange that trade on such exchange contemporaneously with the Fund's Shares; exchange-traded futures that are traded on a U.S. futures exchange contemporaneously with the Fund's Shares; and cash and cash equivalents (which are short-term U.S. Treasury securities, government money market funds, and repurchase agreements). The Fund will not borrow for investment purposes, hold short positions, or purchase any securities that are illiquid investments at the time of purchase.

[13] *Id.*

[14] The Fund's broad-based securities benchmark index will be identified in a future amendment to its Registration Statement following the Fund's first full calendar year of performance.

[15] The Adviser represents that, to the extent the Issuer effects the creation or redemption of Shares in cash on any given day, such transactions will be effected in the same manner for all Authorized Participants placing trades with the Fund on that day.

The Fund, through the National Securities Clearing Corporation (''NSCC''), will make available on each Business Day, immediately prior to the opening of business on the Exchange (9:30 a.m. E.T.), the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Amount (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following Business Day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. The Portfolio Reference Basket will be published each Business Day regardless of whether the Fund decides to issue or redeem Creation Units entirely or in part on a cash basis.

All orders to purchase Creation Units must be placed with the Distributor by or through an Authorized Participant, which is either: (1) A ''participating party'' (*i.e.,* a broker or other participant) in the Continuous Net Settlement (''CNS'') System of the NSCC, a clearing agency registered with the Commission and affiliated with the Depository Trust Company (''DTC''), or (2) a DTC participant, which in any case has executed a participant agreement with the Distributor and the Transfer Agent.

Orders to purchase or redeem Creation Units will be accepted until the ''Cut-Off Time,'' generally 4:00 p.m. E.T. The date on which an order to purchase or redeem Creation Units is received and accepted is referred to as the ''Order Placement Date.'' All Creation Unit orders must be received by the Distributor no later than the Cut-Off Time in order to receive the NAV determined on the Order Placement Date. When the Exchange closes earlier than normal, the Fund may require orders for Creation Units to be placed earlier in the Business Day.

Availability of Information

The Fund's website (*https://www.stancecap.com/*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's website will include on a daily basis, per Share for the Fund, the prior Business Day's NAV and the ''Closing Price'' or ''Bid/Ask Price,'' [16] and a calculation of the premium/discount of the Closing Price or Bid/Ask Price against such NAV.[17] The Adviser has represented that the Fund's website will also provide: (1) Any other information regarding premiums/discounts as may be required for other ETFs under Rule 6c–11 under the 1940 Act, as amended, and (2) any information regarding the bid/ask spread for the Fund as may be required for other ETFs under Rule 6c–1 under the 1940 Act, as amended. The Fund's website also will disclose the information required under Rule 8.601–E(c)(3).[18] The website and information will be publicly available at no charge.

The Proxy Portfolio holdings for the Fund (including the identity and quantity of investments in the Portfolio Reference Basket) will be publicly available on the Fund's website before the commencement of trading in Shares on each Business Day. The website will also include information relating to the Guardrail Amount, as discussed above.

Typical mutual fund-style annual, semi-annual and quarterly disclosures contained in the Fund's Commission filings will be provided on the Fund's website on a current basis.[19] Thus, the Fund will publish the portfolio contents of its Actual Portfolio on a periodic basis, and no less than 60 days after the end of every fiscal quarter.

Investors can also obtain the Fund's SAI, Shareholder Reports, Form N–CSR, N–PORT, and Form N–CEN. The prospectus, SAI, and Shareholder Reports are available free upon request from the Issuer, and those documents and the Form N–CSR, N–PORT, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website. The Exchange also notes that pursuant to the Application, the Fund must comply with Regulation Fair Disclosure, which prohibits selective disclosure of any material non-public information.

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares, ETFs, ETNs, U.S. exchange-traded common stocks, preferred stocks, and ADRs will be available via the Consolidated Tape Association (''CTA'') high-speed line or from the exchange on which such securities trade. Price information for futures, foreign stocks, and cash equivalents is available through major market data vendors. Intraday pricing information for all constituents of the Portfolio Reference Basket for the Fund that are exchange-traded, which includes all eligible instruments except cash and cash equivalents, will be available on the exchanges on which they are traded and through subscription services. Intraday pricing information for cash equivalents will be available through subscription services and/or pricing services.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[20] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Rule 8.601–E(d)(2)(D), which sets forth circumstances under which Shares of the Fund will be halted.

Specifically, Rule 8.601–E(d)(2)(D) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Active Proxy Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Active Proxy Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the Proxy Portfolio and/or Actual Portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. If the Exchange becomes aware that the NAV, Proxy Portfolio, or Actual Portfolio with

[16] The records relating to Bid/Ask Prices will be retained by the Fund or its service providers. The ''Bid/Ask Price'' is the midpoint of the highest bid and lowest offer based upon the National Best Bid and Offer as of the time of calculation of the Fund's NAV. The ''National Best Bid and Offer'' is the current national best bid and national best offer as disseminated by the Consolidated Quotation System or UTP Plan Securities Information Processor. The ''Closing Price'' of Shares is the official closing price of the Shares on the Exchange.

[17] The ''premium/discount'' refers to the premium or discount to the NAV at the end of a trading day and will be calculated based on the last Bid/Ask Price or the Closing Price on a given trading day.

[18] *See* note 4, *supra.* Rule 8.601–E (c)(3) provides that the website for each series of Active Proxy Portfolio Shares shall disclose the information regarding the Proxy Portfolio as provided in the exemptive relief pursuant to the 1940 Act applicable to such series, including the following, to the extent applicable: (i) Ticker symbol; (ii) CUSIP or other identifier; (iii) Description of holding; (iv) Quantity of each security or other asset held; and (v) Percentage weighting of the holding in the portfolio.

[19] *See* note 7, *supra.*

[20] *See* NYSE Arca Rule 7.12–E.

respect to a series of Active Proxy Portfolio Shares is not disseminated to all market participants at the same time, the Exchange shall halt trading in such series until such time as the NAV, Proxy Portfolio, or Actual Portfolio is available to all market participants at the same time.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace in all trading sessions in accordance with NYSE Arca Rule 7.34–E(a). As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.601–E. The Exchange has appropriate rules to facilitate trading in the Shares during all trading sessions.

A minimum of 100,000 Shares for the Fund will be outstanding at the commencement of trading on the Exchange. In addition, pursuant to Rule 8.601–E(d)(1)(B), the Exchange, prior to commencement of trading in the Shares, will obtain a representation from the Adviser that the NAV per Share of the Fund will be calculated daily and that the NAV, Proxy Portfolio, and the Actual Portfolio for the Fund will be made available to all market participants at the same time.

With respect to Active Proxy Portfolio Shares, all of the Exchange member obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with Exchange rules and federal securities laws, and the Exchange and the Financial Industry Regulatory Authority, Inc. (''FINRA'') will continue to monitor Exchange members for compliance with such requirements.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by the Exchange, as well as cross-market surveillances administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[21] The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading such securities and underlying exchange-traded instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in such securities and underlying exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[22]

The Adviser will make available daily to FINRA and the Exchange the Actual Portfolio of the Fund, upon request, in order to facilitate the performance of the surveillances referred to above.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Commentary .03 to NYSE Arca Rule 8.601–E provides that the Exchange will implement and maintain written surveillance procedures for Active Proxy Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will, upon request by the Exchange or FINRA, on behalf of the Exchange, make available to the Exchange or FINRA the daily Actual Portfolio holdings of each series of Active Proxy Portfolio Shares. The Exchange believes that the ability to access the information on an as needed basis will provide it with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Active Proxy Portfolio Shares on the Exchange, including the ability to monitor compliance with the initial and continued listing requirements as well as the ability to surveil for manipulation of Active Proxy Portfolio Shares.

The Exchange will utilize its existing procedures to monitor issuer compliance with the requirements of Rule 8.601–E. For example, the Exchange will continue to use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require from the issuer of a series of Active Proxy Portfolio Shares, upon initial listing and periodically thereafter, a representation that it is in compliance with Rule 8.601–E. The Exchange notes that Commentary .01 to Rule 8.601–E requires an issuer of Active Proxy Portfolio Shares to notify the Exchange of any failure to comply with the continued listing requirements of Rule 8.601–E. In addition, the Exchange will require issuers to represent that they will notify the Exchange of any failure to comply with the terms of applicable exemptive and no-action relief. As part of its surveillance procedures, the Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 8.601–E.

With respect to the Fund, all statements and representations made in this filing regarding (a) the description of the portfolio or reference asset, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange. The Exchange will obtain a representation from the Adviser, prior to commencement of trading in the Shares of the Fund, that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

[21] FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[22] For a list of the current members of ISG, *see www.isgportal.org.*

2. Statutory Basis

The Exchange believes that the proposed rule change 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 prevent fraudulent and manipulative acts and practices, 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.[25]

With respect to the proposed listing and trading of Shares of the Fund, the Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.601–E.

The Fund's holdings will conform to the permissible investments as set forth in the Application, and the holdings will be consistent with all requirements in the Application.[26]

The Fund's investments, including derivatives, will be consistent with its investment objective and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage). That is, the Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*e.g.,* 2X or –3X) of the Fund's primary broad-based securities benchmark index (as defined in Form N–1A).

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and underlying exchange-traded instruments with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and underlying exchange-traded instruments from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and underlying exchange-traded instruments from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Any foreign common stocks held by the Fund will be traded on an exchange that is a member of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The daily dissemination of the identity and quantity of Proxy Portfolio component investments, together with the right of Authorized Participants to create and redeem each day at the NAV, will be sufficient for market participants to value and trade Shares in a manner that will not lead to significant deviations between the Shares' Bid/Ask Price and NAV.

The Exchange believes that the Fund and Active Proxy Portfolio Shares generally, will provide investors with a greater choice of active portfolio managers and active strategies through which they can manage their assets in an ETF structure. This greater choice of active asset management is expected to be similar to the diversity of active managers and strategies available to mutual fund investors. Unlike mutual fund investors, investors in Active Proxy Portfolio Shares would also accrue the benefits derived from the ETF structure, such as lower fund costs, tax efficiencies, intraday liquidity, and pricing that reflects current market conditions rather than end-of-day pricing.

The Adviser represents that, unlike ETFs that publish their portfolios on a daily basis, the Fund, as Active Proxy Portfolio Shares, will allow for efficient trading of Shares through an effective Fund portfolio transparency substitute, Proxy Portfolio transparency. The Adviser believes that this approach will provide an important benefit to investors by protecting the Fund from the potential for frontrunning of portfolio transactions and the potential for free-riding on the Fund's portfolio strategies, each of which could adversely impact the performance of the Fund.

The Exchange believes that Active Proxy Portfolio Shares will provide the platform for many more asset managers to launch ETFs, increasing the investment choices for consumers of actively managed funds, which should lead to a greater competitive landscape that can help to reduce the overall costs of active investment management for retail investors. Unlike mutual funds, Active Proxy Portfolio Shares would be able to use the efficient share settlement system in place for ETFs today, translating into a lower cost of maintaining shareholder accounts and processing transactions.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the Adviser that the NAV per Share of the Fund will be calculated daily and that the NAV, Portfolio Reference Basket, and the Actual Portfolio for the Fund will be made available to all market participants at the same time. Investors can obtain the Fund's SAI, shareholder reports, and its Form N–CSR, Form N–PORT, and Form N–CEN. The Fund's SAI and shareholder reports will be available free upon request from the Fund, and those documents and the Form N–CSR, Form N–PORT, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website. In addition, with respect to the Fund, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares, ETFs, ETNs, U.S. exchange-traded common stocks, preferred stocks, and ADRs will be available via the CTA high-speed line or from the exchange on which such securities trade. Price information for futures, foreign stocks, and cash equivalents is available through major market data vendors. The website for the Fund will include a form of the prospectus that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares will be subject to NYSE Arca Rule 8.601–E(d)(2)(D), which sets forth circumstances under which Shares of the Fund will be halted. In addition, as noted above, investors will have ready access to the Portfolio Reference Basket and quotation and last sale information for the Shares. The Proxy Portfolio holdings for the Fund (including the identity and quantity of investments in the Portfolio Reference Basket) will be publicly available on the Fund's website before the commencement of trading in Shares on each Business Day. The Shares will conform to the initial and continued listing criteria under Rule 8.601–E.[27]

The Fund's holdings will conform to the permissible investments as set forth in the Application and the holdings will be consistent with all requirements in the Application.[28] Any foreign common stocks held by the Fund will be traded

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] The Exchange represents that, for initial and continued listing, the Fund will be in compliance with Rule 10A–3 under the Act, as provided by NYSE Arca Rule 5.3–E.

[26] *See* note 12, *supra.*

[27] *See* note 4, *supra.*

[28] *See* note 12, *supra.*

on an exchange that is a member of the ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The components of the Fund's Actual Portfolio will (a) be listed on an exchange and the primary trading session of such exchange will trade synchronously with the Exchange's Core Trading Session, as defined in Rule 7.34–E(a); (b) with respect to exchange-traded futures, be listed on a U.S. futures exchange; or (c) consist of cash and cash equivalents.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange will obtain a representation from the Adviser, prior to commencement of trading in the Shares of the Fund, that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding quotation and last sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed rule change would permit listing and trading of another type of actively-managed ETF that has characteristics different from existing actively-managed and index ETFs and would introduce additional competition among various ETF products to the benefit of investors.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–104 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–2020–104. 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–2020–104 and should be submitted on or before January 11, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28013 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90672; File No. SR–NYSEArca–2020–56]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Arca Rules 5.2–E(j)(3), 5.2–E(j)(8), 5.5–E(g)(2), 8.600–E, and 8.900–E

December 15, 2020.

On June 18, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the **Federal Register** on July 7, 2020.[3] On August 17, 2020, pursuant to Section

[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89197 (June 30, 2020), 85 FR 40720.

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 October 2, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.[7] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act[8] 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 by not more than 60 days if the Commission determines that a longer period is appropriate and publishes reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on July 7, 2020. January 3, 2021 is 180 days from that date, and March 4, 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 the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[9] designates March 4, 2021 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–NYSEArca–2020–56).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28007 Filed 12–18–20; 8:45 am]

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[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89584, 85 FR 51817 (August 21, 2020).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 90075, 86 FR 63597 (October 8, 2020).

[8] 15 U.S.C. 78s(b)(2).

[9] *Id.*

[10] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90671; File No. SR–CboeBZX–2020–053]

Self-Regulatory Organizations; CboeBZX Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the 2x Long VIX Futures ETF, a Series of VS Trust, Under Rule 14.11(f)(4) (Trust Issued Receipts)

December 15, 2020.

On June 23, 2020, Cboe BZX Exchange, Inc. (''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 list and trade shares of the 2x Long VIX Futures ETF, a series of VS Trust. On June 26, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 10, 2020.[3] On August 13, 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, as modified by Amendment No. 1.[5] On October 7, 2020, the Commission instituted proceedings pursuant to Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[7] The Commission has received one comment letter on the proposed rule change, as modified by Amendment No. 1.[8]

Section 19(b)(2) of the Act[9] 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 proposed rule change, as modified by Amendment No. 1, was published for notice and comment in the **Federal Register** on July 10, 2020. January 6, 2021 is 180 days from that date, and March 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 the proposed rule change, as modified by Amendment No. 1. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[10] designates March 7, 2021 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR–CboeBZX–2020–053), as modified by Amendment No. 1.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28015 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89234 (July 6, 2020), 85 FR 41644.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89545, 85 FR 51124 (August 19, 2020).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 90118, 85 FR 64563 (October 13, 2020).

[8] The comment letter on the proposed rule change can be found at: *https://www.sec.gov/comments/SR-cboebzx-2020-053/srcboebzx2020053.htm.*

[9] 15 U.S.C. 78s(b)(2).

[10] *Id.*

[11] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90678; File No. SR–NYSEARCA–2020–111]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Shorten the Time Period Before a Letter of Acceptance, Waiver, and Consent Under Rule 10.9216 and an Uncontested Offer of Settlement Under Rule 10.9270(f)

December 15, 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 9, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to shorten the time period before a letter of acceptance, waiver, and consent under Rule 10.9216 and an uncontested offer of settlement under Rule 10.9270(f) becomes final and the corresponding time period to request review of these settlements under Rule 10.9310 from 25 days to 10 days. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to shorten the time period before a letter of acceptance, waiver, and consent (''AWC'') under Rule 10.9216 and an uncontested offer of settlement under Rule 10.9270(f) becomes final and the corresponding time period to request review of these settlements under Rule 10.9310 from 25 days to 10 days.

In 2019, NYSE Arca adopted disciplinary rules that are, with certain exceptions, substantially the same as the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[4] In adopting disciplinary rules modeled on FINRA's rules, the Exchange established processes for settling disciplinary matters both before and after issuance of a complaint.[5] As adopted, Rules 10.9216, 10.9270 and 10.9310 permit a Director and any member of the Committee for Review (''CFR'') to require a review by the Board of any AWC letter under Rule 10.9216 and any offer of settlement under Rule 10.9270 within 25 days after the AWC letter or offer of settlement was sent to each Director and each member of the CFR.

Proposed Rule Change

Rule 10.9216 (Acceptance, Waiver, and Consent; Procedure for Imposition of Fines for Minor Violation(s) of Rules) establishes AWC procedures by which an ETP Holder, OTP Holder, OTP Firm or covered person, prior to the issuance of a complaint, may execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such ETP Holder's, OTP Holder's, OTP Firm's or covered person's right to a hearing, appeal and certain other procedures. The rule also establishes procedures for executing a minor rule violation plan letter.

Under Rule 10.9216(a)(4), an AWC accepted by the Chief Regulatory Officer (''CRO'') must be sent to each Director and each member of the CFR and would be deemed final and constitute the complaint, answer, and decision in the matter 25 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1)(B).[6]

The Exchange proposes that an AWC accepted by the CRO would be deemed final and constitute the complaint, answer, and decision in a matter 10 days after being sent to each Director and each member of the CFR, unless review is requested pursuant to Rule 10.9310(a)(1)(B)(i). As described below, the time period to request review under Rule 10.9310(a)(1)(B)(i) would also be shortened to 10 days.

Rule 10.9270 (Settlement Procedure) provides a settlement procedure for a Respondent who has been notified of the initiation of a proceeding. Specifically, Rule 10.9270(f) provides that uncontested settlement offers accepted by the CRO, the Hearing Panel or, if applicable, Extended Hearing Panel must be issued and sent to each Director and each member of the CFR and becomes final 25 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1).

The Exchange proposes that uncontested settlement offers accepted by the CRO, the Hearing Panel or, if applicable, Extended Hearing Panel (together, a ''Panel'') under Rule 10.9270(f) would become final 10 days after being sent to each Director and each member of the CFR, unless review by the Exchange Board of Directors is requested pursuant to Rule 10.9310(a)(1). As noted, the time to request review of an uncontested settlement under Rule 10.9310(a)(1) would also be shortened to 10 days.

Finally, under Rule 10.9310(a)(1)(B)(i), any Director and any member of the CFR may require a review by the Board of any determination or penalty, or both, imposed in connection with an AWC letter under Rule 10.9216 or an offer of settlement determined to be uncontested before a hearing on the merits has begun under Rule 10.9270(f), except that none of those persons could request Board review of a determination or penalty concerning an affiliate of the Exchange as such term is defined in Rule 12b–2 under the Exchange Act. A request for review under this provision is made by filing with the Secretary of the Exchange a written request stating the basis and reasons for such review, within 25 days after an AWC letter or an offer of settlement has been sent to each Director and each member of the CFR pursuant to Rule 10.9216(a)(4) or Rule 10.9270(f)(3).

To permit AWC letters and uncontested settlements to become final within 10 days as proposed, the Exchange would amend Rule 10.9310(a)(1)(B)(i) to provide that a request for review of these settlements as permitted by the rule must be made by filing the requisite written request with the Secretary of the Exchange within 10 days after the AWC letter or an offer of settlement is sent to each Director and each member of the CFR pursuant to Rule 10.9216(a)(4) or Rule 10.9270(f)(3).[7]

[4] *See* Securities Exchange Act Release No. 34–85639 (April 12, 2019), 84 FR 16346 (April 18, 2019) (SR–NYSEArca–2019–15) (''Notice'').

[5] *See* Notice, 84 FR at 16366–67.

[6] Requests for review of an AWC accepted by the CRO are governed by Rule 10.9310(a)(1)(B)(i). For the sake of clarity and transparency, the Exchange proposes the non-substantive change of including the omitted reference to subsection (B)(i) of Rule 10.9310(a)(1) in both in the current and proposed text of Rule 10.9216(a)(4).

[7] The time period for requesting review pursuant to Rule 10.9310(a)(1)(B)(ii) of any rejection by the CRO of any AWC letter under Rule 10.9216 or of an uncontested offer of settlement under Rule 10.9270(f), would remain unchanged as would the time period to request for review of any determination or penalty, or both, imposed by a Panel under the Rule 10.9310(a)(1)(A) other than an offer of settlement determined to be uncontested after a hearing on the merits have begun under Rule 10.9270(f). For the avoidance of doubt, the Exchange would add text to Rule 10.9310(a)(1)(A)

Continued

The Exchange believes maintaining a 25 day waiting period for negotiated settlements under Rule 10.9216 and uncontested settlements pursuant to 10.9270(f) unnecessarily delays final resolution of matters that have been resolved by the parties and accepted by the CRO or a Panel. Shortening the waiting period to 10 days, and requiring requests for Board of Directors review to be made within that same 10 day period, would significantly expedite the settlement process in situations where ETP Holders, OTP Holders, OTP Firms and covered persons and Respondents have entered into a consensual, negotiated settlement with Enforcement or made settlement offers that Enforcement does not oppose, while continuing to ensure the independence and integrity of the regulatory process by preserving the ability of Directors and CFR members to call those settlements for review.

Further, the Exchange believes that the proposed 10 day period to call a settlement for review under Rule 10.9310(a)(1)(B)(i) is reasonable and sufficient. Like the current 25 day period, the time to call a settlement for review would begin when the AWC or uncontested settlement is sent to each Director and member of the CFR. Rules 10.9216 and 10.9270 specify that an AWC or uncontested settlement accepted by the CRO or a Panel can be sent to each Director and each CFR member via courier, express delivery or electronic means. As a practical matter, AWCs and settlements are sent to the Directors and CFR members by email, which ensures prompt and instantaneous communication. As a result, the Directors and members of the CFR will have the full 10 day period to determine whether to call these settlements for review. Moreover, the requirement in Rule 10.9310(a)(1)(B)(i) that a request for review be in writing and state the basis and reasons for such review can similarly be satisfied by a Director or CFR member sending an email to the Secretary of the Exchange requesting that a specific matter be reviewed within the proposed 10 day period. The Director or CFR member would need to take no additional steps nor include any additional information in order to call a matter for review under Rule 10.9310(a)(1)(B)(i). In light of these facts, and the relative infrequency of calls for review of AWCs and uncontested settlements,[8] the Exchange believes that 10 days are more than sufficient for a Director or member of the CFR to determine whether to call a settlement for review. Once accepted by the CRO or Panel, the proposed 10 day period for negotiated settlements to be called for review or become final would expedite disciplinary proceedings and provide finality to the disciplinary process sooner, to the benefit of the parties and the investing public.

Finally, the Exchange also believes that shortening these time periods would further promote efficiency in connection with cross-market settlements involving multiple self-regulatory organizations (''SROs''). Often such settlements are contingent upon the acceptance of a settlement by all of the SROs involved in the matter. In these situations, a settlement with the Exchange would not be final until the end of the time period specified in Rules 10.9216 and 10.9270 while a settlement with other SROs could be final once accepted.[9] Thus by reducing the amount of time these settlements are outstanding at the Exchange, the proposed change could speed up the settlement process for cross-market settlements involving multiple SROs, to the benefit of the parties and the investing public.

The Exchange intends to announce the operative date of the amended time periods in Rules 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1) at least 30 days in advance via regulatory notice to its ETP Holders, OTP Holders and OTP Firms.[10] To further facilitate an orderly transition from the current rules to the new rules, the Exchange proposes that matters already initiated under the current rules would be completed under such rules. Specifically, the Exchange proposes to apply the current 25 day period for AWCs prepared and submitted to an ETP Holder, OTP Holder, OTP Firm or covered persons under Rule 10.9216(a)(1) prior to the operative date and to uncontested settlement offers in proceedings where a Party was served with a complaint by Enforcement pursuant to Rule 10.9131 prior to the operative date. Rules 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1)(B)(i) would be amended to reflect the transition process. When the transition is complete, the Exchange intends to submit a proposed rule change that would delete the unnecessary transition provisions of 10.9216(a)(4), 10.9270(f)(3) and 10.9310(a)(1)(B)(i).

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[11] in general, and furthers the objectives of Section 6(b)(5),[12] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [13] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Specifically, the Exchange believes that shortening the waiting period for negotiated settlements and uncontested offers of settlement would serve to expedite the final resolution of both Exchange and cross-market matters that have been resolved by the parties and accepted by the CRO or Panel, thereby protecting investors and the public interest by addressing rule violations and achieving finality in disciplinary matters sooner. The proposed rule change to shorten the waiting period before an AWC letter and offer of settlement becomes final and the member of CFR or Board's time to call such settlements for review will therefore provide for a more efficient, streamlined disciplinary process.

The Exchange further believes that the proposed amendments are consistent with Section 6(b)(6) of the Act,[14] which

providing that any request for review of an offer of settlement determined to be uncontested after a hearing on the merits has begun under Rule 10.9270(f) that has been accepted by a Panel shall be governed by Rule 10.9310((a)(1)(B)(i).

[8] For example, no AWC letter or uncontested settlement has been called for review in the past year.

[9] *See, e.g.,* FINRA Rule 9216(a)(4) (''If the [AWC] letter is accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter.''); FINRA Rule 9270(e)(3) (''If the offer of settlement and order of acceptance are accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, they shall become final and the Director of the Office of Disciplinary Affairs shall issue the order and notify the Office of Hearing Officers. The Department of Enforcement shall provide a copy of an issued order of acceptance to each FINRA member with which a Respondent is associated.''). *See also e.g.,* Nasdaq Rule 9216(a)(4) & 9270(e)(3); Cboe BZX Exchange, Inc. Rule 8.8(a); Cboe EDGA Exchange, Inc. Rule 8.8(a).

[10] The effective date of the new time periods would be simultaneously communicated to the Directors and to the members of the CFR.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

[13] *Id.*

[14] 15 U.S.C. 78f(b)(6).

provides that members and persons associated with members shall be appropriately disciplined for violation of the provisions of the rules of an exchange by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction. As noted, the proposed changes will not affect the ability of Enforcement to enter into negotiated settlements or accepting uncontested settlement offers when appropriate, and will not alter the requirement that settlements be scrutinized by the CRO or Panel, who will continue to approve them, or the Directors and members of the CFR, whose right to call both types of voluntary settlements for review will not change.

For the same reasons, the Exchange believes that the proposed changes are designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[15] Moreover, as noted, the Exchange believes that the proposed 10 day period to call a settlement for review under Rules 10.9310(a)(1)(B)(i) is reasonable and sufficient, and provides an appropriate balance between the procedural safeguards of the call for review process and the benefits of expediting the resolution of disciplinary matters and providing finality to the disciplinary process sooner. Reducing the period for review would also mean that AWCs and uncontested settlements would be published two weeks earlier, thereby allowing members and the investing public to be educated about the issues they addressed sooner. Finally, the Exchange believes that the proposed transition plan is designed to provide a fair procedure for the disciplining of members and persons associated with members by providing for a clearly demarcated and orderly transition from the current 25 day period to the proposed 10 day period.

Finally, the Exchange believes that the non-substantive changes to clarify the cross-reference to Rule 10.9310 in Rules 10.9216 would 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 because the proposed non-substantive changes would add clarity, transparency and consistency to the Exchange's disciplinary rules. The Exchange believes that market participants would benefit from the increased clarity, thereby reducing potential confusion and ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public can more easily navigate and understand the Exchange's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather concerned with facilitating less burdensome regulatory compliance and processes and enhancing the quality of the regulatory process. The Exchange believes the proposed rule changes would reduce the burdens within the disciplinary process, as well as move matters through the process expeditiously by providing for more efficient finality of negotiated settlements and offers of settlement, to the benefit of all permit holders and the investing public.

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

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)(iii) of the Act[16] and subparagraph (f)(6) of Rule 19b–4 thereunder.[17]

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–NYSEARCA–2020–111 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–2020–111. 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–2020–111,

[15] 15 U.S.C. 78f(b)(7) and 78f(d).

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

and should be submitted on or before January 11, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–28011 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 19, 2021.

ADDRESSES: Send all comments to Kelly Templeton Financial Analyst, Office of Portfolio Management and Office of Financial Program Operations, Small Business Administration.

FOR FURTHER INFORMATION CONTACT: Kelly Templeton Financial Analyst, Office of Portfolio Management and Office of Financial Program Operations, phone number 1–800–736–6048 extension 7194 or *kelly.templeton@sba.gov,* or Curtis B. Rich, Management Analyst, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA has authority under SOP 50 52 to request documentation to support loan servicing requests from borrowers or guarantors in SBA's disaster loan program. The requested documentation provided by debtors is a prerequisite to such servicing actions. SBA uses the information in making a determination regarding the repayment and or change of the loan and other liquidation proceedings, including litigation by the Agency and/or the Department of Justice.

Solicitation of Public Comments: SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Titles:

1. Assumption Requirements Letter
2. Collateral Release Requirements Letter
3. Liquidation Hardship Relief Requirements Letter
4. Offer in Compromise Requirements Letter
5. Release of Guarantor Requirements Letter
6. Subordination Requirements Letter
7. Substitution of Collateral Requirements Letter
8. Substitution of Guarantor Requirements Letter
9. Work-Out Relief Requirements Letter

Description of Respondents: Debtors in SBA Disaster Loan Program.

Total Estimated Number of Respondents: 15,000.

Total Estimated Annual Responses: 15,000.

Total Estimated Annual Hour Burden: 5,000.

Curtis Rich,

Management Analyst.

[FR Doc. 2020–28075 Filed 12–18–20; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 19, 2021.

ADDRESSES: Send all comments to Terrance Moultrie, Supervisor Business Operations Specialist, Government Contracting, Small Business Administration.

FOR FURTHER INFORMATION CONTACT: Terrance Moultrie, Supervisor Business Operations Specialist, Government Contracting, *terrence.moultrieSr@sba.gov* or Curtis B. Rich, Management Analyst, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: In carrying out its statutory mandate in 15 U.S.C. 637(m) to provide oversight of certification related to the Women-Owned Small Business Federal Contract Program (WOSB Program), the U.S. Small Business Administration (SBA) is currently approved to collect information from WOSB Program applicants or participants through its certification and information collection platform, Certify.SBA.gov (Certify). SBA is revising this information collection by updating its hourly burden analysis to reflect the new certification requirements, including the new monthly reporting requirement for third-party certifiers, and adding instructions for firms that wish to document their eligibility using their CVE certification.

Solicitation of Public Comments: SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Title: ''Certification for the Women-Owned Small Business Federal Contract Program''.

Description of Respondents: Women Owned Small Business.

Form Number: 2413, 2414.

Total Estimated Annual Responses: 12,000.

Total Estimated Annual Hour Burden: 24,400.

Curtis Rich,

Management Analyst.

[FR Doc. 2020–28079 Filed 12–18–20; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Meeting of the National Parks Overflights Advisory Group

ACTION: Notice of meeting.

SUMMARY: The Federal Aviation Administration (FAA) and the National Park Service (NPS), in accordance with the National Parks Air Tour

Management Act of 2000, announce the next meeting of the National Parks Overflights Advisory Group (NPOAG). This notification provides the date, format, and agenda for the meeting.

DATES: The NPOAG will meet on January 22, 2021 from 10:30 a.m. to 1:30 p.m. Pacific Time.

ADDRESSES: The meeting will be conducted virtually. Prior to the meeting, information about how the public can view the meeting will be posted on the NPOAG website (*https://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/*).

FOR FURTHER INFORMATION CONTACT: Keith Lusk, AWP–1SP, Special Programs Staff, Federal Aviation Administration, Western-Pacific Region Headquarters, 777 South Aviation Boulevard, Suite 150, El Segundo, CA 90245, telephone: (424) 405–7017, email: *Keith.Lusk@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The National Parks Air Tour Management Act of 2000 (NPATMA), enacted on April 5, 2000, as Public Law 106–181, required the establishment of the NPOAG within one year after its enactment. The Act requires that the NPOAG be a balanced group of representatives of general aviation, commercial air tour operations, environmental concerns, and Native American tribes. The Administrator of the FAA and the Director of NPS (or their designees) serve as ex officio members of the group. Representatives of the Administrator and Director serve alternating 1-year terms as chairperson of the advisory group.

The duties of the NPOAG include providing advice, information, and recommendations to the FAA Administrator and the NPS Director on: implementation of Public Law 106–181; quiet aircraft technology; other measures that might accommodate interests to visitors of national parks; and at the request of the Administrator and the Director, on safety, environmental, and other issues related to commercial air tour operations over national parks or tribal lands.

Agenda for the January 22, 2021 NPOAG Meeting

The agenda for the meeting will be posted on the NPOAG website (*https://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/*) one week prior to the meeting and focus primarily on current FAA and NPS work to prepare air tour management plans at 23 parks nationwide as a result of a recent court order.

Attendance at the Meeting and Submission of Comments

Although this is not a public meeting, interested persons may attend virtually and can view the meeting and listen to the proceedings. Information about how the public can view the meeting will be posted on the NPOAG website (*https://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/*) prior to the meeting. To submit written comments regarding the meeting or to sign up for verbal public comment, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. Verbal comment time will be limited to 3 minutes each and the number of commenters may be capped. Written comments will not be limited or capped and will be included in the meeting notes.

Record of the Meeting

If you cannot attend the virtual NPOAG meeting, a summary record of the meeting will be made available under the NPOAG section of the FAA ATMP website at:

http://www.faa.gov/about/office_org/headquarters_offices/arc/programs/air_tour_management_plan/parks_overflights_group/minutes.cfm

or through the Special Programs Staff, Western-Pacific Region Headquarters, 777 South Aviation Boulevard, Suite 150, El Segundo, CA 90245, telephone: (424) 405–7017.

Issued in El Segundo, CA on December 15, 2020.

Keith Lusk,

Program Manager, Special Programs Staff, Western-Pacific Region.

[FR Doc. 2020–28035 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0434]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Passenger Facility Charge (PFC) Application

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 8, 2020.

DATES: Written comments should be submitted by January 20, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Vanessa Balgobin by email at: *Vanessa.balgobin@faa.gov;* phone: 202–267–3867.

SUPPLEMENTARY INFORMATION: You are asked to comment on any aspect of this information collection, including (a) whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0557.

Title: Passenger Facility Charge (PFC) Application.

Form Numbers: FAA Form 5500–1.

Type of Review: Renewal of an Information Collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on May 8, 2020 (85 FR 27506). The FAA will use any information submitted in response to this collection to carry out the intent of 49 U.S.C. 40117. This statute authorizes public agencies controlling airports to impose PFCs and use PFC revenues. The information collected enables the FAA to approve the collection of PFC revenue for projects which preserve or enhance safety, security, or capacity of the national air transportation system, or which reduce noise or mitigate noise impacts resulting from an airport, or which furnish opportunities for enhanced competition between or among air carriers, and to provide oversight of the PFC program, as required by statute.

Respondents: Approximately 650 respondents annually.

Frequency: On occasion.

Estimated Average Burden per Response: Approximately 2 hours.

Estimated Total Annual Burden: Approximately 35,466 hours annually.

Issued in Washington, DC, on December 15, 2020.

David F. Cushing,

Manager, Airports Financial Assistance Division, APP–500.

[FR Doc. 2020–27997 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2019–0093]

Deepwater Port License Application: Texas GulfLink LLC; Extension of Draft Environmental Impact Statement Comment Period

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of extension of the Draft Environmental Impact Statement comment period.

SUMMARY: By **Federal Register** notice of Friday, November 27, 2020, titled *Notice of Availability; Notice of Virtual Public Meetings; Request for Comments,* the Maritime Administration (MARAD), in coordination with the U.S. Coast Guard (USCG), announced the availability of the Draft Environmental Impact Statement (DEIS) for the Texas GulfLink LLC (GulfLink) deepwater port license application for the export of crude oil from the United States to nations abroad. Publication of this notice announced a 45-day comment period, requested public participation in the environmental impact review process, provided information on how to participate in the environmental impact review process, and announced the two virtual public meetings and an informational open house website for the DEIS.

The notice advised that the comment period for Texas GulfLink would end on January 11, 2021. MARAD and USCG have determined that an extension of the public comment period to January 22, 2021 for the GulfLink application is necessary to allow the public and interested parties a full 45 days to review the application and provide written feedback to the agencies. This extension is due to delays in getting the DEIS fully posted on the project's docket at *www.regulations.gov.* This notice announces the extension of the comment period and new comment period end date.

DATES: Comments or related material on the Texas GulfLink deepwater port license application must be received by January 22, 2021.

ADDRESSES: The public docket for the Texas GulfLink deepwater port license application is maintained by the U.S. Department of Transportation, Docket Management Facility, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The license application is available for viewing at the *Regulations.gov* website: *http://www.regulations.gov* under docket number MARAD–2019–0093.

We encourage you to submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* If you submit your comments electronically, it is not necessary to also submit a hard copy. If you cannot submit material using *http://www.regulations.gov,* please contact either Mr. Patrick Clark, USCG or Linden Houston, MARAD, as listed in the following **FOR FURTHER INFORMATION CONTACT** section of this document, which also provides alternate instructions for submitting written comments. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted. Anonymous comments will be accepted. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided. The Federal Docket Management Facility's telephone number is 202–366–9317 or 202–366–9826, the fax number is 202–493–2251.

FOR FURTHER INFORMATION CONTACT: Mr. Patrick Clark, U.S. Coast Guard, telephone: 202–372–1358, email: *Patrick.W.Clark@uscg.mil* or Mr. Linden Houston, Maritime Administration, telephone: 202–366–4839, email: *Linden.Houston@dot.gov.* For questions regarding viewing the Docket, call Docket Operations, telephone: 202–366–9317 or 202–366–9826.

SUPPLEMENTARY INFORMATION:

Request for Comments

We request public comment on this proposal. The comments may relate to, but are not limited to, the environmental impact of the proposed action. All comments will be accepted. You may submit comments directly to the Federal Docket Management Facility during the public comment period (see Dates). We will consider all comments and material received during the extended scoping period.

The license application, comments and associated documentation, as well as the DEIS and Final Environmental Impact Statement (when published), are available for viewing at the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2019–0093.

Public comment submissions should include:

- Docket number MARAD–2019–0093.
- Your name and address.

Submit comments or material using only one of the following methods:

- Electronically (preferred for processing) to the Federal Docket Management System (FDMS) website: *http://www.regulations.gov* under docket number MARAD–2019–0093.
- By mail to the Federal Docket Management Facility (MARAD–2019–0093), U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- By personal delivery to the room and address listed above between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.
- By fax to the Federal Docket Management Facility at 202–493–2251.

Faxed, mailed or hand delivered submissions must be unbound, no larger than 8½ by 11 inches and suitable for copying and electronic scanning. The format of electronic submissions should also be no larger than 8½ by 11 inches. If you mail your submission and want to know when it reaches the Federal Docket Management Facility, please include a stamped, self-addressed postcard or envelope.

Regardless of the method used for submitting comments, all submissions will be posted, without change, to the FDMS website (*http://www.regulations.gov*) and will include any personal information you provide. Therefore, submitting this information to the docket makes it public. You may wish to read the Privacy and Use Notice that is available on the FDMS website and the Department of Transportation Privacy Act Notice that appeared in the **Federal Register** on April 11, 2000 (65 FR 19477), see Privacy Act. You may view docket submissions at the Federal Docket Management Facility or electronically on the FDMS website.

Privacy Act

The electronic form of all comments received into the FDMS can be searched by the name of the individual

submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). The Department of Transportation Privacy Act Statement can be viewed in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477–78) or by visiting *http://www.regulations.gov.*

Authority: 33 U.S.C. 1501, *et seq.,* 49 CFR 1.93(h).

Dated: December 16, 2020.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2020–28044 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0119]

Notice Regarding the Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of interpretation; request for comments.

SUMMARY: The National Traffic and Motor Vehicle Safety Act (Safety Act) prohibits the sale, manufacture for sale, import or introduction into interstate commerce of a motor vehicle or item of motor vehicle equipment, unless fully compliant with all applicable Federal motor vehicle safety standards (FMVSS). The FMVSS set a threshold of performance that a vehicle or equipment item must attain, at a minimum, to meet the need for safety. The Safety Act also requires a manufacturer or distributor of a motor vehicle or motor vehicle equipment to certify that the vehicle or equipment complies with applicable FMVSS. This notice reestablishes NHTSA's longstanding position that the FMVSS test conditions and procedures apply to NHTSA's compliance testing, and that manufacturers are not required to ensure that their vehicles are designed in such a manner as to ensure that the vehicles are capable of being tested pursuant to such standards as a condition of self-certification. This notice also discusses NHTSA's enforcement with respect to vehicles with novel or innovative designs that preclude them from being tested for FMVSS compliance using NHTSA's FMVSS test procedures. This notice supersedes prior contrary statements the Agency has made—including those in NHTSA's 2016 letter of interpretation to Google, Inc.—stating that manufacturers could not validly certify FMVSS compliance unless NHTSA could verify compliance using the FMVSS test procedures.

DATES: NHTSA is inviting public comment on this document. The comment closing date is January 20, 2021. NHTSA will post a public response to major concerns raised in the comments.

You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: 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:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, 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) 366–9322 before coming.
- *Fax:* 202–493–2251.

Regardless of how you submit your comments, please be sure to mention the docket number of this document.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation section of this document.

Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below regarding documents submitted to the agency's dockets.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or the street address listed above. Follow the online instructions for accessing the dockets.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an organization, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

FOR FURTHER INFORMATION CONTACT: Daniel Koblenz or Kerry Kolodziej, Office of Chief Counsel, Telephone: 202–366–2992, Facsimile: 202–366–3820. The mailing address for these officials is: National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Introduction

The National Traffic and Motor Vehicle Safety Act [1] (the Safety Act) requires that motor vehicles meet two separate requirements before they may be sold or otherwise introduced into interstate commerce in the United States: (1) they must be compliant with the FMVSS, and (2) they must be certified as compliant by a manufacturer exercising reasonable care.[2] In a 2016 letter of interpretation to Google, Inc.,[3] NHTSA stated, without substantive discussion, that manufacturers could not validly certify vehicles as compliant with FMVSS unless the vehicles were capable of being tested using the test procedures associated with those standards.[4] This interpretation imposed major design restrictions on motor vehicles, because it effectively required manufacturers not only to certify that a motor vehicle complies with the substantive requirements of all applicable FMVSS, but also to design the vehicle in such a way that NHTSA would be able to conduct each element of each test procedure specified within each applicable regulation.

It should be noted the 2016 Google interpretation addressed a situation involving a novel, theoretical design of a vehicle that lacked driving controls, including the absence of a steering wheel and a brake pedal. Heretofore, the

[1] 49 U.S.C. 30101, *et seq.*

[2] 49 U.S.C. 30112, 30115.

[3] Letter to C. Urmson, Google (Feb. 4, 2016), *https://www.nhtsa.gov/interpretations/google-compiled-response-12-nov-15-interp-request-4-feb-16-final.*

[4] For purposes of this notice, the term ''test conditions and procedures'' refers to the preparatory steps NHTSA takes prior to measuring the performance of a motor vehicle or item of motor vehicle equipment when checking for FMVSS compliance. NHTSA designs test conditions and procedures both to ensure that vehicle performance is measured under realistic driving conditions (representative of the real-world situation posing the safety risk), and to eliminate or control variables that reduce the objectivity of the compliance test. Test procedures are incorporated into the regulatory text alongside the performance requirement with which they are associated. NHTSA's Enforcement office publishes test procedures on NHTSA's website to provide more detail into how NHTSA conducts a compliance test. *https://www.nhtsa.gov/vehicle-manufacturers/test-procedures.*

FMVSS were designed such that their threshold requisite levels of performance were defined in the context of the test procedures and conditions set forth in the standards,[5] measured under those procedures and conditions, and applied to the vehicle in the assessment of compliance. However, in the situation presented by the Google inquiry, certain test conditions or procedures could not be conducted on the vehicle as specified in the FMVSS. For example, in FMVSS No. 126, *Electronic stability control,* the test procedures specify the use of a steering machine test device that makes precise movements of the steering wheel in order to perform the ''sine with dwell'' maneuver. This is not possible to do on a vehicle with no steering wheel.

Faced with the question of how such procedures are implicated by novel designs, the 2016 Google interpretation determined that it is not possible for a manufacturer to certify compliance with a standard if NHTSA does not ''have a test procedure or other means of verifying such compliance.''

Upon further consideration of the question of what the Safety Act requires of certifying manufacturers, NHTSA believes the 2016 Google Interpretation construed the certification requirement too restrictively, and was not in full accordance with the Safety Act or prior Agency interpretations of the statute. Previous NHTSA interpretations of the Safety Act held that manufacturers are not required to test a vehicle's performance using the test conditions and procedures in an FMVSS to certify compliance with a standard. Rather, interpretations held the test conditions and procedures in an FMVSS simply establish the means by which the Agency would evaluate compliance with an applicable FMVSS. Manufacturers were free to use other methods to certify the compliance of their products, provided that the vehicles met the standards when NHTSA tests the vehicles using the procedures, and under the conditions specified in the FMVSS.

The certification requirement set out in the Safety Act, states that ''[a] manufacturer or distributor of a motor vehicle or motor vehicle equipment shall certify to the distributor or dealer at delivery that the vehicle or equipment complies with applicable motor vehicle safety standards prescribed under this chapter.'' It also states that ''[a] person may not issue the certificate if, in exercising reasonable care, the person has reason to know the certificate is false or misleading in a material respect.''[6] In NHTSA interpretations prior to the 2016 Google interpretation, the Agency had interpreted this certification requirement such that manufacturers were permitted to certify vehicles using means other than that specified in an FMVSS at issue. NHTSA specifies test conditions and procedures in the FMVSS and on NHTSA's website to provide transparency, clarity and notice as to how NHTSA will measure the requisite performance in its compliance tests. For example, if a standard establishes performance requirements specifying that a vehicle must provide occupant crash protection by limiting the crash forces measured by a particular test dummy used in a crash test specified in the standard, the standard's test procedures provide the conditions and procedures NHTSA will use to assess conformance to the performance requirements.

Test procedures, and the conditions under which they are conducted, serve an important role in the FMVSS: They provide context to the performance requirement and provide notice to the industry of NHTSA's methodology for determining compliance with the minimum performance standards established in the FMVSS. However, they are not performance requirements themselves. Although performing the test in the manner the FMVSS directs is one path a manufacturer may follow when certifying compliance with an FMVSS requirement, manufacturers are not required to use the test conditions and procedures in the standard to certify compliance. A manufacturer may base its certification on, for example, simulations or engineering analyses if it exercised reasonable care in certifying that the vehicle would meet the standard when tested by NHTSA using the standard's test conditions and procedures.[7]

The issue addressed by this notice, and by the 2016 Google interpretation, regards the situation where NHTSA is not able to test a vehicle in accordance with the FMVSS test conditions and procedures due to its design. The Agency stated, in part, that a manufacturer cannot validly certify a vehicle as compliant unless NHTSA can perform compliance testing using its FMVSS test conditions and procedures. The impact of this new interpretation was effectively to convert the FMVSS test conditions and procedures from the method by which NHTSA validates FMVSS compliance to the only valid method of certification. In other words, per the 2016 Google Interpretation, vehicles on which the FMVSS test conditions or procedures cannot be run, such as vehicles that operate using an Automated Driving System (ADS)[8] and that are not equipped with conventional manual controls necessary for testing, could not be certified as FMVSS compliant. Instead, the 2016 Interpretation concluded that manufacturers of these unique vehicles would either have to pursue an exemption from certain FMVSSs or wait until the Agency issued amendments to the FMVSS test conditions and procedures accommodating the new designs.

Following the issuance of 2016 Google Interpretation, some manufacturers continued to certify as compliant vehicles that are unable to be precisely tested in accordance with NHTSA's test procedures, while other manufacturers felt restricted from doing so.[9] Thus, NHTSA decided that it was important to revisit this issue.[10]

As discussed in today's notice, NHTSA has revisited the issues raised in the 2016 Google Interpretation, and determined that some of the views articulated in that interpretation were premised on an erroneous reading of the Safety Act's certification requirement. While the manufacturer of a motor vehicle must produce vehicles that comply with all applicable FMVSS and must exercise reasonable care in certifying compliance, the Safety Act does not require that a manufacturer ensure that NHTSA can validate the manufacturer's certification through the FMVSS test conditions and procedures when it certifies the vehicle.[11]

[5] Some FMVSSs also specifically require certain items of equipment, such as a sun visor (FMVSS No. 201) or a brake pedal (FMVSS No. 135).

[6] 49 U.S.C. 30115.

[7] NHTSA has also stated that the reasonableness of the basis for certifying depends on many factors, including the resources available to the manufacturer. For example, a small manufacturer's efforts to certify compliance might not be held to the same level as a large manufacturers' efforts to ascertain its vehicles' compliance.

[8] For purposes of this notice, Automated driving system (ADS) means the hardware and software that are collectively capable of performing the entire dynamic driving task on a sustained basis, regardless of whether it is limited to a specific operational design domain. SAE International (SAE) J3016, ''Taxonomy and Definitions for Terms Related to On-Road Motor Vehicle Automated Driving Systems.'' ADS refers to SAE driving automation levels 3, 4, and 5.

[9] *See* Nuro, Inc.; Grant of Temporary Exemption for a Low-Speed Vehicle With an Automated Driving System, 85 FR 7826, 7834–36 (Feb. 11, 2020) (discussing request from Nuro, Inc. for an exemption from portions of FMVSS No. 111 test procedures).

[10] *Id.* at 7834–35 (indicating that ''NHTSA intends to clarify the application of test procedures in a subsequent notice'').

[11] *See* 49 U.S.C. 30115(a).

Accordingly, NHTSA is rescinding the portions of the 2016 Google Interpretation stating that manufacturers must ensure that NHTSA could conduct the FMVSS test procedures on the vehicle using the test conditions and procedures specified in the standard. Instead, the Agency clarifies that for those vehicles with designs that preclude testing under existing FMVSS test conditions and procedures, a manufacturer acting in good faith and exercising reasonable care may certify the vehicle as compliant even if the Agency cannot conduct the exact test procedure set forth in the standard. NHTSA's decision to rescind portions of the 2016 Google Interpretation, and a brief explanation of how NHTSA may continue to enforce the requirements of the Safety Act and regulations with respect to vehicles that cannot be tested using NHTSA's test procedures, are discussed below.

II. Background

a. Safety Act

The Safety Act authorizes NHTSA to regulate the performance of motor vehicles and motor vehicle equipment through the issuance and enforcement of FMVSS. The Safety Act defines a ''motor vehicle safety standard'' as ''a minimum standard for motor vehicle or motor vehicle equipment performance.'' [12] Per the Safety Act, each standard must be practicable, meet the need for motor vehicle safety, and be stated in objective terms.[13] Currently, there are in force more than 60 FMVSS that regulate a wide variety of aspects of vehicle performance. These standards are codified at 49 CFR part 571.

While all FMVSS necessarily set performance standards that vehicles or equipment must meet, the FMVSS also include test conditions and procedures that provide context to the required performance. For example, in the FMVSS No. 208 occupant protection requirements for the 50th percentile adult male dummy belted test (S5.1.1), the performance standard is the maximum permissible level of certain injury metrics (*e.g.,* chest deflection) that are experienced by a dummy in a crash of up to 35 mph, whereas the test conditions and procedures describe the circumstances under which NHTSA will measure these metrics. The test conditions and procedures describe how NHTSA prepares a vehicle for compliance testing and measures its performance to determine whether it complies with the standard. NHTSA designs test conditions and procedures to ensure that vehicle performance is measured under realistic operating conditions representative of the real-world situation posing the safety risk, that tests and test results are repeatable and reproducible, that manufacturers are provided with notice of how tests will be performed, and to maintain the objectivity of the Agency's compliance testing.

It is critical that the FMVSS set forth procedures that are designed so that ''the question of whether there is compliance with the standard can be answered by objective measurements and without recourse to any subjective determination.'' [14] Clear, objective test procedures ensure that the same results are produced from lab-to-lab and from vehicle-to-vehicle, ''and that compliance is based upon readings obtained from measuring instruments as opposed to the subjective opinions of human beings.'' [15] The test conditions and procedures both assist in providing notice of what performance is required under an FMVSS,[16] and, if written into regulatory text, establish by regulation how NHTSA will establish whether a vehicle complies with the FMVSS in the context of a compliance investigation.[17] However, manufacturers that otherwise have a good faith basis for certification are not required to test to the FMVSS when they certify a product or follow the test conditions and procedures in an FMVSS if testing is part of their certification process.

Per the Safety Act, new motor vehicles must meet two requirements before they are sold or otherwise introduced into interstate commerce in the United States. First, the vehicle must meet all applicable FMVSS that are in effect on the date of manufacture.[18] Second, the vehicle must be covered by a manufacturer certification issued under 49 U.S.C. 30115. By certifying a vehicle under § 30115, a manufacturer assumes responsibility for compliance with all applicable FMVSS. For vehicles, the manufacturer affixes a certification label on the vehicle, and for equipment the FMVSS generally require the manufacturer to provide its certification by marking the equipment with the letters ''DOT'' in a prescribed location.

The Safety Act requires NHTSA to establish through rulemaking the requirements for compliance with the FMVSS, *i.e.,* by setting performance standards.[19] However, in addition to requiring actual compliance with applicable FMVSS, the Act itself expressly established a separate requirement that manufacturers exercise ''reasonable care'' when certifying compliance.[20] Specifically, a manufacturer may not certify a vehicle under Section 30115 if, in exercising ''reasonable care,'' the manufacturer has reason to know the certification is false or misleading in any material respect.[21]

Under the system of self-certification established by the Safety Act, NHTSA does not pre-approve vehicles, through testing or other means, before they can be sold or otherwise introduced into interstate commerce. Instead, as described above, vehicles must be certified as compliant by the manufacturer. NHTSA's enforcement of the FMVSS typically involves the Agency purchasing already-certified new vehicles to test for compliance with the FMVSS. In addition, NHTSA conducts other enforcement activities to help ensure compliance with other legal requirements in the Safety Act.

b. NHTSA's Longstanding Interpretation of the Certification Requirement

Prior to 2016, NHTSA repeatedly stated the FMVSS test procedures are for NHTSA's own use, and need not be used by manufacturers, who may instead use different test conditions and procedures or non-testing methodologies (such as engineering analyses) as a reasonable basis for certification.[22] NHTSA has held this position since at least the early 1970s, when it stated: ''The National Traffic and Motor Vehicle Safety Act does not require a manufacturer to test vehicles by any particular method. . . . [The

[12] 49 U.S.C. 30102(a)(10).

[13] 49 U.S.C. 30111(a).

[14] *Chrysler Corp.* v. *Dep't of Transp.,* 472 F.2d 659, 675 (6th Cir. 1972) (citing House Report 1776, 89th Cong. 2d Sess.1966, p. 16).

[15] *Ibid., at 676.*

[16] *See, United States* v. *Chrysler Corp.* 158 F.3d 1350 (DC Cir. 1998).

[17] When it is possible for NHTSA to perform the FMVSS test conditions and procedures with a vehicle, the results of testing the vehicle using the test conditions and procedures form the basis for any noncompliance finding.

[18] 49 U.S.C. 30112.

[19] 49 U.S.C. 30111.

[20] 49 U.S.C. 30115.

[21] *Id.*

[22] *See, e.g.,* letter to F. Smidler, Wabash Nat'l Corp. (Apr. 29, 1997), *https://isearch.nhtsa.gov/files/13241-2.pja.html* (''The test procedures in the standard describe how NHTSA will test guards for compliance with the standard's requirements, and are not binding upon guard manufacturers. They may certify their guards based on other kinds of testing or even engineering analysis, if these provide a reasonable basis for certification.''); letter to K. Manke, Dakota Manufacturing (Apr. 15, 2008), *https://isearch.nhtsa.gov/files/07-005971as%20underride%20guards.htm.* (''Keep in mind that the test procedures in FMVSS No. 223 describe how NHTSA will test guards for compliance with the standard's requirements, and are not binding upon guard manufacturers. A manufacturer is not required to use the standard's procedures when certifying compliance with the standard.'')

manufacturer] is under no obligation to repeat the procedures of the standards.'' [23]

NHTSA repeated the position on numerous instances over the decades that followed, including in both rulemaking notices and letters of interpretation, that ''reasonable care'' [24] does not require manufacturers to perform the FMVSS test procedures to certify a vehicle or equipment.[25] Expanding on this issue in one such interpretation, NHTSA explained:

Vehicle manufacturers certifying compliance with the safety standards are not required to follow the compliance test procedures set forth in the applicable standard. The standards specify the procedures NHTSA would use in compliance testing. However, vehicle manufacturers must exercise reasonable care in certifying that their products meet applicable standards. It may be simplest for a manufacturer to establish that it exercised 'reasonable care' if the manufacturer has conducted testing that strictly followed the compliance test procedures set forth in the standard. However, 'reasonable care' might also be shown using modified test procedures if the manufacturer could demonstrate that the modifications were not likely to have had a significant impact on the test results. In addition, it might be possible to show 'reasonable care' using engineering analyses, computer simulations, and the like.[26]

It should be noted, however, that in past Agency interpretations, NHTSA could generally conduct the FMVSS test procedure on the vehicle to assess compliance. Thus, the past letters often pointed out that manufacturers may use a basis other than the testing specified in the FMVSS for their certification, but are responsible for ensuring that the vehicle or equipment meets the FMVSS when testing by NHTSA in accordance with the standard.[27]

Nonetheless, NHTSA has repeatedly made clear that ''[t]esting, as provided in the FMVSS, is not required as a matter of law to certify a vehicle.'' [28] The Safety Act requires only that vehicles comply, and that manufacturers certify, using reasonable care, that a motor vehicle complies. The test conditions and procedures in the FMVSS are not themselves motor vehicle safety standards as that term is defined in the Safety Act.[29]

c. 2016 Google Interpretation

NHTSA's position regarding manufacturer obligations to certify a motor vehicle had been consistent for several decades, until NHTSA responded to a 2016 interpretation request from Google asking the Agency to clarify how the FMVSS would apply to a vehicle that lacks manual driving controls and is exclusively operated by an Automated Driving System (ADS).[30] [31] As noted above, with most past Agency interpretations, NHTSA could conduct the FMVSS test procedure to assess compliance, so the Agency could determine compliance and compare its results to that of the manufacturer. Thus, the Google interpretation request presented a novel issue in that the Google vehicles could not be tested for compliance to certain FMVSS because their advanced designs lacked traditional controls used in the FMVSS test conditions and procedures.

NHTSA responded to Google's request in an interpretation letter dated February 4, 2016. In this letter, NHTSA stated that if the Agency was unable to verify a vehicle's compliance using the existing FMVSS test conditions and procedures, NHTSA would consider that standard as not ''allowing'' a manufacturer of an ADS vehicle to certify compliance with it. The interpretation's discussion of FMVSS test conditions and procedures reasoned that ''[a]s self-driving technology moves beyond what was envisioned at the time when standards were issued, NHTSA may not be able to use the same kinds of test procedures for determining compliance.'' [32] The letter stated that ''since the Safety Act creates a self-certification system for compliance, NHTSA's verification of a manufacturer's compliance . . . is based on our established test procedures.'' [33]

On reconsideration of the Google interpretation, NHTSA believes it incorrect in some respects. Although the letter recognized that test procedures are for NHTSA's use in compliance testing, it stated that ''in order for NHTSA to interpret a standard as *allowing* certification of compliance by a vehicle manufacturer, NHTSA must first have a test procedure or other means of verifying such compliance.'' [34] The letter repeated similar assertions in its discussion of specifically applicable standards, and suggested that, for Google to certify its vehicles with designs that prevented compliance

[23] *See, e.g.,* 39 FR 40858 (Nov. 21, 1974) (''The National Traffic and Motor Vehicle Safety Act does not require a manufacturer to test vehicles by any particular method . . . . [the manufacturer] is under no obligation to repeat the procedures of the standards.''); *see also* 38 FR 12935 (May 17, 1973) (''Manufacturers should understand that they are not required to test their products in any particular manner, as long as they exercise due care that their products will meet the requirements when tested by the NHTSA under the procedures specified in the standard.''); 36 FR 5856 (Mar. 30, 1971) (''Manufacturers have the responsibility of insuring, by any methods that constitute due care, that their products meet the requirements at the stated level. Normally this is done by setting their own test conditions slightly on the 'adverse side' of the stated level.'').

[24] In 1994, the Safety Act was recodified and the statutory language was modified ''without substantive change'' from ''due care'' to ''reasonable care.'' Pub. L. 103–272.

[25] *See, e.g.,* 76 FR at 15905, 15908 (Mar. 22, 2011) (''[M]anufacturers are not required to test their products in the manner specified in the relevant safety standard, or even to test the product at all, as their basis for certifying that the product complies with all relevant standards. A manufacturer may evaluate its products in various ways to determine whether the vehicle or equipment will comply with the safety standards and to provide a basis for its certification of compliance. Depending on the circumstances, the manufacturer may be able to base its certification on actual testing (according to the procedure specified in the standard or some other procedure), computer simulation, engineering analysis, technical judgment or other means . . . . manufacturers can use their judgment, including engineering or technical judgment, to certify vehicles. Testing, as provided in the FMVSS, is not required as a matter of law to certify a vehicle. Instead, sound judgment may be used.'') (footnote omitted). See 71 FR at 28183–84 (Sept. 1, 2006), letters to S. Trinkl, DEKRA Automobil GmbH (Dec. 30, 2004), *https://isearch.nhtsa.gov/files/Trinkl.1.html,* F. Anderson, BrakeQuip Int'l, Inc. (Aug. 12, 2003), *https://isearch.nhtsa.gov/files/GF005279.html,* to D. Dawkins, Chrysler Corp. (Oct. 2, 1992), *https://isearch.nhtsa.gov/files/7714.html,* to D. Cole, Nat'l Van Conversion Ass'n, Inc. (Nov. 1, 1988), *https://isearch.nhtsa.gov/files/3140o.html.*

[26] Letter to A. Ughini Jr., Marcopolo SA (June 24, 2002) *https://isearch.nhtsa.gov/files/24423-2.html.*

[27] For example, in the letter to A. Ughini Jr., Marcopolo SA (June 24, 2002), NHTSA also stated: ''Please note that, while the exercise of 'reasonable care' may relieve a manufacturer of liability for civil penalties in connection with the manufacture and sale of noncomplying vehicles, it does not relieve a manufacturer of the responsibility to discontinue sales of vehicles or notify purchasers of the noncompliance and remedy the noncompliance without charge to the purchasers, if either the manufacturer or this agency determines that vehicles do not comply with all applicable safety standards.'' *https://isearch.nhtsa.gov/files/24423-2.html.*

[28] 76 FR 15903, 15908 (Mar. 22, 2011), Response to petition for reconsideration, *Roof crush resistance.*

[29] The Safety Act defines ''motor vehicle safety standard'' to mean ''a minimum standard for motor vehicle or motor vehicle equipment performance.'' 49 U.S.C. 30102. Test conditions and procedures are not aspects of motor vehicle or motor vehicle equipment performance; they are steps NHTSA takes to prepare a motor vehicle or motor vehicle equipment to have its performance measured.

[30] Google's interpretation request and NHTSA's response can be found here: *https://www.regulations.gov/document?D=NHTSA-2016-0009-0001.*

[31] The Google interpretation uses the term ''Self-Driving System'' or ''SDS'' rather than the more-current term ''ADS.''

[32] Letter to C. Urmson, Google (Feb. 4, 2016), *https://www.nhtsa.gov/interpretations/google-compiled-response-12-nov-15-interp-request-4-feb-16-final.*

[33] *Id.*

[34] *Id.* (Emphasis added.) We note that, in addition to the fact that the interpretation appeared to establish a policy not based in NHTSA's statutory authority, the interpretation should have cited 49 U.S.C. 30115—not the standards promulgated pursuant to the Safety Act—as the legal provision that allows or disallows certification. This quoted sentence attempts to give the FMVSS agency (in this case, meaning power or effect) they lack over what is required for a valid certification.

testing using the test conditions and procedures specified in the FMVSS, Google must seek exemptions under 49 CFR part 555.

Under NHTSA's 2016 Google Interpretation of NHTSA's authority, a manufacturer of an ADS vehicle without the manual controls necessary to conduct some FMVSS compliance tests cannot certify it as FMVSS compliant. Therefore, to the extent that, for example, a conventional steering wheel may be needed for compliance testing, the Google Interpretation is design restrictive and compels use of certain controls or attributes as a condition of certifying the vehicle meets all applicable FMVSS. On reconsideration, NHTSA does not believe the Safety Act requires that manufacturers ensure that their vehicles are equipped to accommodate portions of certain test procedures as a condition of certification. After further examination, the Agency concludes that this approach stifles innovation and unfairly punishes manufacturers seeking to implement innovative technologies, without the safety or other justification that would be required to support a design-specific standard.

III. Reaffirmation of NHTSA's Position on Certification

With this notice, NHTSA is reestablishing its previous position that the Safety Act requires that a manufacturer exercise ''reasonable care'' in certifying that the vehicle meets the performance criteria in the FMVSS; certification by the manufacturer does not require the manufacturer ensure that NHTSA is able to verify compliance by performing the test procedures established in the FMVSS. NHTSA's statement in the 2016 Google Interpretation that a vehicle cannot be certified unless the vehicle is designed in such a way that NHTSA can perform the test procedures or replicate the test conditions in the FMVSS, is inconsistent with the Safety Act's certification requirement. Accordingly, that aspect of the 2016 Google Interpretation is rescinded.

A manufacturer may certify compliance with the FMVSS in a manner that differs from the test described in the FMVSS. If the manufacturer's basis for certification demonstrates that the manufacturer exercised ''reasonable care'' in making its certification, it may so certify, even if the vehicle were designed in such a way that the FMVSS test conditions and procedures cannot be performed. FMVSS test conditions and procedures provide notice to the public of the parameters of the procedures NHTSA will undertake to determine compliance with the performance standards. Above all, however, the vehicle must comply with the standard. As discussed later in this notice, if NHTSA cannot conduct the test, the Agency will pursue other means to determine whether the vehicle meets the need for motor vehicle safety identified in the standard.

Per 49 U.S.C. 30115, a manufacturer is required to certify that a vehicle complies with ''applicable *motor vehicle safety standards* prescribed under [the Safety Act]'' (emphasis added). The Safety Act defines the term ''motor vehicle safety standard'' as ''a minimum standard for motor vehicle or motor vehicle equipment *performance.*'' 49 U.S.C. 30102(a)(9) (emphasis added). Fundamentally, the reason the 2016 Google Interpretation is inconsistent with the Safety Act is that, by maintaining that manufacturers must ensure that compliance with the FMVSS can be verified using the specific test conditions and procedures in the FMVSS, it effectively required those manufacturers to follow those specific conditions and procedures to certify the vehicle. Test conditions and procedures are not minimum performance criteria; they are a set of preparatory actions that are taken to set up a scenario for one way *in which* performance will be measured.

For those vehicles whose design and configuration allow NHTSA to conduct testing employing existing test conditions and procedures, the Agency is bound by that specific method of measuring performance, which provides the regulated industry with fair notice of how the Agency will test for compliance. *See United States* v. *Chrysler Corp., supra.*[35] Manufacturers are not so bound as to their basis for certification. It is for this reason that, as noted earlier, NHTSA has long stated that manufacturers could use methods such as engineering analysis or computer simulations, which do not involve physically running the FMVSS test procedures, to provide a basis for certification. The FMVSS test procedures do not foreclose other methods of exercising reasonable care in certifying that a vehicle complies with applicable minimum performance standards.

Requiring that vehicles be designed in such a way that the FMVSS compliance test can be run fundamentally alters the statutory scheme from one where the Agency sets ''minimum standard[s] for motor vehicle or motor vehicle equipment performance'' to one in which the agency is dictating designs that accommodate a particular method of testing, without expressly stating as much when establishing the FMVSS through rulemaking. To the extent that test procedures introduce design constraints not found in the standard's performance requirements, interpreting test procedure compatibility as a mandatory requirement hinders innovation of all types, including innovative technological methods of meeting or exceeding the actual performance standards that constitute the FMVSS. Such an approach undermines the safety-innovation goals behind the Safety Act's self-certification approach.

In addition to these legal and practical reasons, NHTSA is also rescinding the portions of the 2016 Google Interpretation related to the application of the FMVSS test procedures to certifying manufacturers based on procedural concerns. The 2016 Google Interpretation did not acknowledge that it represented a change.[36] The Agency's longstanding position that manufacturers do not have to test using the FMVSS test procedures to certify their products undoubtedly engendered serious reliance interests that should have been taken into account when considering a change.[37]

IV. Implications of This Return to NHTSA's Position on Certification

a. Certification of Vehicles and Equipment With Innovative Designs

By clarifying that manufacturers are not required to ensure that the test conditions and procedures in the FMVSS can be performed when they certify the vehicle, this notice confirms that manufacturers have more flexibility than described in the 2016 Google Interpretation to certify vehicles with innovative designs, including ADS vehicles that are not equipped with manual controls or other features that are referenced in the FMVSS test conditions or procedures. Importantly, however, NHTSA distinguishes the situation where the FMVSS specifies a substantive performance or other requirement that the vehicle cannot meet because of an innovative design from one where the innovative design omits a feature that is an instrumental means to satisfying such performance requirement. In the former situation,

[35] *See also* 49 CFR 5.69 (''Notice to the regulated party is a due process requirement.'')

[36] *See FCC* v. *Fox,* 556 U.S. 502, 515 (2009) (''[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.'').

[37] *See id.*

manufacturers are not permitted to certify vehicles as compliant if they do not meet all applicable performance standards, including any particular section of a performance standard or subcomponent thereof. For example, FMVSS No. 135, ''Light vehicle brake systems,'' specifically requires that service brakes be activated by means of a foot control (S5.3.1). Today's notice reaffirming the Agency's position on certification would not permit the manufacturer of a vehicle without a brake pedal to certify the vehicle as compliant, because such a vehicle would not meet the substantive requirement of S5.3.1. Unless and until NHTSA conducts a rulemaking to remove or modify that requirement, a manufacturer must seek an exemption from S5.3.1 if that manufacturer wishes to build a vehicle not equipped with a foot control. If, however, FMVSS No. 135 did not specifically require in S5.3.1 that the service brakes be actuated by a foot control, a manufacturer would be able to certify a vehicle without that foot control even though the *Road test procedures and performance requirements* in S7 of the standard require that certain forces be applied to the brake pedal in the course of testing.

The 2016 Google Interpretation restricted the extent to which manufacturers of ADS vehicles could incorporate innovative design features into these vehicles, since it effectively required manufacturers either to equip a vehicle with all motor vehicle equipment referenced in an applicable FMVSS test procedure, or seek an exemption.[38] By reestablishing that manufacturers can certify their vehicles as compliant even if one or more FMVSS test procedures cannot be performed, NHTSA confirms that manufacturers have flexibility in designing vehicles to meet the FMVSS. This also reduces the need for a manufacturer to seek exemptions from FMVSS test procedures under 49 U.S.C. 30113.

The impact this return to NHTSA's prior position will have on the ability of manufacturers of ADS vehicles without some manual controls to certify FMVSS compliance can be illustrated using FMVSS No. 126, ''Electronic Stability Control for Light Vehicles.'' FMVSS No. 126 requires that most light vehicles be equipped with an electronic stability control (ESC) system that automatically adjusts the vehicle's brakes to prevent loss of vehicle control. The performance criteria in the standard require that the vehicle cannot exceed certain limits on the yaw rate and lateral displacement of the vehicle's center of gravity when the vehicle is tested in accordance with the standard's test conditions and procedures. However, because the standard's test conditions state that ''a steering machine programmed to execute the required steering pattern must be used'' to execute the FMVSS test procedures,[39] it would not be possible to run the compliance test on a vehicle that is not equipped with a conventional steering wheel compatible with existing steering machines. Thus, under the 2016 Google Interpretation, a manufacturer would not be permitted to certify such a vehicle to FMVSS No. 126 absent an exemption—even if the vehicle's ESC system would meet the standard when tested on an otherwise identical vehicle with manual controls.

By contrast, under today's return to NHTSA prior position, a manufacturer will be able to certify an ADS vehicle without a steering wheel as compliant with FMVSS No. 126 if the manufacturer has, pursuant to 49 U.S.C. 30115, exercised reasonable care to ensure that the vehicle complies with the performance requirements in the standard. A valid basis for certification does not require that the manufacturer recreate the exact test conditions and use the exact methods described in the FMVSS No. 126 test procedures. Rather, the manufacturer must ensure that its basis for certifying compliance with the standard reasonably demonstrates that the vehicle's ESC system achieves the performance levels required. A basis for certification could consist of simulation, testing performed with alternative ways of controlling the vehicle, or even alternative testing scenarios that demonstrate that the ESC maintains vehicle stability to the same degree as a compliant vehicle tested in accordance with the test procedures.

b. Enforcement

The return to NHTSA's position on certification may have implications for NHTSA's enforcement with respect to vehicles that it is unable to test using the FMVSS test conditions and procedures. NHTSA is confirming that such vehicles may be certified as compliant by a manufacturer exercising ''reasonable care,'' notwithstanding circumstances where the Agency is unable to use all aspects of the FMVSS test procedures to verify compliance independently. However, while this may impact how NHTSA exercises its oversight, it does not relieve a manufacturer of such vehicles of any obligations under the Safety Act or NHTSA regulations.

NHTSA reemphasizes that the Safety Act requires that vehicles must both comply with all applicable FMVSS and be certified as compliant by a manufacturer exercising reasonable care before they may be sold or otherwise introduced into interstate commerce.[40] NHTSA enforcement actions commonly address the requirement of actual compliance and result in recalls independent of any finding that the manufacturer's certification was improper.[41]

As explained above, the Safety Act requires that every vehicle must comply with applicable FMVSS regardless of design. If a vehicle does not comply with these applicable performance standards, due to its design or for any other reason, it is noncompliant and generally may not be sold or otherwise introduced into interstate commerce.[42] In the case of a vehicle whose advanced design impairs NHTSA's ability to apply all FMVSS test procedures and conditions outlined within the FMVSS, the minimum performance standards in the FMVSS still apply and the manufacturer's obligations under the Safety Act remain unchanged. If the vehicle is determined, by the manufacturer or Agency, to be noncompliant, the Safety Act requires that the manufacturer notify owners, purchasers and dealers, and remedy the noncompliance without charge—even if the manufacturer had certified compliance using reasonable care.[43]

To be clear, the Agency's position as described in this notice does not render any FMVSS inapplicable to ADS vehicles, or any other vehicles. Manufacturers of such vehicles must determine, through the exercise of reasonable care, whether their vehicles comply with the FMVSS. If they do, they may certify the vehicles as compliant. Like all manufacturers, if they or NHTSA later determine that a vehicle does not in fact comply, they must recall it.

Of course, NHTSA's inability to test a vehicle using an established FMVSS test condition or procedure does have some

[38] *See* 85 FR 7826, 7834–36 (Feb. 11, 2020) (discussing request from Nuro, Inc. for an exemption from portions of FMVSS No. 111 test procedures).

[39] 49 CFR 571.126, S6.3.5.

[40] 49 U.S.C. 30112, 49 U.S.C. 30115.

[41] A recall is required when a manufacturer ''decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard.'' 49 U.S.C. 30118(c)(2). NHTSA may also make a decision that a vehicle or equipment does not comply. 49 U.S.C. 30118(a)–(b).

[42] A noncompliant vehicle, however, may be subject to a statutory exception or qualify for an exemption. *See* 49 U.S.C. 30112(b), 30113–14.

[43] 49 U.S.C. 30118–30120.

impact on the regulatory tools at the Agency's disposal to conduct oversight and enforcement activities. Independent verification of FMVSS compliance through testing has long been a backbone of NHTSA's enforcement program prior to the 2016 Google Interpretation, and will remain an integral part of its enforcement program subsequent to this interpretation. NHTSA enforces FMVSS compliance by conducting compliance testing. NHTSA decides what vehicles it will test to various FMVSS. The Agency contracts with independent laboratories to conduct compliance testing on its behalf, in accordance with the FMVSS test conditions and procedures. If an apparent noncompliance is found, NHTSA typically continues its investigation by asking the manufacturer various questions, including those relating to the manufacturer's basis for certification. Manufacturers have an opportunity to rebut any apparent noncompliance found by the Agency. If NHTSA does not believe that the manufacturer has rebutted an apparent noncompliance, the Agency pursues a recall.[44]

NHTSA emphasizes that the FMVSS enforcement framework remains an effective and critical method of enforcing the Federal safety standards. While the Agency is returning to its longstanding position that manufacturers are not required to certify compliance using the test conditions and procedures in the FMVSS, NHTSA *will* hold a manufacturer responsible for a noncompliance when a vehicle fails a compliance test using those procedures. The compliance tests adopted into the FMVSS accurately and objectively demonstrate the vehicle's performance measured under the conditions and procedures to which it was subjected. A vehicle's failure of the FMVSS compliance test is *prima facie* evidence of noncompliance. The FMVSS test procedures are generally designed to replicate or represent the real-world circumstances giving rise to the safety need underlying the performance mandated by the FMVSS. The test assesses the performance of the vehicle relative to the minimum necessary to meet a safety need determined through the rulemaking process. A failure of the FMVSS compliance test is evidence of a failure to attain the minimum level of performance set by the standard to meet the safety need. NHTSA can and generally will pursue a violation of the Safety Act for the nonconformance based on a failure of that test alone.

The traditional enforcement framework is applicable to vehicles that are designed in such a way that NHTSA can use its FMVSS test conditions and procedures fully. However, as explained above, the Safety Act permits manufacturers to certify vehicles as FMVSS compliant even if they are designed in a way that does not allow the Agency to use its existing FMVSS test procedures, such as vehicles without the manual controls that are needed for the test procedures. A gap between a manufacturer's ability to certify compliance and NHTSA's ability to verify compliance using the FMVSS test procedures has always been a possibility. However, since many of the manual controls referenced in FMVSS test procedures are not mandated equipment, it is only with the recent advent of ADS technology that manufacturers have realistically started to consider developing production vehicles without manual controls. As NHTSA expects that the Agency will confront this issue should manufacturers begin producing vehicles without such controls (until NHTSA amends its FMVSS test procedures to accommodate vehicles without manual controls), this notice is intended to provide transparency into the methods by which the Agency expects to exercise its oversight.

Specifically, for vehicles for which NHTSA cannot fully utilize its existing FMVSS test conditions or procedures, NHTSA first maintains that by choosing to introduce these new designs, manufacturers do so with knowledge that the Agency will likely be forced to adapt existing test procedures to novel vehicle configurations. Instead of, or in addition to testing, NHTSA may focus additional efforts on investigating the manufacturer's basis for certification. NHTSA may request information and documentation from a manufacturer regarding its method of certification. For example, if a manufacturer used alternate test procedures, NHTSA may review those procedures and test results to evaluate whether they demonstrate the vehicle complies with the standard and/or whether the manufacturer exercised reasonable care. In addition to information gathering, NHTSA may perform other inquiries or analyses, such as testing in the same manner as the manufacturer, or applying the Agency's own engineering judgment in an investigation as to whether the vehicle complies with all applicable FMVSS and/or whether the manufacturer exercised reasonable care. If NHTSA finds an apparent noncompliance, and the manufacturer has not rebutted the apparent noncompliance, the Agency can and likely will pursue a recall. If a manufacturer's basis for certifying does not satisfy the requirement of ''reasonable care'' then, in general, it is not permitted to sell or otherwise introduce into interstate commerce its vehicles that lack a valid certification, and may be subject to civil penalties.[45]

With respect to compliance, there are several methods by which NHTSA may continue to exercise its oversight over vehicles for which NHTSA cannot fully utilize its existing FMVSS test conditions or procedures. To the extent that NHTSA's FMVSS test conditions and procedures can enable the Agency to conduct a partial compliance test, it may do so. In other words, NHTSA may omit testing those aspects of a FMVSS for which its test procedures do not apply to a particular design, while otherwise using its established test procedures to conduct a compliance test.[46] In such cases, NHTSA will need to consider the extent to which various aspects of its test procedures are independent from the aspects that cannot be used with a particular design. In addition, certain aspects of compliance may also be verified through visual inspections, without need for testing.[47]

The Agency may also rely on other investigative techniques to evaluate a vehicle's compliance with the FMVSS. The Safety Act specifically contemplates that the Agency may make noncompliance (or safety-related defect) determinations through methods

[44] In most cases, a manufacturer agrees to conduct a recall without NHTSA taking additional formal steps. If the manufacturer does not agree to a recall, the Agency may send the manufacturer a recall request letter and may utilize the statutory process for ordering a recall. *See* 49 U.S.C. 30118(a)–(b).

[45] *See* 49 U.S.C. 30112(a)(1). A manufacturer that violates the certification requirement is also liable for civil penalties and may be subject to additional action, as appropriate. 49 U.S.C. 30165(a)(1); *see* 49 U.S.C. 30163(a)(1) (actions to enjoin violations of the Safety Act).

[46] This approach has been codified in FMVSS No. 214, ''Side impact protection,'' regarding the moving deformable barrier (MDB) test (S7). The MDB test is designed so that a 50th percentile male dummy is seated in the front outboard seating position on the side struck by the MDB, and with a 5th percentile adult female test dummy seated in the rear outboard seating position on the same struck side. In S5(b)(3), *General exclusions,* FMVSS No. 214 states that passenger cars, multipurpose passenger vehicles, trucks and buses are excluded from the MDB test as applied to the rear seat ''for rear seating areas that are so small that [the 5th percentile adult female test dummy used in the test] cannot be accommodated according to the positioning procedure specified in S12.3.4 of this standard.'' For those vehicles where the rear seating position is too small to fit the 5th female dummy, the MDB test is nonetheless conducted with the 50th percentile male dummy in the front seat.

[47] For example, a vehicle may be noncompliant because it lacks a required telltale, or an item of equipment may be noncompliant because it does not contain a required label.

beyond testing and inspection. Specifically, the Act provides that NHTSA ''shall notify the manufacturer of a motor vehicle or replacement equipment immediately after making an initial decision (through testing, inspection, investigation, or research carried out under this chapter, examining communications under section 30166(f) of this title, or otherwise) that the vehicle or equipment contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard prescribed under this chapter.'' [48] Should the Agency's research, information gathering, or other forms of investigation reveal an apparent noncompliance, the Agency would discuss the findings with the affected manufacturer. This information could result in a manufacturer ''decid[ing] in good faith that the vehicle . . . does not comply with an applicable motor vehicle safety standard,'' and thus initiating a recall.[49] Alternatively, the Agency could conduct further investigation, or proceed with ordering a recall based on the evidence it has collected.

As an example, if a manufacturer used an alternative test procedure to test its vehicles for compliance with the FMVSS, the Agency's evaluation of those test procedures might reveal a flaw in methodology, which could result in overstating the vehicle's performance. If the error was significant enough to impact the vehicle's compliance (*i.e.,* the vehicle did not achieve the performance required by the standard), that error could result in a noncompliance determination or finding that the manufacturer failed to exercise reasonable care in certifying compliance.

As noted above, this notice has no impact on a manufacturer's obligations under the Safety Act to manufacture vehicles that fully comply with the FMVSS (absent an exception or exemption), and that are certified as compliant based on the exercise of reasonable care. NHTSA's oversight and enforcement of these requirements continues irrespective of whether it can fully test a vehicle based on its existing FMVSS test procedures. The Safety Act is premised on a system of self-certification. Vehicles with novel designs are held to the same performance standards as vehicles with traditional designs. NHTSA's enforcement program will continue to evaluate a wide variety of vehicles to verify their compliance.

Finally, NHTSA emphasizes that, where the Agency is able to evaluate compliance using the FMVSS test conditions and procedures—as is the case with almost all vehicles, the results of such a compliance test would be the basis for the Agency's compliance determination. The test conditions and procedures in the FMVSS remain the primary method by which NHTSA will assess compliance with the FMVSS. They were established through notice-and-comment rulemaking procedure and establish the threshold levels of safety required of vehicles. Therefore, if a vehicle fails to meet the minimum performance criteria when tested according to the test conditions and procedures established in the FMVSS, that failure is prima facie evidence of a noncompliance (evidence sufficient for a manufacturer to ''decide[ ] in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard'' (49 U.S.C. 30118(c)(2))). It is only where NHTSA is unable to apply or reasonably adapt the established test conditions and procedures to a vehicle to assess compliance, such as due to the absence of traditional manual controls, that NHTSA would look to its other investigatory tools to form a basis for a noncompliance finding.

c. Motor Vehicle Safety as the Nexus Between FMVSS and Defect Obligations

The Safety Act's compliance and defect authorities are complementary. Pursuant to the Safety Act, NHTSA is required to prescribe ''*motor vehicle safety* standards'' (FMVSS), which must ''meet the need for *motor vehicle safety*.'' [50] Under the Safety Act, motor vehicles and motor vehicle equipment must not contain any ''defect related to *motor vehicle safety*.'' The recall and sale prohibition provisions of the Safety Act for noncompliance with FMVSS and when there exists a ''defect related to motor vehicle safety'' are effectively identical; [51] the common use of ''motor vehicle safety'' is worthy of note. The Safety Act defines ''motor vehicle safety ''as ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.'' [52] This common term, which is the driving force behind both FMVSS-setting and defect determinations, acts to link NHTSA's execution of its authorities against unreasonable safety risks inherently, both in setting FMVSS and in overseeing the safety of vehicle design, construction, and performance.

When NHTSA establishes a performance standard in the form of an FMVSS, the Agency is declaring the requisite minimum threshold metric to meet the need for motor vehicle safety in that aspect of performance. In so doing, the Agency bars itself from declaring a vehicle defective solely on performance meeting that specific and discrete threshold.[53] For instance, the side impact protection requirements of FMVSS No. 214 require each vehicle to meet vehicle-to-pole test requirements when tested under the conditions specified in the standard.[54] The requirements must be met when test dummies representing a 50th-percentile adult male and a 5th-percentile female are used in the test (S9.2). In the pole test, the vehicle's side protection system must perform in a manner that limits the accelerations measured by the test dummy's head in the test. When using the 50th-percentile male test dummy, the dynamic performance requirements that must be met in the test include a head injury criterion (HIC) that is not to exceed 1000 (S9.2.1). If the test dummy used in a compliance test of a vehicle tested under the conditions of the standard records a HIC of 850, absent other information indicating the existence of an unreasonable safety risk, the Agency legally cannot declare the protection system defective based on that HIC value alone, as the vehicle satisfied the threshold the Agency has established as meeting the need for motor vehicle safety.[55]

However, just as evidence of FMVSS compliance can serve as a logical constraint as to the existence of a potential defect, evidence of FMVSS *non*-compliance can serve as evidence of a defect. In other words, evidence that a vehicle would not likely meet a performance standard established in an FMVSS, even if the Agency could not precisely apply FMVSS test procedures, is evidence the vehicle failed to attain the minimum standard for motor vehicle performance set by NHTSA. Such a failure can demonstrate that the vehicle failed to ''protect[ ] the public

[48] 49 U.S.C. 30118(a).

[49] *See* 49 U.S.C. 30118(c)(2).

[50] 49 U.S.C. 30111(a) (emphasis added).

[51] *See, e.g.,* 49 U.S.C. 30112 (a) and (c), 30116, and 30118–20 (emphasis added).

[52] 49 U.S.C. 30102(a)(9).

[53] Note that other aspects of the vehicle or equipment design, construction or performance could lead to a defect determination.

[54] 49 CFR 214, S9.

[55] Of course, evidence that the system fails sporadically, wears prematurely, or otherwise has problems, could be the basis for a defect determination.

against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle,'' or ''against unreasonable risk of death or injury in an accident.'' Such evidence is indicative of not only a noncompliance, but also the existence of a defect related to motor vehicle safety, which potentially can serve as the basis of a defect finding.

For instance, FMVSS No. 302 establishes requirements for the flammability resistance of certain materials in a vehicle's interior compartment.[56] Material shall not burn, nor transmit a flame front across its surface, at a rate of more than 102 millimeters (4 inches per minute) (S4.3(a)). Under the standard's test procedures, a specimen of material is tested in a metal burn cabinet. Each specimen of material to be tested must be a rectangle 102 millimeters (4 inches) wide by 356 millimeters (14 inches) long, wherever possible, to fit between two matching U-shaped frames (S5.2.1, S5.1.3). If NHTSA were unable to obtain a specimen from the vehicle large enough to fit in the U-shaped frames, the Agency may not be technically capable of meeting specifics of the setup requirements of the test procedure. But in setting the standard's actual performance requirements, the Agency has declared the requisite threshold metric that meets the need for motor vehicle safety. If the Agency were to have reason to believe that a material used in a vehicle would transmit a flame front at a higher rate than specified in FMVSS No. 302 (*e.g.,* in performing an examination, the Agency finds that the material combusts immediately), it has sufficient authority to pursue a recall of the vehicle based on its complementary compliance and defect authorities. The manufacturer's duty to ensure its vehicles comply with the standard, and is free from defects related to motor vehicle safety, is not affected by the Agency's ability to utilize the test procedures fully. Thus, if the vehicle does not comply with the standard, the manufacturer must fulfill its recall obligations. If the manufacturer does not do so, the Agency could investigate the apparent noncompliance, and if necessary, potentially use its defect authority to pursue a recall of the vehicle. In sum, in addition or as an alternative to evaluating a vehicle's compliance with the FMVSS and certification, in appropriate circumstances, the Agency may consider whether a particular vehicle poses an unreasonable risk to motor vehicle safety. In all circumstances, if the Agency has information that indicates a potential noncompliance or other safety concern with a vehicle, it will take appropriate action.

[56] 49 CFR 571.302. The materials are: Seat cushions, seat backs, seat belts, headlining, convertible tops, arm rests, all trim panels including door, front, rear, and side panels, compartment shelves, head restraints, floor coverings, sun visors, curtains, shades, wheel housing covers, and any other interior materials, including padding and crash-deployed elements, that are designed to absorb energy on contact by occupants in the event of a crash (S4.1). Child restraint systems also must meet FMVSS No. 302 (49 CFR 571.213, S5.7).

V. Request for Comment

Given the importance of the issues addressed in this notice, and consistent with the requirements in 49 CFR part 5.41 and Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' the Agency is requesting comments on the implications of this interpretation, which may inform future Agency rulemaking actions.

How long do commenters have to submit comments?

We are providing a 30-day comment period.

How do commenters prepare and submit comments?

- Comments must be written in English.
- To ensure that comments are correctly filed in the Docket, commenters should include the Docket Number shown at the beginning of this document in their comments.
- If persons are submitting comments electronically as a PDF (Adobe) File, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of the submissions. Comments may be submitted to the docket electronically by logging onto the Docket Management System website at *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Commenters may also submit two copies of their comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**.

Commenters should note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, the data must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage commenters to consult the guidelines in preparing comments. OMB's guidelines may be accessed at *http://www.whitehouse.gov/omb/fedreg/reproducible.html.* DOT's guidelines may be accessed at *http://www.bts.gov/programs/statistical_policy_and_research/data_quality_guidelines.*

How can commenters be sure that their comments were received?

If commenters wish Docket Management to notify them upon them receipt of their comments, they should enclose a self-addressed, stamped postcard in the envelope containing their comments. Upon receiving their comments, Docket Management will return the postcard by mail.

How do commenters submit confidential business information?

If a commenter wishes to submit any information under a claim of confidentiality, it should submit three copies of your complete submission, including the information claimed to be confidential business information, to the Chief Counsel, NHTSA, at the address given above under **FOR FURTHER INFORMATION CONTACT**. In addition, commenters should submit two copies, from which they have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When they send a comment containing information claimed to be confidential business information, they should include a cover letter setting forth the information specified in NHTSA's confidential business information regulation.[57] To facilitate social distancing during COVID–19, NHTSA is temporarily accepting confidential business information electronically. Please see *https://www.nhtsa.gov/coronavirus/submission-confidential-business-information* for details.

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider, we will consider that comment as an informal suggestion for future consideration.

How can the public read the comments submitted by other people?

Persons may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location. Persons may also see the comments on the internet. To read the comments on the internet, go to *http://www.regulations.gov.*

[57] 49 CFR part 512

Follow the online instructions for accessing the dockets.

Please note that, even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that interested persons periodically check the Docket for new material.

Issued in Washington, DC, under authority delegated in 49 CFR 1.94, 1.95, 501.5, and 501.8.

Jonathan Charles Morrison,

Chief Counsel.

[FR Doc. 2020–28107 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

[Docket Number: DOT–OST–2020–0254]

Request for Information for the Inclusive Design Reference Hub

AGENCY: Office of the Secretary of Transportation (OST), Department of Transportation.

ACTION: Notice; request for information (RFI).

SUMMARY: In July 2020, as part of an event celebrating the 30th anniversary of the Americans with Disabilities Act, DOT committed to undertake a new initiative to establish a library of resources for accessibility in automation, and work with outside experts to study voluntary best practices for ensuring accessibility in automated vehicles. DOT invites stakeholders to provide input on critical first steps in this process, the qualifications of entities that are best suited to perform this work, and considerations to ensure long-term sustainability of this initiative. This notice is not a Solicitation, and it does not seek the submission of formal, binding quotations/proposals. In the event OST–P determines that services will be procured, a formal Request for Quote/Proposal will be issued. OST–P cannot and will not reimburse any organization for its time, effort, or costs expended in responding to this RFI.

DATES: Responses to the RFI must be received by January 20, 2021, no later than 5:00 p.m. (ET) to ensure consideration of your views.

ADDRESSES: Written comments may be submitted using any one of the following methods:

- *Electronic mail:* Email comments to *inclusivedesign@dot.gov* with a courtesy copy to *Robin.Gates@dot.gov.* Responses must be provided as attachments to an email. It is recommended that attachments with file sizes exceeding 25MB be compressed (*i.e.,* zipped) to ensure message delivery. Responses must be provided as a Microsoft Word (.docx) attachment to the email, and be no more than 5 pages in length, with 12-point font and 1-inch margins.
- *Internet:* To submit comments electronically, go to the Federal regulations website at *http://www.regulations.gov.* Search by using the docket number (DOT–OST–2020–0254). Follow the online instructions for submitting comments.

Respondents may answer as many or as few questions (see the questions below) as they wish.

DOT will not respond to individual submissions or publish publicly a compendium of responses. A response to this RFI will not be viewed as a binding commitment to develop or pursue the project or ideas discussed.

Respondents are requested to provide the following information at the beginning of their response to this RFI:

- Company/institution name
- Company/institution contact
- Contact's address, phone number, and email address

Proprietary Information

Because information received in response to this RFI may be used to structure future programs and/or otherwise be made available to the public, respondents are strongly advised to NOT include any information in their responses that might be considered business sensitive, proprietary, or otherwise confidential. However, respondents may choose to include such information in their submissions if they believe it will significantly assist DOT in the design of the program.

Responses containing confidential, proprietary, or privileged information must be conspicuously marked as described below. Failure to comply with these marking requirements may result in the disclosure of the unmarked information under the Freedom of Information Act, 5 U.S.C. 552.

If a response contains trade secrets or confidential commercial or financial information, the respondent must include a cover sheet identifying the specific pages containing that information. The cover sheet must also provide evidence that the respondent actually or customarily treats the information as private.

In addition, the respondent must (1) mark the header and footer of every page that contains trade secrets or confidential commercial or financial information with ''Contains Confidential Information Exempt from Public Disclosure'' and (2) identify every line and paragraph containing such information with double brackets or highlighting.

FOR FURTHER INFORMATION CONTACT: The monitored inbox at *inclusivedesign@dot.gov.* You may also contact the Contracting Officer, Robin Gates, at *Robin.Gates@dot.gov* or (202) 366–1408.

Please reference ''RFI for Inclusive Design Reference Hub'' in the subject line when submitting your response.

DOT looks forward to your submission in response to this notice.

SUPPLEMENTARY INFORMATION:

Summary

The purpose of this RFI is to collect input on a proposed initiative to establish and curate a *library* of existing technical specifications, voluntary consensus or consortia standards, and best practices and a *roadmap* of such resources that may be needed to enable accessibility of automated vehicles for persons with physical, sensory, and cognitive disabilities. This initiative, tentatively entitled the *Inclusive Design Reference Hub,* will involve consultation with a range of stakeholders. This RFI will serve to refine DOT's vision, next steps, and long-term ownership and maintenance plan for this initiative. Respondents are encouraged to visit *https://www.transportation.gov/accessibility* for more information on DOT's accessibility initiatives.

Background

As transportation evolves, DOT is committed to a more accessible future and exploring accessibility opportunities that may materialize as vehicles and mobility services evolve. DOT encourages research into technologies that have the potential to remove barriers to accessibility in the transportation system and will seek to complement research done by leading academic institutions, the private sector and other entities to fill gaps that industry is not already covering. To this end, DOT recently announced its intent to establish a library of resources for accessibility in automation, and to work with outside experts to study voluntary best practices for ensuring accessibility in automated vehicles.

Needs Statement

DOT has made early investments intended to begin unlocking this potential through its Accessible Transportation Technologies Research Initiative (ATTRI), the Inclusive Design Challenge, the Complete Trip—ITS4US Deployment Program, and numerous research projects. Industry stakeholders and others have reported difficulty in

finding existing technical specifications and best practices for designing accessible vehicle features, or in prioritizing development of new resources where there are knowledge gaps. In addition, the expertise for developing such resources is fragmented across traditional organizational and sectoral bounds, making it difficult to begin new technical resource development. Early and widespread action by a coalition of industry, disability advocacy, academia, and government partners can help ensure shared understanding of the needs of individuals with a range of disabilities and corresponding technical specifications and best practices. An open and inclusive partnership to develop voluntary, consensus-based technical specifications, best practices, and standards can provide a foundation for consistently and comprehensively meeting the needs of people with disabilities and inform the design of future automated vehicles (AVs).

A robust research pipeline can accelerate the accumulation of knowledge and encourage private sector experimentation. Tracking and sharing less mature, early stage research through technical specifications and best practices—in addition to developing and maintaining published technical standards—can help clarify where technical consensus is emerging and where investment and attention is most needed to fill long-term gaps.

Numerous voluntary consensus standards, technical specifications, recommended practices, and other technical resources currently exist that relate either directly to vehicle accessibility or could indirectly inform future automated vehicle accessibility. For example, the former category includes numerous voluntary consensus standards focused on the safety, functionality, and interoperability of wheelchair-accessible vehicles, while the latter includes voluntary consensus and consortia standards from the consumer electronics sector that provide insights into how to design interfaces that are useable by people with sensory or cognitive disabilities. A list of such resources is included at the end of this RFI for reference. While these existing resources form a starting point for considering the accessibility of passenger vehicles, DOT also recognizes that gaps likely exist between current technical standards and specifications and best practices and a set of resources that would comprehensively address the physical, sensory, and cognitive accessibility needs of future vehicle users, including users of automated vehicles.

Proposed Approach

This initiative will serve as a ''one-stop shop'' for engineers, designers, and individuals with disabilities to find and to collaborate on technical resources for an inclusive future. The *Hub* could either be a stand-alone resource or built within an existing platform. All content will need to be compliant with requirements stated in Section 508 of the Rehabilitation Act of 1973 and accompanying standards developed by the U.S. Access Board.

An initial investment to launch this initiative will seek to establish a process to maintain this resource in regular consultation with stakeholders, including relevant standards development organizations, primarily through existing forums. DOT will assess potential approaches in terms of how likely they are to result in a self-sustaining long-term effort that includes active participation from all stakeholders with relevant expertise and perspective.

Request for Information

In launching the proposed initiative outlined above, DOT is seeking input from its stakeholders and potential partners on defining its scope, the most critical first steps, the necessary qualifications and expertise to support it, and how to ensure long-term ownership and maintenance of the resulting resources. To clarify input provided in response to this notice, DOT may seek additional follow-up information. Through this notice specifically, DOT seeks input on the following questions:

Background and Current Condition Information

1. What existing initiatives, industry activities, best practices, or other resources/actions could help to inform this initiative?

2. What existing technical standards and specifications and best practices are relevant or potentially relevant to the accessibility of vehicles for people with physical, sensory, and cognitive disabilities? What dependencies exist between existing resources and needed resources?

3. What information could help stakeholders understand the user population, potential market, and business case for inclusive design solutions? What information does not exist but could potentially help fill gaps in knowledge regarding the user population, potential market, and business case for inclusive design solutions?

4. What existing and needed resources are applicable to all vehicles? What existing and needed resources are specific to automated vehicles and when will they be needed?

5. How can this initiative support improved accessibility of conventional vehicles in the short-term while also enabling the accessibility of automated vehicles in the long-term?

Initiative Scope, Focus, and Proposed Initial Steps

1. Are there any technical references in this area that do not currently exist and should be prioritized for development?

(a) Please describe the need and ways to expedite the development of needed references with relevant stakeholders, including consumers.

(b) Please also discuss the extent to which the topic(s) identified are at an appropriate stage for voluntary standards development in terms of industry consensus and technological maturity.

2. Are there any existing resources or programs on which DOT could build or model this effort? Should the Inclusive Design Reference Hub be developed as a stand-alone resource, or integrated into an existing platform?

3. Are there any aspects of DOT's vision for this effort that could be clarified or improved ahead of a potential procurement?

4. Should the DOT directly host the resource, or should it be hosted by a third-party organization or coalition of organizations serving as the convener(s) and technical curator(s) on behalf of DOT?

5. How can this initiative be maintained in the long term with more limited federal involvement? What conditions need to be met in order for partner organizations to continue support for this initiative following an initial phase?

6. How could DOT assess the success of this activity over a two-year period? How can processes to support long-term sustainability be established in this timeframe?

Performing Organization Qualifications—General Input

1. What entities, organizations, groups, or Government agencies are most qualified and appropriate to perform this work?

2. What perspectives need to be represented in the execution of this initiative? Which groups should represent these perspectives?

3. What partnerships are critical?

4. What organizations currently play a role with respect to the development of standards around automated vehicles, transportation accessibility, and the

intersection of the two? For responding organizations that currently have a role, please discuss your organizational and technical capabilities and experience in this area. Please also discuss how you might augment your qualifications with those of potential partner organizations.

Additional Information

Below are existing resources that might be featured in the *Inclusive Design Reference Hub.*

- Automated Driving Systems:
  - SAE J3171: Identifying Automated Driving Systems-Dedicated Vehicles (ADS–DVs) Passenger Issues for Persons with Disabilities (SAE)
- Vehicles:
  - 49 CFR 571.141: Minimum Sound Requirements for Hybrid and Electric Vehicles (NHTSA)
  - 49 CFR 571.206: Door locks and door retention components (NHTSA)
  - 49 CFR 571.222: School bus passenger seating and crash protection (NHTSA)
  - 49 CFR 571.403: Platform Lift Systems for Motor Vehicles (NHTSA)
  - 49 CFR 571.404: Platform Lift Installations in Motor Vehicles (NHTSA)
  - 49 CFR part 38: Americans With Disabilities Act (ADA)—Accessibility Specifications For Transportation Vehicles (U.S. Access Board/U.S. DOT)
  - QAP–103: National Mobility Equipment Dealers Association Quality Assurance Program Guidelines (NMEDA)
  - SAE J1725: Structural Modification for Personally Licensed Vehicles to Meet the Transportation Needs of Persons with Disabilities (SAE)
  - SAE J1903: Automotive Adaptive Driver Controls, Manual (SAE)
  - SAE J2092: Testing of Wheelchair Lifts for Entry to or Exit from a Personally Licensed Vehicle (SAE)
  - SAE J2093: Design Considerations for Wheelchair Lifts for Entry to or Exit from a Personally Licensed Vehicle (SAE)
  - SAE J2094: Vehicle and Control Modifications for Drivers with Physical Disabilities Terminology (SAE)
  - SAE J2603: Recommended Practice for Powered Gas Brake Control Systems (SAE)
- Mobility Equipment:
  - ANSI/RESNA WC–4:2017: Wheelchairs and Transportation (RESNA)
  - ISO 10542–1: Technical systems and aids for disabled or handicapped persons—Wheelchair tiedown and occupant-restraint systems (ISO)
  - ISO 10865: Wheelchair containment and occupant retention systems for accessible transport vehicles designed for use by both sitting and standing passengers (ISO)
  - ISO 10865: Part 1: Systems for rearward-facing wheelchair-seated passengers (ISO)
  - ISO 10865: Part 2: Systems for forward-facing wheelchair-seated passengers (ISO)
  - ISO 16840–4: Wheelchair seating—Part 4: Seating systems for use in motor vehicles (ISO)
  - ISO 7176–19: Wheeled mobility devices for use as seats in motor vehicles (ISO)
  - RESNA SP–3 (under development): Universal Docking Interface Guidelines (UDIG) (RESNA)
  - SAE J2249: Wheelchair Tiedown and Occupant Restraint Systems for Use in Motor Vehicles (SAE)
- Electronic Interfaces/Devices:
  - 36 CFR 1194.1: Standards for Section 508 of the Rehabilitation Act (U.S. Access Board)
  - ANSI/RESNA CA–1: Universal Criteria for Reporting the Cognitive Accessibility of Products and Technologies (RESNA)
  - CTA–CEB27: Recommended Practice for Audio Accessibility of Audiovisual Devices (CTA)
  - ISO 21801–1: Cognitive accessibility—Part 1: General guidelines (ISO)
  - ISO 9241–171: Ergonomics of human-system interaction—Part 171: Guidance on software accessibility (ISO)
  - ISO/IEC 24786: Information Technology—User interfaces—Accessible user interface for accessibility settings (ISO/IEC)
  - ISO/IEC 29138–1: Information technology—User interface accessibility—Part 1: User accessibility needs (ISO/IEC)
  - ISO/IEC TS 20071–21:2015: Information technology—User interface component accessibility—Part 21: Guidance on audio descriptions (ISO/IEC)
  - WCAG 2.1: Web Content Accessibility Guidelines Overview (W3C)
- General Product Usability and Accessibility:
  - ISO/IEC 20282: Ease of operation of everyday products (ISO)
  - ISO/IEC 20282–1: Part 1: Design requirements for context and use and user characteristics (ISO)
  - ISO/IEC 20282–2: Part 2: Summative test method (ISO)
  - ISO/IEC 20282–3: Part 3: Test method for consumer products (ISO)
  - ISO/IEC 20282–3: Part 4: Test method for the installation of consumer products (ISO)
  - ISO/IEC 24756: Framework for specifying a common access profile (CAP) of needs and capabilities of users, systems, and their environments (ISO)

Issued on: December 15, 2020.

Thomas Finch Fulton,

Deputy Assistant Secretary for Transportation Policy.

[FR Doc. 2020–27994 Filed 12–18–20; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (the SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: *OFAC:* Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490; Assistant Director for Licensing, tel.: 202–622–2480.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*www.treas.gov/ofac*).

Notice of OFAC Actions

On December 10, 2020, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals:

1. CHERIZIER, Jimmy, 22 Impasse Hall, Rue Beauvais, Delmas 75, Delmas, Ouest, Haiti; DOB 30 Mar 1977; POB Port-au-Prince, Haiti; nationality Haiti; Gender Male; Passport PP3227493 (Haiti) expires 21 Oct 2019; National ID No. 0018439897 (Haiti) (individual) [GLOMAG].

   Designated pursuant to section 1(a)(iii)(A) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2018 Comp., p. 399, (E.O. 13818) for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

2. DUPLAN, Joseph Pierre Richard, Haiti; DOB 03 Apr 1970; Gender Male; Passport 545829751 (United States) expires 28 Apr 2026 (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

3. MONCHERY, Fednel, 129 Rue Capois, Port-au-Prince, Ouest HT6110, Haiti; DOB 25 Aug 1963; POB Anse-A-Veau, Haiti; nationality Haiti; Gender Male; Passport PP3955929 (Haiti) expires 04 Jan 2022; alt. Passport PPF006455 (Haiti) expires 16 May 2022; National ID No. 0030787210 (Haiti) (individual) [GLOMAG].

   Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

4. DUGAZAEV, Timur (a.k.a. DUGAZAYEV, Timur), Kiel, Schleswig-Holstein, Germany; DOB 18 Sep 1985; Gender Male (individual) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

5. KADYROV, Ramzan Akhmatovich (a.k.a. KADYROV, Ramzan; a.k.a. KADYROW, Ramzan Achmatowisch), Russia; DOB 05 Oct 1976; POB Tsentoroi, Chechen Republic, Russia; nationality Russia; Gender Male (individual) [MAGNIT] [GLOMAG].

   Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

6. MARTYNOV, Daniil Vasilievich (a.k.a. MARTYNOV, Daniil Vasilyevich), Moscow, Russia; DOB 19 Mar 1983; POB Moscow Region, Russia; nationality Russia; Gender Male (individual) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

7. SABSABI, Ziyad (a.k.a. SABCABI, Ziyad Mukhamedovich), Russia; DOB 01 Feb 1964; POB Aleppo, Syria; nationality Russia; Gender Male (individual) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

8. SEEMAR, Satish, United Arab Emirates; DOB 25 Dec 1961; POB Punjab, India; Gender Male; Passport Z1917610 expires 18 Mar 2019 (individual) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, KADYROV, Ramzan Akhmatovich, an individual that has engaged in, or whose members have engaged in, serious human rights abuse.

9. USMAYEV, Vakhit (a.k.a. USMAEV, Vakhit; a.k.a. USMAEV, Vakhit Abubakarovich; a.k.a. USMAYEV, Vakhit Abubakarovich), Russia; DOB 20 Nov 1964; POB Shalinsky District, Chechen Republic, Russia; Gender Male (individual) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

10. AL-KHAIWANI, Abdul Hakim (a.k.a. AL KHIYAWANI, Abdulhakim; a.k.a. AL KIYAWANI, Abdul Hakim; a.k.a. AL-KHAIWANI, Abdulhakem Hashim; a.k.a. "AL-KARAR, Abu"; a.k.a. "KARAR, Abu"), Yemen; DOB 1986; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

11. AL-SHAMI, Abdul Qader (a.k.a. AL SHAMI, Abdelkader Kassim Ahmed; a.k.a. AL-SHAMI, Abdulqader), Yemen; DOB 10 Oct 1954; POB Yemen; nationality Yemen; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

12. ZABIN, Sultan (a.k.a. ZABEN, Sultan; a.k.a. ZABIN, Abu Saqer (Arabic: زابن صقر ابو); a.k.a. ZABIN, Sultan Saleh; a.k.a. ZABIN, Sultan Saleh Aida Aida (Arabic: صالح لطانس زابن ضةىع ضةىع); a.k.a. ZABINYE, Sultan; a.k.a. "SAGAR, Abu"; a.k.a. "SAQAR, Abu"), Sana'a, Yemen; DOB 1986; POB Razih District, Sana'a, Yemen; nationality Yemen; Gender Male; National ID No. 10010095104 (Yemen); Identification Number 20322 (Yemen) (individual) [YEMEN] [GLOMAG].

Designated pursuant to section 1(a) of Executive Order 13611 of May 16, 2012, "Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen," (E.O. 13611), 77 FR 29533, for having engaged in acts that directly or indirectly threaten the peace, security, or stability of Yemen, such as acts that obstruct the implementation of the agreement of November 23, 2011 between the Government of Yemen and those in opposition to it, which provides for a peaceful transition of power in Yemen, or that obstruct the political process in Yemen.

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

13. AL-MARRANI, Motlaq Amer (a.k.a. AL MARRANI, Mutlaq Ali Aamer; a.k.a. "EMAD, Abu"), Al-Jawf, Yemen; DOB 01 Jan 1984; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

14. JARFAN, Abdul Rahab (a.k.a. GARAFAN, Abdelrab; a.k.a. JARFAN, Abdul Rab Saleh Ahmed Hussain; a.k.a. JARFAN, Abdulrabb Saleh Ahmed; a.k.a. "TAHA, Abu"), Ibb Governorate, Yemen; DOB 04 Feb 1979; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

Entities:

1. ABSOLUTE CHAMPIONSHIP AKHMAT (a.k.a. PROMOUTERSKAYA KOMPANIYA ABSOLYUTNY CHEMPIONAT BERKUTA OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU; a.k.a. "ACHB, PK"), d. 64 etazh 3 ofis 1, ul. Im Gairbekova Muslima Gairbekovicha, Grozny, Chechenskaya Resp. 364903, Russia; Tax ID No. 2013800375 (Russia); Registration Number 1142036002976 (Russia) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

2. AKHMAT KADYROV FOUNDATION (a.k.a. AKHMAD KADYROV FUND; a.k.a. IMENI KADYROVA, OF; a.k.a. REGIONALNY OBSHCHESTVENNY FOND IMENI GEROYA ROSSII AKHMATA KADYROVA; a.k.a. ROSSII AKHMATA KADYROVA), d. 5 korp., ofis, ul. A.Kadyrova Gudermes, Gudermesski Raion, Chechenskaya Respublika 366200, Russia; Registration Number 1042000001713 (Russia) [GLOMAG].

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

3. AKHMAT MMA (a.k.a. AKHMAT MMA FIGHT CLUB), Russia; Organization Type: Operation of sports facilities [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

   Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

4. CHECHEN MINERAL WATERS LTD (a.k.a. CHECHENSKIE MINERALNYE VODY, OOO; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU CHECHENSKIE MINERALNYE VODY), 23A, ul. Kurortnaya S. Sernovdskoe, Sunzhenski Raion, Chechenskaya Resp. 366701, Russia; Tax ID No. 2029180769 (Russia); Registration Number 1072033000049 (Russia) [GLOMAG] (Linked To: AKHMAT KADYROV FOUNDATION).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, AKHMAT KADYROV FOUNDATION, a entity whose property and interests in property are blocked pursuant to E.O. 13818.

5. FC AKHMAT GROZNY (a.k.a. AKHMAT GROZNY; a.k.a. RESPUBLIKANSKII FUTBOLNYI KLUB AKHMAT; a.k.a. RFK AKHMAT; a.k.a. RFK AKHMAT GROZNY), Ul im s.sh.lorsanova 3, G Groznyi, Russia; Business Registration Number RU45275964 (Russia) [GLOMAG] (Linked To: KADYROV, Ramzan Akhmatovich).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KADYROV, Ramzan Akhmatovich, a person whose property and interests in property are blocked pursuant to E.O. 13818.

6. MEGASTROYINVEST LTD (a.k.a. MEGASTROIINVEST, OOO; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU MEGASTROIINVEST), 23, ul. Boevaya, Grozny, Chechenskaya Resp. 364913, Russia; Tax ID No. 2013431689 (Russia); Registration Number 1072031001580 (Russia) [GLOMAG] (Linked To: AKHMAT KADYROV FOUNDATION).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, AKHMAT KADYROV FOUNDATION, a entity whose property and interests in property are blocked pursuant to E.O. 13818.

BILLING CODE 4810–AL–C

Dated: December 10, 2020.

Andrea Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2020–28129 Filed 12–18–20; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

IMARA Calculation for Calendar Year 2021 Under the Terrorism Risk Insurance Program

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury (Treasury) is providing notice to the public of the insurance marketplace aggregate retention amount (IMARA) for calendar year 2021 for purposes of the Terrorism Risk Insurance Program (TRIP or the Program) under the Terrorism Risk Insurance Act, as amended (TRIA or the Act). As explained below, Treasury has determined that the IMARA for calendar year 2021 is $41,705,989,523.

DATES: The IMARA for calendar year 2021 is effective January 1, 2021 through December 31, 2021.

FOR FURTHER INFORMATION CONTACT: Richard Ifft, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202–622–2922 or Lindsey Baldwin, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, 202–622–3220.

SUPPLEMENTARY INFORMATION:

I. Background

TRIA—which established TRIP—was signed into law on November 26, 2002, following the attacks of September 11, 2001, to address disruptions in the market for terrorism risk insurance, to help ensure the continued availability and affordability of commercial property and casualty insurance for terrorism risk, and to allow the private markets to stabilize and build insurance capacity to absorb any future losses for terrorism events.[1] TRIA requires insurers to ''make available'' terrorism risk insurance for commercial property and casualty losses resulting from certified acts of terrorism, and provides for shared public and private compensation for such insured losses. The Program has been reauthorized four times, most recently by the Terrorism Risk Insurance Program Reauthorization Act of 2019.[2] The Secretary of the Treasury (Secretary) administers the Program, with assistance from the Federal Insurance Office (FIO).[3]

TRIA provides for an ''industry marketplace aggregate retention amount'' or ''IMARA'' to be used for determining whether Treasury must recoup any payments it makes under the

[1] Public Law 107–297, sec. 101(b), 116 Stat. 2322, codified at 15 U.S.C. 6701 note. Because the provisions of TRIA (as amended) appear in a note instead of particular sections of the U.S. Code, the provisions of TRIA are identified by the sections of the law.

[2] See Terrorism Risk Insurance Extension Act of 2005, Public Law 109–144, 119 Stat. 2660; Terrorism Risk Insurance Program Reauthorization Act of 2007, Public Law 110–160, 121 Stat. 1839; Terrorism Risk Insurance Program Reauthorization Act of 2015, Public Law 114–1, 129 Stat. 3 (2015 Reauthorization Act); Terrorism Risk Insurance Program Reauthorization Act of 2019, Public Law 116–94, 133 Stat. 2534.

[3] 31 U.S.C. 313(c)(1)(D).

Program. Under the Act, if total annual payments by all participating insurers are below the IMARA, then Treasury must recoup all amounts expended by it up to the IMARA threshold. If total annual payments by all participating insurers are above the IMARA, then Treasury has discretionary authority (but not the obligation) to recoup all of the expended amounts that are above the IMARA threshold.[4]

TRIA provides for a schedule of defined IMARA values for calendar year 2015 through calendar year 2019.[5] For calendar year 2020 and beyond, TRIA states that the IMARA ''shall be revised to be the amount equal to the annual average of the sum of insurer deductibles for all insurers participating in the Program for the prior 3 calendar years,'' as such sum is determined pursuant to final rules issued by the Secretary.[6]

On November 15, 2019, Treasury issued a final rule for calculation of the IMARA.[7] This rule, which is codified at 31 CFR 50.4(m)(2), provides that the IMARA will be calculated by averaging the annual industry aggregate deductibles over the prior three calendar years, based upon the direct earned premium (DEP) reported to Treasury by insurers in Treasury's annual data calls. Insurer deductibles under the Program are based upon the DEP of individual insurers reported to Treasury in the prior year (*e.g.,* 2018 DEP for 2019 calendar year).

Accordingly, for purposes of determining the IMARA for calendar 2021, Treasury has averaged the aggregate insurer deductibles for calendar years 2020, 2019, and 2018 (as reported to Treasury in each of these years), which are based on the reported DEP for calendar years 2019, 2018, and 2017, respectively.

FIO's 2020 Report on the Effectiveness of the Terrorism Risk Insurance Program[8] identified the DEP amounts participating insurers reported to Treasury in the TRIP-eligible lines of insurance in the 2018, 2019, and 2020 TRIP data calls. For purposes of the 2021 IMARA calculation, those figures are as follows:

TRIP-ELIGIBLE DEP BY INSURER CATEGORY[9]

	2018 TRIP data call		2019 TRIP data call		2020 TRIP data call	
	2017 DEP in TRIP-eligible lines	% of Total	2018 DEP in TRIP-eligible lines	% of Total	2019 DEP in TRIP-eligible lines	% of Total
Alien Surplus Lines Ins.	$9,492,933,571	5	$7,618,548,358	4	$11,149,972,542	5
Captive Insurers	9,052,630,571	4	8,937,119,082	4	9,083,384,310	4
Non-Small Insurers	163,891,791,592	80	166,188,192,378	81	172,970,757,331	80
Small Insurers	21,806,195,201	11	22,516,178,612	11	22,882,139,290	11
Total	204,243,550,936	100	205,260,038,430	100	216,086,253,473	100

Source: 2018–2020 TRIP Data Calls.

Treasury has used these reported premiums to calculate the IMARA for calendar year 2021. The average annual DEP figure for the combined period of 2017, 2018, and 2019 is $208,529,947,613 [($204,243,550,936 + $205,260,038,430 + $216,086,253,473)/3 = $208,529,947,613]. The average aggregate deductible for the prior three years is 20 percent of $208,529,947,613, which equals $41,705,989,523.[10] Accordingly, the IMARA for purposes of calendar year 2021 is $41,705,989,523.

Dated: December 15, 2020.

Steven E. Seitz,

Director, Federal Insurance Office.

[FR Doc. 2020–27996 Filed 12–18–20; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

United States Mint

Establish Pricing for 2020 United States Mint Numismatic Product

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notice.

SUMMARY: The United States Mint is announcing pricing for the new United States Mint numismatic product in accordance with the table below:

Product	2020 retail price
Presidential $1 Coin & First Spouse Medal Set™-George H.W. Bush and Barbara Bush	$25.00

FOR FURTHER INFORMATION CONTACT: Angela Hicks, Marketing Specialist, Sales and Marketing; United States Mint; 801 9th Street, NW; Washington, DC 20220; or call 202–354–7750.

Authority: 31 U.S.C. 5111, 5112, & 9701.

Eric Anderson,

Executive Secretary, United States Mint.

[FR Doc. 2020–28051 Filed 12–18–20; 8:45 am]

BILLING CODE 4810–37–P

[4] *See* TRIA, sec. 103(e)(7); see also 31 CFR part 50 subpart J (Recoupment and Surcharge Procedures).

[5] In 2015, the IMARA was $29.5 billion; it increased to $31.5 billion in 2016, $33.5 billion in 2017, $35.5 billion in 2018, and $37.5 billion in 2019. *See* TRIA, sec. 103(e)(6)(B).

[6] TRIA, sec. 103(e)(6)(B)(ii) and (e)(6)(C). An insurer's deductible under the Program for any particular year is 20 percent of its direct earned premium subject to the Program during the preceding year. TRIA, sec. 102(7). For example, an insurer's calendar year 2020 Program deductible is 20 percent of its calendar year 2019 direct earned premium.

[7] 84 FR 62450 (November 15, 2019) (Final Rule). On December 18, 2019, Treasury issued a notice that the IMARA calculation for calendar year 2020 was $40,878,630,900. 84 FR 69462 (December 18, 2019).

[8] FIO, Report on the Effectiveness of the Terrorism Risk Insurance Program (June 2020) (2020 Effectiveness Report), 11 (Figure 1), *https://home.treasury.gov/system/files/311/2020-TRIP-Effectiveness-Report.pdf.*

[9] The figures from the 2019 and 2018 TRIP data calls (some figures may not add up on account of rounding) were previously reported in the IMARA calculation for calendar year 2020. *See* 84 FR 69462 (December 18, 2019). Figures from the 2020 TRIP data call were previously reported in FIO's June 2020 Effectiveness Report, as available at that time and rounded. 2020 Effectiveness Report, 11 (Figure 1). The figures from the 2020 TRIP data call as originally reported in June 2020 have been updated to include data received by FIO after the reporting deadline.

[10] *See* note 6.

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Part II

Securities and Exchange Commission

17 CFR Parts 239, 249, 270, et al.

Use of Derivatives by Registered Investment Companies and Business Development Companies; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 239, 249, 270, and 274

[Release No. IC–34084; File No. S7–24–15]

RIN 3235–AL60

Use of Derivatives by Registered Investment Companies and Business Development Companies

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is adopting a new exemptive rule under the Investment Company Act of 1940 (the ''Investment Company Act'') designed to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives and the other transactions the new rule addresses. In addition, the Commission is adopting new reporting requirements designed to enhance the Commission's ability to effectively oversee funds' use of and compliance with the new rule, and to provide the Commission and the public additional information regarding funds' use of derivatives. Finally, the Commission is adopting amendments under the Investment Company Act to allow leveraged/inverse ETFs that satisfy the rule's conditions to operate without the expense and delay of obtaining an exemptive order. The Commission, accordingly, is rescinding certain exemptive relief that has been granted to these funds and their sponsors.

DATES: *Effective Date:* This rule is effective February 19, 2021. *Compliance Date:* August 19, 2022. *See* Section II.L of the **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Blair Burnett, Senior Counsel; Joel Cavanaugh, Senior Counsel; Mykaila DeLesDernier, Senior Counsel, John Lee, Senior Counsel; Amy Miller, Senior Counsel; Amanda Hollander Wagner, Branch Chief; Thoreau A. Bartmann, Senior Special Counsel; or Brian McLaughlin Johnson, Assistant Director, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management; U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

SUPPLEMENTARY INFORMATION: Regulations in 17 CFR 270.18f–4 (''rule 18f–4'') will apply to mutual funds (other than money market funds), exchange-traded funds (''ETFs''), registered closed-end funds, and companies that have elected to be treated as business development companies (''BDCs'') under the Investment Company Act (collectively, ''funds''). It will permit these funds to enter into derivatives transactions and certain other transactions, notwithstanding the restrictions under sections 18 and 61 of the Investment Company Act, provided that the funds comply with the conditions of the rule. The rule also permits money market funds (and other funds) to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to conditions.

The Commission is adopting rule 18f–4 under the Investment Company Act, amendments to 17 CFR 270.6c–11 (rule 6c–11), 17 CFR 270.22e–4 (rule 22e–4), and 17 CFR 270.30b1–10 (rule 30b1–10) under the Investment Company Act; amendments to Form N–PORT [referenced in 17 CFR 274.150], Form N–LIQUID (which we are re-titling as ''Form N–RN'') [referenced in 17 CFR 274.223], Form N–CEN [referenced in 17 CFR 274.101], and Form N–2 [referenced in 17 CFR 274.11a–1] under the Investment Company Act.

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I. Introduction

The Commission is adopting rule 18f–4 under the Investment Company Act to provide an updated, comprehensive approach to the regulation of funds' use of derivatives. This rule, along with amendments that the Commission is adopting to rule 6c–11 and certain forms under the Investment Company Act, will modernize the regulatory framework for funds to reflect the broad ways in which funds' use of derivatives has developed over past decades, and also will address investor protection concerns related to funds' derivatives use. We are committed to designing regulatory programs that reflect the ever-broadening product innovation and investor choice available in today's asset management industry, while also taking into account the risks associated with funds' increasingly complex portfolio composition and operations. The rules we are adopting reflect these considerations, and are also informed by the Commission's ongoing exploration—particularly over the past decade—of the benefits, risks, and costs associated with funds' current practices regarding derivatives.[1]

Under this new framework, funds using derivatives generally will have to adopt a derivatives risk management program that a derivatives risk manager administers and that the fund's board of directors oversees, and comply with an outer limit on fund leverage risk based on value at risk, or ''VaR.'' Funds that use derivatives only in a limited manner will not be subject to these requirements, but they will have to adopt and implement policies and procedures reasonably designed to manage the fund's derivatives risks. Funds also will be subject to reporting and recordkeeping requirements regarding their derivatives use.

Funds using derivatives must consider requirements under the Investment Company Act of 1940.[2] These include sections 18 and 61 of the Investment Company Act, which limit a fund's ability to obtain leverage or incur obligations through the issuance of ''senior securities.''[3] The Commission and its staff have addressed the use of specific derivatives instruments and practices, and other financial instruments, under section 18. In determining how they will comply with section 18, we understand that funds consider Commission and staff guidance, as well as staff no-action letters and the practices that other funds disclose in their registration statements.[4]

In November 2019, the Commission proposed rule 18f–4, an exemptive rule under the Act designed to address the investor protection purposes and concerns underlying section 18.[5] The proposal also was designed to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives and the other transactions addressed in the proposed rule by replacing the Commission and staff guidance with a codified, consistent regulatory framework. The Commission observed in proposing this rule that, in the absence of Commission rules and guidance that encompass the current broad range of funds' derivatives use, inconsistent industry practices have developed.[6] The proposal was designed to respond to the concern that certain of these practices may not address investor protection concerns that underlie section 18's limitations on funds' issuance of senior securities. Specifically, certain fund practices can heighten leverage-related risks, such as the risk of potentially significant losses and increased fund volatility, that section 18 is designed to address. By standardizing the regulatory framework governing funds' derivatives use, the proposal also was designed to respond to the concern that funds' disparate practices could create an un-level competitive landscape and make it difficult for funds and the Commission

[1] *See, e.g.,* Use of Derivatives by Investment Companies under the Investment Company Act of 1940, Investment Company Act Release No. 29776 (Aug. 31, 2011) [76 FR 55237 (Sept. 7, 2011)] (''2011 Concept Release''). The comment letters on the 2011 Concept Release (File No. S7–33–11) are available at *https://www.sec.gov/comments/s7-33-11/s73311.shtml. See also* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 31933 (Dec. 11, 2015) [80 FR 80883 (Dec. 28, 2015)] (''2015 Proposing Release''); Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles, Investment Company Act Release No. 33704 (Nov. 25, 2019) [85 FR 4446 (Jan. 24, 2020)] (''Proposing Release''). The comment letters on both the 2015 Proposing Release and the Proposing Release (File No. S7–24–15) are available at *https://www.sec.gov/comments/s7-24-15/s72415.shtml.*

[2] 15 U.S.C. 80a (the ''Investment Company Act,'' or the ''Act''). Except in connection with our discussion of the proposed sales practices rules (*see infra* paragraph following footnote 7) or as otherwise noted, all references to statutory sections are to the Investment Company Act, and all references to rules under the Investment Company Act, including rule 18f–4, will be to title 17, part 270 of the Code of Federal Regulations, 17 CFR part 270.

[3] *See infra* section I.B.1. Funds using derivatives must also comply with all other applicable statutory and regulatory requirements, such as other federal securities law provisions, the Internal Revenue Code, Regulation T of the Federal Reserve Board, and the rules and regulations of the Commodity Futures Trading Commission (the ''CFTC''). *See also* Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) (the ''Dodd-Frank Act''), *available at http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.*

Section 61 of the Investment Company Act makes section 18 of the Act applicable to BDCs, with certain modifications. *See infra* footnote 33 and accompanying text. Except as otherwise noted, or unless the context dictates otherwise, references in this release to section 18 of the Act should be read to refer also to section 61 with respect to BDCs.

[4] Any staff guidance or no-action letters discussed in this release represent the views of the staff of the Division of Investment Management. They are not a rule, regulation, or statement of the Commission. Furthermore, the Commission has neither approved nor disapproved their content. Staff guidance has no legal force or effect; it does not alter or amend applicable law; and it creates no new or additional obligations for any person.

[5] *See* Proposing Release, *supra* footnote 1. This proposal was a re-proposal of rules that the Commission proposed in 2015 to address funds' derivatives use, which included an earlier version of proposed rule 18f–4. *See* 2015 Proposing Release, *supra* footnote 1. In developing the 2019 re-proposal, the Commission considered the approximately 200 comment letters in response to the 2015 proposal, as well as subsequent staff engagement with large and small fund complexes and investor groups. *See also* Division of Economic and Risk Analysis, Memorandum re: Risk Adjustment and Haircut Schedules (Nov. 1, 2016), *available at https://www.sec.gov/comments/s7-24-15/s72415260.pdf* (''2016 DERA Memo'').

[6] *See infra* section I.B.3 (discussing the asset segregation practices funds have developed to ''cover'' their derivatives positions, which vary based on the type of derivatives transaction and with respect to the types of assets that funds segregate to cover their derivatives positions).

to evaluate funds' compliance with section 18.[7]

The rules that the Commission proposed in 2019 would permit a fund to enter into derivatives transactions, notwithstanding the restrictions under section 18 of the Investment Company Act, subject to certain conditions. These proposed conditions include adopting a derivatives risk management program and complying with a limit on the amount of leverage-related risk that the fund may obtain, based on VaR. Under the proposed rule, a streamlined set of requirements would apply to funds that use derivatives in a limited way. The proposed rule would also permit a fund to enter into reverse repurchase agreements and similar financing transactions, as well as ''unfunded commitments'' to make certain loans or investments, subject to conditions tailored to these transactions. The proposal also included new reporting and recordkeeping requirements for funds using derivatives.

Certain registered investment companies that seek to provide leveraged or inverse exposure to an underlying index—including leveraged/inverse ETFs—would not have been subject to the limit on fund leverage risk under the 2019 proposal but instead would be subject to alternative requirements. The 2019 proposal provided that sales of these funds also would be subject to new sales practices rules for brokers, dealers, and investment advisers that are registered with the Commission (collectively, the ''proposed sales practices rules'').[8] Finally, the proposal would amend rule 6c–11 under the Investment Company Act to allow leveraged/inverse ETFs that satisfy that rule's conditions to operate without the expense and delay of obtaining an exemptive order.

The Commission received approximately 6,100 comment letters in response to the 2019 proposal. Of these comment letters, approximately 70 addressed proposed rule 18f–4, and the balance addressed the proposed sales practices rules. The majority of commenters who discussed proposed rule 18f–4 supported the Commission acting to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives.[9] Commenters generally supported the proposal's derivatives risk management program requirement and use of VaR to provide a limit on fund leverage risk, while suggesting certain modifications.[10] Many commenters, however, expressed concerns with the proposed sales practices rules, and urged the Commission not to adopt these proposed rules (or to adopt alternative requirements designed to address the investor protection concerns underlying the proposed sales practices rules).[11]

After consideration of the comments received, we are adopting rule 18f–4, with certain modifications. The final rule retains each of the elements of the proposed rule, as we continue to believe that these requirements provide important investor protections. We have, however, made modifications to the proposed rule to address the comments the Commission received. We are also adopting, with certain modifications, the proposed new reporting and recordkeeping requirements, as well as the proposed amendments to rule 6c–11. We are not, however, adopting the proposed sales practices rules. Instead, leveraged/inverse funds will generally be subject to rule 18f–4, like other funds that use derivatives. The enhanced standard of conduct for broker-dealers under Regulation Best Interest and the fiduciary obligations of registered investment advisers also apply to broker-dealer recommendations and advice from investment advisers in connection with leveraged/inverse funds, as well as with respect to the listed commodity pools following the same strategies that would have been subject to the proposed sales practices rules.[12] In addition, we have directed the staff to review the effectiveness of the existing regulatory requirements in protecting investors who invest in leveraged/inverse funds and other complex investment products.

A. Overview of Funds' Use of Derivatives

As we discussed in the Proposing Release, funds today use a variety of derivatives. These derivatives can reference a range of assets or metrics, such as: Stocks, bonds, currencies, interest rates, market indexes, currency exchange rates, or other assets or interests. Examples of derivatives that funds commonly use include forwards, futures, swaps, and options. Derivatives are often characterized as either exchange-traded or over-the-counter (''OTC'').[13]

A common characteristic of most derivatives is that they involve leverage or the potential for leverage. The Commission has stated that ''[l]everage exists when an investor achieves the right to a return on a capital base that exceeds the investment which he has personally contributed to the entity or instrument achieving a return.'' [14] Many fund derivatives transactions, such as futures, swaps, and written options, involve leverage or the potential for leverage because they enable the fund to magnify its gains and losses compared to the fund's investment, while also obligating the fund to make a payment or deliver assets to a counterparty under specified conditions.[15] Other derivatives transactions, such as

[7] *See* Proposing Release, *supra* footnote 1, at n.9 and accompanying text (discussing funds that segregate the notional amount of physically-settled futures contracts, and those that segregate only the marked-to-marked obligation in respect of cash-settled futures, and the concern that these practices can result in differing treatment of arguably equivalent products).

[8] As discussed in more detail in section II.G, the proposed sales practices rules would have covered transactions in ''leveraged/inverse investment vehicles,'' which include registered investment companies and certain exchange-listed commodity- or currency-based trusts or funds that seek, directly or indirectly, to provide investment returns that correspond to the performance of a market index by a specified multiple, or to provide investment returns that have an inverse relationship to the performance of a market index, over a predetermined period of time. For purposes of this release, we refer to leveraged, inverse, and leveraged inverse investment vehicles collectively as ''leveraged/inverse.''

[9] *See, e.g.,* Comment Letter of the American Bar Association (May 2, 2020) (''ABA Comment Letter''); Comment Letter of Better Markets (Mar. 24, 2020) (''Better Markets Comment Letter''); Comment Letter of the U.S. Chamber of Commerce (''Chamber Comment Letter''); Comment Letter of Investment Company Institute (Apr. 20, 2020) (''ICI Comment Letter''); Comment Letter of New York City Bar (May 1, 2020) (''NYC Bar Comment Letter'').

[10] *See infra* footnotes 125, 287 and accompanying text.

[11] *See, e.g., infra* footnotes 579–584 and accompanying text.

[12] *See* Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031 (June 5, 2019) [84 FR 33318 (July 12, 2019)] (''Regulation Best Interest Adopting Release''). The proposed sales practices rules would have applied to certain exchange-listed commodity- or currency-based trusts or funds. *See* proposed rule 15*l*–2(d); proposed rule 211(h)–1(d). In this release we refer to these trusts or funds collectively as listed commodity pools.

[13] Exchange-traded derivatives—such as futures, certain options, and options on futures—are standardized contracts traded on regulated exchanges. OTC derivatives—such as certain swaps, non-exchange-traded options, and combination products such as swaptions and forward swaps—are contracts that parties negotiate and enter into outside of an organized exchange. *See* Proposing Release, *supra* footnote 1, at n.14 and accompanying text. Unlike exchange-traded derivatives, OTC derivatives may be significantly customized and may not be cleared by a central clearing organization. Title VII of the Dodd-Frank Act provides a comprehensive framework for the regulation of the OTC swaps market. *See supra* footnote 3.

[14] *See* Securities Trading Practices of Registered Investment Companies, Investment Company Act Release No. 10666 (Apr. 18, 1979) [44 FR 25128 (Apr. 27, 1979)], at n.5 (''Release 10666'').

[15] The leverage created by such an arrangement is sometimes referred to as ''indebtedness leverage.'' *See* Proposing Release, *supra* footnote 1, at n.16.

purchased call options, provide the economic equivalent of leverage because they can magnify the fund's exposure beyond its investment but do not impose a payment obligation on the fund beyond its investment.[16]

The Proposing Release considered, and commenters also discussed, how funds use derivatives both to obtain investment exposures as part of their investment strategies and to manage risk. A fund may use derivatives to gain, maintain, or reduce exposure to a market, sector, or security more quickly, and with lower transaction costs and portfolio disruption, than investing directly in the underlying securities.[17] A fund also may use derivatives to obtain exposure to reference assets for which it may be difficult or impractical for the fund to make a direct investment, such as commodities.[18] With respect to risk management, funds may employ derivatives to hedge currency, interest rate, credit, and other risks, as well as to hedge portfolio exposures.[19] At the same time, a fund's derivatives use may entail risks relating to, for example, leverage, markets, operations, liquidity (particularly with respect to complex OTC derivatives), and counterparties, as well as legal risks (*e.g.,* contract enforceability).[20]

Section 18 is designed to limit the leverage a fund can obtain or incur through the issuance of senior securities. The Proposing Release discussed recent examples involving significant fund losses, which illustrate how a fund's use of derivatives may raise the investor protection concerns underlying section 18.[21] While the losses suffered in the examples discussed in the 2019 proposal are extreme, and funds rarely suffer such large and rapid losses, these examples illustrate the rapid and extensive losses that can result from a fund's investments in derivatives absent effective derivatives risk management. In contrast, there are many other instances in which funds, by employing derivatives, have avoided losses, increased returns, and lowered risk.

The 2020 outbreak of coronavirus disease 2019 (COVID–19) and related effects on markets similarly have highlighted the importance of funds' derivatives risk management. Our staff has considered, and multiple commenters also discussed, the impact of COVID–19 both on funds' current derivatives risk management, as well as considerations relating to the Commission's 2019 proposal in light of market events stemming from this health crisis. The market volatility that followed the onset of this health crisis resulted in disruptions and challenges across asset classes.[22] In the context of derivatives, this volatility resulted in trading, liquidity, and pricing disruptions, valuation challenges, counterparty issues, and issues relating to derivatives' underlying assets, all of which emphasize the significance of robust derivatives risk management.[23] Certain leveraged/inverse ETFs changed their investment objectives and strategies during this period.[24] On the other hand, commenters observed that the recent market volatility has shown the importance for funds to be able to use derivatives both to hedge risk and the flexibility to respond to quickly-changing market demands.[25] Some commenters suggested changes to certain aspects of proposed rule 18f-4 that reflect their experiences with this market volatility.[26] The rules we are adopting here take these considerations into account.

[16] This type of leverage is sometimes referred to as ''economic leverage.'' *See id.* at n.17.

[17] *See id.* at n.18; *see also, e.g.,* ICI Comment Letter; Comment Letter of SIFMA, Asset Management Group (Apr. 21, 2020) (''SIFMA AMG Comment Letter'').

[18] *See* Proposing Release, *supra* footnote 1, at n.19; *see also* ICI Comment Letter.

[19] *See* Proposing Release, *supra* footnote 1, at n.20; *see also infra* sections II.E.2.b and II.E.2.c.

[20] *See* Proposing Release, *supra* footnote 1, at n.21.

[21] *See* Proposing Release, *supra* footnote 1, at nn.22–23 and accompanying text (discussing the following settled actions: In the Matter of OppenheimerFunds, Inc. and OppenheimerFunds Distributor, Inc., Investment Company Act Release No. 30099 (June 6, 2012) (settled action); In the Matter of Claymore Advisors, LLC, Investment Company Act Release No. 30308 (Dec. 19, 2012) and In the Matter of Fiduciary Asset Management, LLC, Investment Company Act Release No. 30309 (Dec. 19, 2012) (settled actions); In the Matter of UBS Willow Management L.L.C. and UBS Fund Advisor L.L.C., Investment Company Act Release No. 31869 (Oct. 16, 2015) (settled action); In the Matter of Team Financial Asset Management, LLC, Team Financial Managers, Inc., and James L. Dailey, Investment Company Act Release No. 32951 (Dec. 22, 2017) (settled action); In the Matter of Mohammed Riad and Kevin Timothy Swanson, Investment Company Act Release No. 33338 (Dec. 21, 2018) (settled action); In the Matter of Top Fund Management, Inc. and Barry C. Ziskin, Investment Company Act Release No. 30315 (Dec. 21, 2012) (settled action)).

The Proposing Release also discussed the 2018 liquidation of the LJM Preservation and Growth Fund, which occurred after the fund—whose investment strategy involved purchasing and selling call and put options on the Standard & Poor's (''S&P'') 500 Futures Index—sustained considerable losses in connection with a market volatility spike in February 2018. *See id.* at nn.24–25 and accompanying text.

Following the issuance of the Proposing Release, an additional settled action similarly illustrates substantial and rapid losses resulting from a fund's investment in derivatives. *See* In the Matter of Catalyst Capital Advisors, LLC and Jerry Szilagyi, Investment Advisers Act Release No. 5436 (Jan. 27, 2020) (settled action) (involving a mutual fund that advises and invests primarily in options on S&P 500 index futures contracts incurring losses of 20% of its net asset value—more than $700 million—during the period December 2016 through February 2017).

[22] *See, e.g.,* Comment Letter of AQR Capital Management, LLC (Apr. 21, 2020) (''AQR Comment Letter I'') (observing ''extremely high levels of market volatility driven by the COVID–19 pandemic''); Comment Letter of AQR Capital Management, LLC (Sept. 29, 2020) (''AQR Comment Letter II'') (discussing the impact and investment returns for certain alternative strategy funds at the onset of stressed market conditions related to the COVID–19 global health pandemic); *see also* ISDA COVID–19 Updates (July, 30, 2020), *available at https://www.isda.org/2020/03/13/covid-19-isda-update/* (providing updates on trading suspensions and regulatory emergency relief relating to COVID–19).

[23] *See, e.g.,* ISDA and Greenwich Associates, The Impact of COVID–19 and Government Intervention on Swaps Market Liquidity (Q2 2020), *available at https://www.isda.org/a/YfbTE/The-Impact-of-COVID-19-on-Swaps-Market-Liquidity.pdf*; CFTC, COVID–19 Commission Action, *available at https://www.cftc.gov/coronavirus* (discussing CFTC actions designed to help facilitate orderly trading and liquidity in the U.S. derivatives markets in response to the COVID–19 pandemic); CFTC Letter No. 20–17, Staff Advisory on Risk Management and Market Integrity Under Current Market Conditions (May 13, 2020), *available at https://www.cftc.gov/coronavirus* (advisory issued to remind certain CFTC-regulated market participants that they are expected to prepare for the possibility that certain contracts may continue to experience ''extreme market volatility, low liquidity and possibly negative pricing''); Derivatives close-outs: COVID–19—Challenges to the valuation of derivatives upon early termination, FTI Consulting (June 2020), *available at https://www.fticonsulting.com/~/media/Files/emea—files/insights/articles/2020/jun/covid-19-derivatives-close-outs-crisis.pdf*; COVID–19 Update: The Impact of COVID–19 on Financial Contracts, The National Law Review Vol. X, Number 111 (Apr. 20, 2020) (discussing market volatility arising from the restrictions imposed to reduce the risk of spread of COVID–19, the impact of this volatility on existing contractual relationships, and illustrating practical issues that a counterparty to a financial contract might take into account using, as an example, a derivative transaction).

[24] In particular, one of the two ETF sponsors that currently relies on exemptive relief from the Commission permitting them to operate leveraged/inverse ETFs changed the objectives of a number of its funds, while also closing a number of its funds. *See* ''Direxion Changes Objectives of Ten Leveraged Funds to Address Extreme Market Conditions, While Also Closing Eight Funds Due to Limited Interest Since Launch'' (Mar. 24, 2020), *available at https://www.direxion.com/uploads/Change-in-Investment-Objectives-and-Strategies-of-Ten-Daily-Leveraged-and-Daily-Inverse-Leveraged-Funds.pdf* (''Direxion Press Release''); *see also infra* footnote 821 and accompanying text.

[25] *See, e.g.,* Comment Letter of BlackRock, Inc. (Apr. 22, 2020) (''BlackRock Comment Letter''); Comment Letter of International Swaps and Derivatives Association, Inc. (Apr. 24, 2020) (''ISDA Comment Letter''); *see also, e.g.,* PIMCO: Taxonomy of Crisis, presentation to Commission's Asset Management Advisory Committee on May 27, 2020, *available at https://www.sec.gov/files/marc-seidner-pimco.pdf.*

[26] *See, e.g.,* AQR Comment Letter I; BlackRock Comment Letter; Comment Letter of Capital Research and Management Company (Apr. 21, 2020) (''Capital Group Comment Letter'').

B. Derivatives and the Senior Securities Restrictions of the Investment Company Act

1. Requirements of Section 18

Section 18 of the Investment Company Act imposes various limits on the capital structure of funds, including, in part, by restricting the ability of funds to issue ''senior securities.'' Protecting investors against the potentially adverse effects of a fund's issuance of senior securities, and in particular the risks associated with excessive leverage of investment companies, is a core purpose of the Investment Company Act.[27] ''Senior security'' is defined, in part, as ''any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness.'' [28]

As discussed in the Proposing Release, Congress' concerns underlying the limits in section 18 focused on: (1) Excessive borrowing and the issuance of excessive amounts of senior securities by funds when these activities increase unduly the speculative character of funds' junior securities; (2) funds operating without adequate assets and reserves; and (3) potential abuse of the purchasers of senior securities.[29] To address these concerns, section 18 prohibits an open-end fund from issuing or selling any ''senior security,'' other than borrowing from a bank (subject to a requirement to maintain 300% ''asset coverage'').[30] Section 18 similarly prohibits a closed-end fund from issuing or selling any ''senior security [that] represents an indebtedness'' unless it has at least 300% ''asset coverage,'' although closed-end funds' ability to issue senior securities representing indebtedness is not limited to bank borrowings.[31] Closed-end funds also may issue or sell senior securities that are a stock, subject to the limitations of section 18 (including that these funds must have asset coverage of at least 200% immediately after such issuance or sale).[32] The Investment Company Act also subjects BDCs to the limitations of section 18 to the same extent as registered closed-end funds, except the applicable asset coverage amount for any senior security representing indebtedness is 200% (and can be decreased to 150% under certain circumstances).[33]

2. Investment Company Act Release 10666 and the Status of Derivatives Under Section 18

Investment Company Act Release 10666

As discussed in the Proposing Release, the Commission considered the application of section 18's restrictions on the issuance of senior securities to certain transactions—reverse repurchase agreements, firm commitment agreements, and standby commitment agreements—in a 1979 General Statement of Policy (Release 10666).[34] The Proposing Release discussed the Commission's conclusion that these agreements fall within the ''functional meaning of the term 'evidence of indebtedness' for purposes of Section 18 of the Investment Company Act.'' [35] The Commission stated in Release 10666 that, for purposes of section 18, ''evidence of indebtedness'' would include ''all contractual obligations to pay in the future for consideration presently received.'' [36] The Commission recognized that, while section 18 would generally prohibit open-end funds' use of reverse repurchase agreements, firm commitment agreements, and standby commitment agreements, Release 10666 nonetheless permitted funds to use these and similar arrangements subject to certain constraints.

These constraints relied on funds' use of ''segregated accounts'' to ''cover'' senior securities, which ''if properly created and maintained, would limit the investment company's risk of loss.'' [37] The Commission also stated that the segregated account functions as ''a practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock'' and that it ''[would] assure the availability of adequate funds to meet the obligations arising from such activities.'' [38] The Commission stated that its expressed views were not limited to the particular trading practices discussed, emphasizing that Release 10666 discussed certain securities trading practices as examples and that the Commission sought to address the implications of all comparable trading practices that could similarly affect funds' capital structures.[39]

Transactions Involving Senior Securities for Purposes of Section 18

We continue to view the transactions described in Release 10666 as falling within the functional meaning of the term ''evidence of indebtedness,'' for purposes of section 18. These transactions, as well as short sales of securities for which the staff initially developed the segregated account approach, all impose on a fund a contractual obligation under which the fund is or may be required to pay or deliver assets in the future to a counterparty.[40] These transactions therefore involve the issuance of a senior security for purposes of section 18.[41]

[27] *See, e.g.,* sections 1(b)(7), 1(b)(8), 18(a), and 18(f) of the Investment Company Act; *see also Provisions Of The Proposed Bill Related To Capital Structure (Sections 18, 19(B), And 21(C)),* Introduced by L.M.C Smith, Associate Counsel, Investment Trust Study, Securities and Exchange Commission, *Hearings on S.3580 Before a Subcommittee of the Senate Committee on Banking and Currency,* 76th Congress, 3rd session (1940), at 1028 (''Senate Hearings''); *see also* Proposing Release, *supra* footnote 1, at n.26.

[28] *See* section 18(g) of the Investment Company Act. The definition of ''senior security'' in section 18(g) also includes ''any stock of a class having priority over any other class as to the distribution of assets or payment of dividends'' and excludes certain limited temporary borrowings.

[29] *See* Proposing Release, *supra* footnote 1, at n.28 and accompanying text (citing to discussion of each of these enumerated concerns in certain Investment Company Act provisions, Release 10666, *supra* footnote 14, and Senate Hearings, *supra* footnote 27).

[30] *See* section 18(f)(1) of the Investment Company Act. ''Asset coverage'' of a class of senior securities representing indebtedness of an issuer generally is defined in section 18(h) of the Investment Company Act as ''the ratio which the value of the total assets of such issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer.'' Take, for example, an open-end fund with $100 in assets and with no liabilities or senior securities outstanding. The fund could, while maintaining the required coverage of 300% of the value of its assets, borrow an additional $50 from a bank. The $50 in borrowings would represent one-third of the fund's $150 in total assets, measured after the borrowing (or 50% of the fund's $100 net assets).

[31] *See* section 18(a)(1) of the Investment Company Act.

[32] *See* section 18(a)(2) of the Investment Company Act.

[33] *See* section 61(a)(1) of the Investment Company Act. BDCs, like registered closed-end funds, also may issue a senior security that is a stock (*e.g.,* preferred stock), subject to limitations in section 18. *See* sections 18(a)(2) and 61(a)(1) of the Investment Company Act. In 2018, Congress passed the Small Business Credit Availability Act, which, among other things, modified the statutory asset coverage requirements applicable to BDCs (permitting BDCs that meet certain specified conditions to elect to decrease their effective asset coverage requirement from 200% to 150%). *See* section 802 of the Small Business Credit Availability Act, Public Law 115–141, 132 Stat. 348 (2018).

[34] *See* Release 10666, *supra* footnote 14.

[35] *See* Proposing Release, *supra* footnote 1, at n.34 and accompanying and following text.

[36] *See id.*

[37] *See* Proposing Release, *supra* footnote 1, at n.35 and accompanying text.

[38] *See id.* at n.36 and accompanying text.

[39] *See id.* at n.37 and accompanying text. The Commission in Release 10666 stated that although it was expressing its views about the particular trading practices discussed in that release, its views were not limited to those trading practices, in that the Commission sought to ''address generally the possible economic effects and legal implications of all comparable trading practices which may affect the capital structure of investment companies in a manner analogous to the securities trading practices specifically discussed in Release 10666.''

[40] *See id.* at n.38 and accompanying text.

[41] *See id.* at n.38 and accompanying text (citing Release 10666, *supra* footnote 14, at ''The

We also continue to apply the same analysis to all derivatives transactions that create future payment obligations.[42] As was the case for trading practices that Release 10666 describes, where the fund has entered into a derivatives transaction and has such a future payment obligation, we believe that such a transaction involves an evidence of indebtedness that is a senior security for purposes of section 18.[43]

Most commenters were silent on the Commission's interpretation. Some commenters, however, raised questions about whether all of the transactions covered in the rule's definition of ''derivatives transaction'' involve senior securities. For example, some of these commenters stated that derivatives such as swaps, options, and futures are not generally structured as ''borrowings'' and therefore questioned whether these derivatives represent ''indebtedness.''[44] One of these commenters stated that the reverse repurchase agreements, firm commitment agreements, and standby commitment agreements that Release 10666 addresses ''can fairly be characterized as 'evidence of indebtedness,' '' but questioned whether those types of arrangements are derivatives ''in today's parlance'' and stated that Release 10666's discussion of those arrangements does not indicate that ''today's derivatives—swaps, options, futures—represent 'indebtedness.' ''[45] Certain commenters also questioned whether a fund ''issues'' senior securities when it engages in derivatives transactions, and some furthermore expressed the view that derivatives transactions do not involve senior securities under section 18.[46]

As discussed in the Proposing Release, we continue to believe that the express scope of section 18, and the broad definition of the term ''senior security'' in section 18, support the interpretation that a derivatives transaction that creates a future payment obligation involves an evidence of indebtedness that is a senior security for purposes of section 18.[47] Section 18 defines the term ''senior security'' broadly to include instruments and transactions that other provisions of the federal securities laws might not otherwise consider to be securities.[48] For example, section 18(f)(1) generally prohibits an open-end fund from issuing or selling any senior security ''except [that the fund] shall be permitted to borrow from any bank.''[49] This statutory permission to engage in a specific borrowing makes clear that such borrowings are senior securities, which otherwise section 18 would prohibit absent this specific permission.[50]

In addition to continuing to believe that section 18's scope supports the interpretation that a derivatives transaction creating a future payment obligation involves an evidence of indebtedness that is a senior security for purposes of section 18, we continue to believe that this interpretation is consistent with the fundamental policy and purposes underlying the Investment Company Act expressed in sections 1(b)(7) and 1(b)(8) of the Act.[51] These respectively declare that ''the national public interest and the interest of investors are adversely affected'' when funds ''by excessive borrowing and the issuance of excessive amounts of senior securities increase unduly the speculative character'' of securities issued to common shareholders and when funds ''operate without adequate assets or reserves.'' The Commission emphasized these concerns in Release 10666, and we continue to believe that the prohibitions and restrictions under the senior security provisions of section 18 should ''function as a practical limit on the amount of leverage which the investment company may undertake and on the potential increase in the speculative character of its outstanding common stock'' and that funds should not ''operate without adequate assets or reserves.''[52]

Funds' use of derivatives, like the trading practices the Commission addressed in Release 10666, may raise the undue speculation and asset sufficiency concerns in section 1(b).[53] First, funds' obtaining leverage (or potential for leverage) through

Agreements as Securities'' discussion and noting that the Investment Company Act's definition of the term ''security'' is broader than the term's definition in other federal securities laws); *see also* section 18(g) (defining the term ''senior security,'' in part, as ''any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness'').

[42] This is the case where the fund has a contractual obligation to pay or deliver cash or other assets to a counterparty in the future, either during the life of the instrument or at maturity or early termination. These payments—which may include payments of cash, or delivery of other assets—may occur as margin, as settlement payments, or otherwise.

[43] *See* Proposing Release, *supra* footnote 1, at n.41 and accompanying text (stating that, as the Commission explained in Release 10666, the Commission continues to believe that an evidence of indebtedness, for purposes of section 18, includes not only a firm and un-contingent obligation, but also a contingent obligation, such as a standby commitment or a ''put'' (or call) option sold by a fund).

[44] *See, e.g.,* Comment Letter of Nuveen Funds Advisors, LLC (Apr. 1, 2020) (''Nuveen Comment Letter''); Comment Letter of Rafferty Asset Management and Rafferty Capital Markets, LLC, including on behalf of the separate series of Direxion Funds and Direxion Shares ETF Trust (Mar. 31, 2020) (''Direxion Comment Letter''); Comment Letter of ProShares (Mar. 28, 2016) (''ProShares Comment Letter'').

[45] *See* Nuveen Comment Letter; *see also* Direxion Comment Letter (stating that total return swap contracts should not qualify as ''evidencing indebtedness'' because they are not the type of long-term debt securities issued by a fund that Congress intended to be considered part of the fund's capital structure and thus subject to regulation under section 18, and stating also that the exception in section 18(f) for bank borrowings does not imply that all borrowings constitute ''senior securities''); ProShares Comment Letter (arguing that derivatives such as options and futures are not ''evidence of indebtedness'').

[46] *See, e.g.,* Comment Letter of James Angel, Associate Professor of Finance Georgetown University (Feb. 24, 2020); Comment Letter of Competitive Enterprise Institute (Apr. 30, 2020); Direxion Comment Letter; ProShares Comment Letter.

[47] *See* Proposing Release, *supra* footnote 1, at paragraph accompanying nn.42–44.

[48] Consistent with Release 10666, and as the Commission stated in the Proposing Release (as well as in the 2015 Proposing Release), we are only expressing our views in this release concerning the scope of the term ''senior security'' in section 18 of the Investment Company Act. *See also* section 12(a) of the Investment Company Act (prohibiting funds from engaging in short sales in contravention of Commission rules or orders).

[49] Section 18(c)(2) similarly treats all promissory notes or evidences of indebtedness issued in consideration of any loan as senior securities except as section 18 otherwise specifically provides.

[50] The Commission similarly observed in Release 10666 that section 18(f)(1), ''by implication, treats all borrowings as senior securities,'' and that ''[s]ection 18(f)(1) of the Act prohibits such borrowings unless entered into with banks and only if there is 300% asset coverage on all borrowings of the investment company.'' *See* Release 10666, *supra* footnote 14, at ''Reverse Repurchase Agreements'' discussion.

[51] Several commenters discussed the Commission's authority to adopt rules based on the policy considerations reflected in section 1 of the Act. *See, e.g.,* Direxion Comment Letter; ProShares Comment Letter. The authority under which we are adopting rules today is set forth in section VI of this release and includes, among other provisions, section 6(c) of the Act. That section provides that ''The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transactions . . . from any provision or provisions of this title or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors . . . .'' As discussed in the paragraph accompanying this footnote, the fundamental statutory policy and purposes underlying the Investment Company Act, as expressed in section 1(b) of the Act, continue to inform our interpretation of the scope of the term ''senior security'' in section 18. This also separately informs our consideration of appropriate conditions for the exemption that rule 18f–4 provides, as we discuss in sections II.B–II.F *infra.*

[52] *See* Release 10666, *supra* footnote 14, at ''Segregated Account'' discussion.

[53] As the Commission stated in Release 10666, leveraging an investment company's portfolio through the issuance of senior securities ''magnifies the potential for gain or loss on monies invested and therefore results in an increase in the speculative character of the investment company's outstanding securities'' and ''leveraging without any significant limitation'' was identified ''as one of the major abuses of investment companies prior to the passage of the Act by Congress.'' *Id.*

derivatives may raise the Investment Company Act's undue speculation concern because a fund may experience gains and losses that substantially exceed the fund's investment, and also may incur a conditional or unconditional obligation to make a payment or deliver assets to a counterparty.[54] Not viewing derivatives that impose a future payment obligation on the fund as involving senior securities, subject to appropriate limits under section 18, would frustrate the concerns underlying section 18.[55] Some commenters mentioned undue speculation concerns underlying section 18 and discussed ways in which the Commission's 2019 proposal would address these concerns.[56]

Second, with respect to the Investment Company Act's asset sufficiency concern, a fund's use of derivatives with future payment obligations also may raise concerns regarding the fund's ability to meet those obligations. Many fund derivatives investments, such as futures contracts, swaps, and written options, pose a risk of loss that can result in payment obligations owed to the fund's counterparties.[57] Losses on derivatives therefore can result in counterparty payment obligations that directly affect the capital structure of a fund and the relative rights of the fund's counterparties and shareholders. These losses and payment obligations also can force a fund's adviser to sell the fund's investments to meet its obligations. When a fund uses derivatives to leverage its portfolio, this can amplify the risk of a fund having to sell its investments, potentially generating additional losses for the fund.[58] In an extreme situation, a fund could default on its payment obligations.[59] Some commenters mentioned asset sufficiency concerns underlying section 18 and discussed ways in which the Commission's 2019 proposal would address these concerns.[60]

Applying rule 18f–4 to derivatives transactions—including swaps, options, and futures—also is consistent with the Commission's views in Release 10666. As discussed above, in Release 10666, the Commission stated that its expressed views were not limited to the particular trading practices discussed, emphasizing that Release 10666 discussed certain securities trading practices as examples and that the Commission sought to address the implications of all comparable trading practices that could similarly affect funds' capital structures.[61] The Commission observed in Release 10666 that firm commitment agreements are also known as forward contracts, and that standby commitment agreements involve, in economic reality, the issuance and sale by the investment company of a ''put.'' [62] Both forward and futures contracts involve the agreement to buy or sell an underlying reference asset at a set price in the future, and a swap contract is structurally the equivalent of a series of forward contracts.[63] Moreover, derivatives transactions as defined in the final rule generally involve a

[54] *See, e.g., The Report of the Task Force on Investment Company Use of Derivatives and Leverage,* Committee on Federal Regulation of Securities, ABA Section of Business Law (July 6, 2010), at 8 (''2010 ABA Derivatives Report'') (stating that ''[f]utures contracts, forward contracts, written options and swaps can produce a leveraging effect on a fund's portfolio'' because ''for a relatively small up-front payment made by a fund (or no up-front payment, in the case with many swaps and written options), the fund contractually obligates itself to one or more potential future payments until the contract terminates or expires''; noting, for example, that an ''[interest rate] swap presents the possibility that the fund will be required to make payments out of its assets'' and that ''[t]he same possibility exists when a fund writes puts and calls, purchases short and long futures and forwards, and buys or sells credit protection through [credit default swaps]'').

[55] One commenter on the 2011 Concept Release made this point directly. *See* Comment Letter of Stephen A. Keen on the 2011 Concept Release (Nov. 8, 2011) (File No. S7–33–11), at 3 (''Keen Concept Release Comment Letter'') (''If permitted without limitation, derivative contracts can pose all of the concerns that section 18 was intended to address with respect to borrowings and the issuance of senior securities by investment companies.''); *see also, e.g.,* Comment Letter of the Investment Company Institute on the 2011 Concept Release (Nov. 7, 2011) (File No. S7–33–11) (''ICI Concept Release Comment Letter''), at 8 (''The Act is thus designed to regulate the degree to which a fund issues any form of debt—including contractual obligations that could require a fund to make payments in the future.''). The Commission similarly noted in Release 10666 that, given the potential for reverse repurchase agreements to be used for leveraging and their ability to magnify the risk of investing in a fund, ''one of the important policies underlying section 18 would be rendered substantially nugatory'' if funds' use of reverse repurchase agreements were not subject to limitation. *See* Proposing Release, *supra* footnote 1, n.49.

[56] *See, e.g.,* AQR Comment Letter I (''For a fund engaging in significant or complex derivative usage, the key to curbing excessive borrowing and undue speculation lies in implementing an effective risk management program.''); Capital Group Comment Letter (''We believe the Proposal is an effective way to address the investor protection concerns underlying Section 18 of the Investment Company Act of 1940 . . . In particular, we believe that creating leverage limits that constrain economic risk, coupled with a derivatives risk management program, is a better way to constrain leverage and prevent undue speculation by funds than limits based on the aggregate gross notional exposure of a fund's derivative transactions, as proposed in 2015.''); Comment Letter of Consumer Federation of America (Mar. 30, 2020) (''CFA Comment Letter'') (''Congress' findings and declaration of policy underlying Section 18 make clear that Congress was concerned with the potential for investment companies, through excessive borrowing, to engage in undue speculation and operate without sufficient assets to cover potential losses . . . While Section 18 does not explicitly refer to funds' use of derivatives, the concerns are the same.''); ICI Comment Letter (''We fully support the Commission's goal of addressing the investor protection concerns underlying Section 18 of the Investment Company Act of 1940, and the reproposed rule is an effective way to achieve that goal. In particular, the leverage limits coupled with elements of the derivatives risk management program, including required stress testing, will restrict the amount of exposure to economic risk that a fund could take when investing in derivatives. Creating leverage limits that confine economic risk is a far better way to addresses Section 18's ''undue speculation'' concerns than limits based solely on the aggregate gross notional exposure (''GNE'') of a fund's derivatives transactions, as proposed in 2015.'').

[57] Some derivatives transactions, like physically-settled futures and forwards, can require the fund to deliver the underlying reference assets regardless of whether the fund experiences losses on the transaction.

[58] *See, e.g.,* Markus K. Brunnermeier & Lasse Heje Pedersen, *Market Liquidity and Funding Liquidity,* 22 The Review of Financial Studies 6, 2201–2238 (June 2009), *available at https://www.princeton.edu/~markus/research/papers/liquidity.pdf* (providing both empirical support as well as a theoretical foundation for how short-term leverage obtained through borrowings or derivative positions can result in funds and other financial intermediaries becoming vulnerable to tighter funding conditions and increased margins, specifically during economic downturns (as in the recent financial crisis), thus potentially increasing the need for the fund or intermediary to de-lever and sell portfolio assets at a loss).

[59] *See* ICI Concept Release Comment Letter, *supra* footnote 55, at 11 (noting that, ''[h]ypothetically, in an extreme scenario, a fund that used derivatives heavily and segregated most of its liquid assets to cover its obligation on a pure mark-to-market basis could potentially find itself with insufficient liquid assets to cover its derivative positions''); *see also* Aditum Comment Letter (discussing asset sufficiency concerns in the context of unfunded commitment agreements and the recent market disruption associated with COVID–19).

[60] *See, e.g.,* Better Markets Comment Letter; Comment Letter of CBOE (May 1, 2020) (''CBOE Comment Letter''); Comment Letter of Dechert LLP (Mar. 24, 2020) (''Dechert Comment Letter I''); Comment Letter of Invesco, Ltd. (Mar. 24, 2020) (''Invesco Comment Letter'') (''Invesco agrees with the Commission that registered funds using derivatives transactions should be subject to a regulatory framework that requires them and their advisers to manage attendant risks, including the risk of leverage that implicates the ''undue speculation'' and ''asset sufficiency'' concerns expressed in Sections 1(b)(7) and 1(b)(8), respectively, of the Investment Company Act . . . We believe the Proposed Rule will aptly address the investor protection purposes and concerns that underlie Section 18 . . .''); Comment Letter of Vanguard Group, Inc. (Apr. 23, 2020) (''Vanguard Comment Letter'') (''We agree with the Commission's assessment that the proposed requirements for a derivatives risk management program, including VaR and stress testing, would appropriately address the asset sufficiency concerns underlying Section 18 with respect to derivatives use.'').

[61] *See supra* footnote 39.

[62] *See* Release 10666, *supra* footnote 14, at nn.10–12 and accompanying text, and at ''Standby Commitment Agreements.''

[63] *See e.g.* John C. Hull, *Options, Futures, and Other Derivatives,* Prentice Hall, 7th Edition (2008) at 161.

synthetic borrowing, in that they provide a market exposure exceeding the fund's investment while also involving a future payment obligation.[64]

3. Need for Updated Regulatory Framework

Market and Industry Developments Following Release 10666

Following Release 10666, Commission staff issued more than thirty no-action letters to funds concerning the maintenance of segregated accounts or otherwise ''covering'' their obligations in connection with various transactions otherwise restricted by section 18.[65] Funds have developed certain general asset segregation practices to cover their derivatives positions, considering at least in part the staff's no-action letters and guidance, which vary based on the type of derivatives transaction.[66] Funds also segregate a broader range of assets to cover their derivatives positions than those the Commission identified in Release 10666.[67]

As a result of these asset segregation practices, funds' derivatives use—and thus funds' potential leverage through derivatives transactions—does not appear to be subject to a practical limit as the Commission contemplated in Release 10666. Funds' mark-to-market liability often does not reflect the full investment exposure associated with their derivatives positions.[68] As a result, a fund that segregates only the mark-to-market liability could theoretically incur virtually unlimited investment leverage.[69]

Furthermore, as discussed in the Proposing Release, funds' current asset segregation practices also may not assure the availability of adequate assets to meet funds' derivatives obligations, on account of both the amount and types of assets that funds may segregate.[70] When a fund's derivatives payment obligations are substantial relative to the fund's liquid assets, the fund may be forced to sell portfolio securities to meet its derivatives payment obligations. These forced sales could occur during stressed market conditions, including at times when prudent management could advise against such liquidation.[71]

Regulatory Framework To Address Concerns Underlying Section 18 in Light of Current Fund Practices

As a result of market and industry developments over the past four decades, funds' current practices regarding derivatives use may not address the undue speculation and asset sufficiency concerns underlying section 18.[72] Additionally, a fund's derivatives use may involve risks that can result in significant losses to a fund.[73] Accordingly, we continue to believe that it is appropriate for funds to address these risks and considerations relating to their derivatives use. Nevertheless, we also recognize the valuable role derivatives can play in helping funds to achieve their objectives efficiently or manage their investment risks.

We therefore are requiring funds that use derivatives in a more than limited way to adopt and implement formalized programs, which must cover certain elements but otherwise will be tailored to manage the risks that funds' derivatives use may pose. In addition, the framework we are adopting addresses our concern that funds today are not subject to a practical limit on potential leverage that they may obtain through derivatives transactions.

We believe that a comprehensive approach to regulating funds' derivatives use also will help address potential adverse results from funds' current, disparate asset segregation practices. The development of staff guidance and industry practice on an instrument-by-instrument basis, together with growth in the volume and complexity of derivatives markets over past decades, has resulted in situations in which different funds may treat the same kind of derivative differently, based on their own view of our staff's guidance or observation of industry practice. This may unfairly disadvantage some funds.[74]

The lack of comprehensive guidance also makes it difficult for funds and our staff to evaluate and inspect for funds' compliance with section 18 of the Investment Company Act. Moreover, where there is no specific guidance, or where the application of existing guidance is unclear or applied inconsistently, funds may take approaches that involve an extensive use of derivatives and may not address the purposes and concerns underlying section 18. The new framework that we are adopting will replace the current, multi-part guidance framework with a unitary rule. This will level-set the regulation of funds' derivatives use in light of the breadth of fund strategies and the variety of ways that funds use derivatives today.

C. Overview of the Final Rule

We are adopting rule 18f–4 to provide an updated, comprehensive approach to the regulation of funds' use of derivatives and certain other

[64] For example, one commenter on the 2011 Concept Release observed that ''a fund's purchase of an equity total return swap produces an exposure and economic return substantially equal to the exposure and economic return a fund could achieve by borrowing money from the counterparty in order to purchase the equities that are reference assets.'' Comment Letter of BlackRock on the 2011 Concept Release (Nov. 4, 2011) (File No. S7–33–11).

[65] *See* Proposing Release, *supra* footnote 1, at paragraph accompanying n.53 (stating that, in these letters and through other staff guidance, staff addressed questions regarding the application of Release 10666 to various types of derivatives and other transactions); *see also* Concept Release, *supra* footnote 1, at section I.

[66] *See* Proposing Release, *supra* footnote 1, at paragraph accompanying n.54 (discussing funds' practices for segregating an amount equal to the full amount of the fund's potential obligation under the contract, or the full market value of the underlying reference asset for the derivative (''notional amount segregation'') for certain derivatives, and funds practices for segregating an amount equal to the fund's daily mark-to-market liability, if any (''mark-to-market segregation'') for certain cash settled-derivatives).

[67] *See id.*at paragraph accompanying nn.56–57 (discussing Release 10666's statement that assets eligible to be included in segregated accounts should be ''liquid assets'' such as cash, U.S. government securities, or other appropriate high-grade debt obligations, and a subsequent staff no-action letter stating that the staff would not recommend enforcement action if a fund were to segregate any liquid asset, including equity securities and non-investment grade debt securities); *see also* Merrill Lynch Asset Management, L.P., SEC Staff No-Action Letter (July 2, 1996).

[68] For example, for derivatives where there is no loss in a given day, a fund applying the mark-to-market approach might not segregate any assets. This may be the case, for example, because the derivative is currently in a gain position, or because the derivative has a market value of zero (as will generally be the case at the inception of a transaction). The fund may, however, still be required to post collateral to comply with other regulatory or contractual requirements.

[69] *See* Proposing Release, *supra* footnote 1, at n.59; *see also* BlackRock Comment Letter (''We agree with the Commission's view that the use of derivatives should not be unlimited or unregulated.''); Comment Letter of J.P. Morgan Asset Management (Mar. 24, 2020) (''J.P. Morgan Comment Letter'') (''Evolving market practices, together with staff guidance over the years, have enabled funds to segregate large portions of their portfolios, while using mark-to-market exposure amounts for many instruments. This approach to asset segregation could result in a fund obtaining a significant degree of leverage.'').

[70] *See* Proposing Release, *supra* footnote 1, at nn.60–62 and accompanying text (discussing: (1) Funds' segregation of assets that only reflect losses that would occur as a result of transaction termination; and (2) funds' practices of segregating any liquid asset, rather than the more narrow range of high-quality assets that the Commission described in Release 10666).

[71] *See id.* at n.62 and accompanying text.

[72] *See* Proposing Release, *supra* footnote 1, at n.63 and accompanying text; *see also supra* footnotes 56 and 60 and accompanying text (discussing, respectively, commenters' statements regarding undue speculation and asset sufficiency concerns underlying section 18 and their discussion of ways in which the Commission's 2019 proposal would address these concerns).

[73] *See supra* paragraph accompanying footnote 21.

[74] *See* Proposing Release, *supra* footnote 1, at n.65 and accompanying text.

transactions that the rule addresses. The amendments we are adopting to Forms N–PORT, N–LIQUID (which we are re-titling as ''Form N–RN''), and N–CEN will enhance the Commission's ability to oversee funds' use of and compliance with the rules, and will provide the Commission, fund investors, and other market participants additional information regarding funds' use of derivatives.

Rule 18f–4 will permit a fund to enter into derivatives transactions, notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Investment Company Act, subject to the following conditions.[75] These conditions are designed to address the undue speculation and asset sufficiency concerns underlying section 18, and they support the Commission's conclusion that the exemptions that the rule provides are in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

• *Derivatives risk management program.* The rule will generally require a fund to adopt a written derivatives risk management program with risk guidelines that must cover certain elements, but that will otherwise be tailored based on how the fund's use of derivatives may affect its investment portfolio and overall risk profile. The program also will include stress testing, backtesting, internal reporting and escalation, and program review elements. The program will institute a standardized risk management framework for funds that engage in more than a limited amount of derivatives transactions, while allowing principles-based tailoring to the fund's particular risks. The program requirement that we are adopting retains the same framework and elements as the proposed program requirement.

• *Limit on fund leverage risk.* The rule will generally require funds when engaging in derivatives transactions to comply with an outer limit on fund leverage risk based on VaR. This outer limit is based on a relative VaR test that compares the fund's VaR to the VaR of a ''designated reference portfolio'' for that fund. Under the final rule, a fund generally can use either an index that meets certain requirements, or the fund's own securities portfolio (excluding derivatives transactions), as its designated reference portfolio. If the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, the fund would be required to comply with an absolute VaR test. In light of our consideration of comments received, the requirements we are adopting incorporate certain changes to the proposed VaR test. These include permitting a fund to use its securities portfolio as the reference portfolio for purposes of the relative VaR test (instead of requiring a fund to compare its VaR against the VaR of a designated index for the relative VaR test), and increasing the relative and absolute VaR limits from 150% and 15% to 200% and 20%, respectively.

• *Board oversight and reporting.* The rule will require a fund's board of directors to approve the fund's designation of a derivatives risk manager, who will be responsible for administering the fund's derivatives risk management program. The fund's derivatives risk manager will have to report to the fund's board on the derivatives risk management program's implementation and effectiveness and the results of the fund's stress testing. The derivatives risk manager will have a direct reporting line to the fund's board. We are adopting these requirements substantially as proposed, with minor changes to clarify the requirements and conform to changes in other rule provisions.

• *Exception for limited derivatives users.* The rule will except limited derivatives users from the derivatives risk management program requirement, the VaR-based limit on fund leverage risk, and the related board oversight and reporting requirements, provided that the fund adopts and implements written policies and procedures reasonably designed to manage the fund's derivatives risks. This exception will be available to a fund that limits its derivatives exposure to 10% of its net assets. In a change from the proposal, in calculating derivatives exposure to determine eligibility for the exception, a fund will be permitted to exclude derivatives transactions that it uses to hedge certain currency and interest rate risks. The exception also includes, in a change from the proposal, provisions for a fund with derivatives exposure that exceeds the 10% threshold. If the fund does not reduce its exposure within five business days, the fund's adviser must provide a written report to the fund's board informing it whether the adviser intends to reduce the exposure promptly, but within no more than 30 days, or put in place a derivatives risk management program and comply with the VaR-based limit on fund leverage risk as soon as reasonably practicable.

• *Alternative requirements for certain leveraged/inverse funds.* After considering comments on the proposed sales practices rules, we have determined not to adopt them at this time. Leveraged/inverse funds instead will generally be subject to rule 18f–4 like other funds, including the requirement to comply with the VaR-based limit on fund leverage risk. This will effectively limit leveraged/inverse funds' targeted daily return to 200% of the return (or inverse of the return) of the fund's underlying index. The final rule also provides an exception from the VaR-based limit for leveraged/inverse funds in operation as of October 28, 2020 that seek an investment return above 200% of the return (or inverse of the return) of the fund's underlying index and satisfy certain conditions and the other requirements of rule 18f–4. The conditions to this exception are designed to allow these funds to continue to operate in their current form, but prohibit them from changing their index or increasing the amount of their leveraged or inverse market exposure. We believe that the enhanced standard of conduct for broker-dealers under Regulation Best Interest and the fiduciary obligations of registered investment advisers help address some of the sales practice concerns that leveraged/inverse funds and listed commodity pools following the same strategies may raise, in the context of recommended transactions and transactions occurring in an advisory relationship. To help ensure that our regulatory framework addresses all potential investor protection concerns associated with complex financial products, including those that use leveraged/inverse strategies and those that are available to investors who do not receive either recommendations subject to Regulation Best Interest or investment advice subject to an adviser's fiduciary obligation, we have directed the staff to begin a review. This review will assess the effectiveness of the existing regulatory requirements in protecting investors—particularly those with self-directed accounts—who invest in leveraged/inverse products and other complex investment products.

• *Recordkeeping.* The final rule will require a fund to adhere to recordkeeping requirements that are designed to provide the Commission,

[75] *See* rule 18f–4(b) and (d). Rule 18f–4(b) provides an exemption for funds' derivatives transactions from sections 18(a)(1), 18(c), 18(f)(1), and 61 of the Investment Company Act. *See supra* section I.B.1 of this release (providing an overview of the requirements of section 18). Because the conditions provide a tailored set of requirements for derivatives transactions, the rule also provides that a fund's derivatives transactions will not be considered for purposes of computing asset coverage under section 18(h). *See infra* section II.K.

and the fund's board of directors and compliance personnel, the ability to evaluate the fund's compliance with the rule's requirements. We are adopting these provisions largely as proposed, with certain conforming changes in light of modifications to other aspects of the final rule.

Final rule 18f–4 also will permit funds to enter into reverse repurchase agreements and similar financing transactions, as well as ''unfunded commitments'' to make certain loans or investments, subject to conditions tailored to these transactions. Under the final rule, a fund is permitted to engage in reverse repurchase agreements and similar financing transactions so long as they meet the asset coverage requirements under section 18. If the fund also borrows from a bank or issues bonds, for example, these senior securities as well as the reverse repurchase agreement would be required to comply with the asset coverage requirements under the Investment Company Act. This approach would provide the same asset coverage requirements under section 18 for reverse repurchase agreements and similar financing transactions, bank borrowings, and other borrowings permitted under the Investment Company Act. In a change from the proposal, a fund also will be permitted to enter into these transactions by electing to treat them as derivatives transactions under the final rule. This alternative approach will permit funds to apply a consistent set of requirements to its derivatives transactions and any reverse repurchase agreements or similar financing transactions.

A fund will be permitted to enter into unfunded commitment agreements under the final rule if the fund reasonably believes that its assets will allow the fund to meet its obligations under these agreements, as proposed. This approach recognizes that, while unfunded commitment agreements may raise the risk that a fund may be unable to meet its obligations under these transactions, such unfunded commitments do not generally involve the leverage and other risks associated with derivatives transactions.

In a change from the proposal, the final rule also includes a new provision that will permit funds, as well as money market funds, to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to conditions. Money market funds, for example, will continue to be able to invest in when-issued U.S. Treasury securities under this provision notwithstanding that these investments trade on a forward basis involving a temporary delay between the transaction's trade date and settlement date.

The amendments we are adopting to Forms N–PORT, N–LIQUID, and N–CEN will require each fund to provide information regarding its compliance with rule 18f–4. This information includes: (1) Certain identifying information about the fund (*e.g.,* identifying the provisions of rule 18f–4 that the fund is relying on to engage in derivatives transactions and the other transactions that the rule addresses); (2) as applicable, information regarding a fund's VaR and designated reference portfolio, and VaR backtesting results; (3) VaR test breaches, to be reported to the Commission in a non-public current report; and (4) for a fund that is operating as a limited derivatives user, information about the fund's derivatives exposure and the number of business days that its derivatives exposure exceeded 10% of its net assets. We are adopting these amendments largely as proposed, with certain modifications, such as streamlining the VaR information and exposure information that certain funds would provide, and requiring additional information about funds operating as limited derivatives users that exceed the 10% threshold. We also are making certain of these data elements non-public in response to comments.

In connection with our adoption of rule 18f–4, we are also adopting amendments to rule 6c–11 under the Investment Company Act. Rule 6c–11 generally permits ETFs to operate without obtaining a Commission exemptive order, subject to certain conditions.[76] When the Commission adopted rule 6c–11, the rule prohibited leveraged/inverse ETFs from relying on the rule, to allow the Commission to consider the section 18 issues raised by these funds' investment strategies as part of a broader consideration of derivatives use by registered funds and BDCs.[77] As part of this further consideration, and in connection with the adoption of rule 18f–4, we are modifying this provision to permit leveraged/inverse ETFs to rely on rule 6c–11 if they comply with all applicable provisions of rule 18f–4. This will permit new leveraged/inverse funds that can satisfy the requirements of rule 18f–4 to come to market under rule 6c–11 without first being required to receive a separate ETF exemptive order. We also are rescinding exemptive orders the Commission previously issued to sponsors of leveraged/inverse funds permitting these funds to operate as ETFs, as these orders will be superseded. Amending rule 6c–11 and rescinding these exemptive orders will help promote a more level playing field by allowing any sponsor (in addition to the sponsors currently granted exemptive orders) to form and launch a leveraged/inverse ETF subject to the conditions in rule 6c–11 and rule 18f–4.

Finally, in view of the updated, comprehensive approach to the regulation of funds' derivative use that the final rules provide, we are rescinding Release 10666. In addition, staff in the Division of Investment Management has reviewed certain of its no-action letters and other guidance addressing derivatives transactions and other transactions covered by rule 18f–4 to determine which letters and staff guidance, or portions thereof, should be withdrawn in connection with our adoption of the final rules. As discussed in section II.L below, some of these letters and staff guidance, or portions thereof, are moot, superseded, or otherwise inconsistent with the final rule and, therefore, will be withdrawn. We are providing funds an eighteen-month transition period while they prepare to come into compliance with rule 18f–4 before Release 10666 is withdrawn.

II. Discussion

A. Scope of Rule 18f–4

As proposed, the rule will apply to a ''fund,'' defined as a registered open-end or closed-end company or a BDC, including any separate series thereof.[78] The rule will therefore apply to mutual funds, ETFs, registered closed-end funds, and BDCs.[79] The rule's definition of a ''fund'' excludes money market funds regulated under rule 2a–7 under

[76] *See generally* Exchange-Traded Funds, Investment Company Act Release No. 33646 (Sept. 25, 2019) [84 FR 57162 (Oct. 24, 2019)] (''ETFs Adopting Release'').

[77] *See id.* at nn.72–74 and accompanying text.

[78] *See* rule 18f–4(a); *see also* proposed rule 18f–4(a).

[79] Section 18 of the Investment Company Act applies only to open-end or closed-end companies (*i.e.,* management investment companies). Rule 18f–4 therefore will not apply to unit investment trusts (''UITs'') because they are not management investment companies. As the Commission has noted, derivatives transactions generally require a significant degree of management, and a UIT engaging in derivatives transactions therefore may not meet the Investment Company Act requirements applicable to UITs. *See* section 4(2) of the Investment Company Act; *see also* Custody Of Investment Company Assets with Futures Commission Merchants And Commodity Clearing Organizations, Investment Company Act Release No. 22389 (Dec. 11, 1996), at n.18 (explaining that UIT portfolios are generally unmanaged). *See also* ETFs Adopting Release, *supra* footnote 76, at n.42.

the Investment Company Act (''money market funds''), as proposed.[80]

Commenters generally supported the scope of funds that are permitted to rely on the proposed rule.[81] Some commenters also specifically expressed support for excluding money market funds from the full scope of rule 18f–4 because money market funds do not typically engage in derivatives transactions.[82] Under rule 2a–7, money market funds seek to maintain a stable share price or limit principal volatility by limiting their investments to short-term, high-quality debt securities that fluctuate very little in value under normal market conditions. As a result of these and other requirements in rule 2a–7, money market funds do not enter into derivatives such as futures, swaps, and options. These instruments are not eligible securities in which money market funds are permitted to invest under rule 2a–7. We also believe that entering into these transactions would be inconsistent with a money market fund maintaining a stable share price or limiting principal volatility, especially if the money market fund were to use derivatives to leverage the fund's portfolio.[83] We therefore continue to believe that generally excluding money market funds from the full scope of the rule is appropriate. As discussed in more detail below, we are, however, including a targeted provision in the final rule that permits funds (including money market funds) to continue to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle.

The final rule will permit funds to enter into derivatives transactions, subject to the rule's conditions. The rule defines the term ''derivatives transaction'' to mean: (1) Any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument (''derivatives instrument''), under which a fund is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as margin or settlement payment or otherwise; (2) any short sale borrowing; and (3) reverse repurchase agreements and similar financing transactions, for those funds that choose to treat these transactions as derivatives transactions under the rule.[84]

The first prong of this definition is designed to describe those derivatives transactions that involve the issuance of a senior security, because they involve a contractual future payment obligation.[85] This prong of the definition incorporates a list of derivatives instruments that, together with ''any similar instrument,'' covers the types of derivatives that funds currently use and that section 18 would restrict because they impose on the fund a contractual obligation (or potential obligation) to make payments or deliver assets to the fund's counterparty. This list is designed to be sufficiently comprehensive to include derivatives that may be developed in the future.

This prong of the definition also provides that a derivatives instrument, for purposes of the rule, must involve a future payment obligation.[86] This aspect of the definition recognizes that not every derivatives instrument imposes such an obligation, and therefore not every derivatives instrument will involve the issuance of a senior security. A fund that purchases a standard option traded on an exchange, for example, generally will make a non-refundable premium payment to obtain the right to acquire (or sell) securities under the option but generally will not have any subsequent obligation to deliver cash or assets to the counterparty unless the fund chooses to exercise the option.[87] A derivative that does not impose any future payment obligation on a fund generally resembles a securities investment that is not a senior security, in that it may lose value but it will not require the fund to make any payments in the future.[88] Whether a transaction involves the issuance of a senior security will depend on the nature of the transaction. The label that a fund or its counterparty assigns to the transaction is not determinative.[89]

A few commenters suggested that the Commission further revise the definition of a derivatives transaction to address situations where several derivatives instruments considered together, or a derivatives instrument and a securities position, in commenters' view did not involve the same risks as the derivatives transactions considered

[80] *See* rule 18f–4(a); *see also* proposed rule 18f–4(a).

[81] *See, e.g.,* Dechert Comment Letter I; Comment Letter of Fidelity Investments (Mar. 24, 2020) (''Fidelity Comment Letter''); Comment Letter of T. Rowe Price (Apr. 14, 2020) (''T. Rowe Price Comment Letter'').

[82] *See, e.g.,* Fidelity Comment Letter; J.P. Morgan Comment Letter; SIFMA AMG Comment Letter; Comment Letter of Stephen A. Keen (Aug. 11, 2020) (''Keen Comment Letter'').

[83] *See* Money Market Fund Reform; Amendments to Form PF, Investment Company Act Release No. 31166 (July 23, 2014) [79 FR 47735 (Aug. 14, 2014)] (discussing: (1) Retail and government money market funds, which seek to maintain a stable net asset value per share; and (2) institutional non-government money market funds whose net asset value fluctuates, but nevertheless seek to minimize principal volatility given that, as ''commenters pointed out[,] investors in floating NAV funds will continue to expect a relatively stable NAV'').

[84] *See* rule 18f–4(a); *see also infra* section II.H (discussing the provision in the final rule that provides an option for funds to manage reverse repurchase agreements and similar financing transactions under the asset coverage provisions of section 18 applicable to bank borrowings. If a fund does not choose to use this option, then reverse repurchase agreements and similar financing transactions would instead be derivatives transactions under the final rule.).

[85] *See supra* footnotes 28, 36 and accompanying text (together, observing that ''senior security'' is defined in part as ''any . . . similar obligation or instrument constituting a security and evidencing indebtedness,'' and that the Commission has previously stated that, for purposes of section 18, ''evidence of indebtedness'' would include ''all contractual obligations to pay in the future for consideration presently received''); *see also infra* footnotes 86–87 (recognizing that not every derivative instrument will involve the issuance of a senior security).

[86] Under the rule, a derivatives instrument is one where the fund ''is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as margin or settlement payment or otherwise.''

[87] *See* 2015 Proposing Release, *supra* footnote 1, at paragraph accompanying nn.82–83. A few commenters suggested we address these purchased options specifically in rule 18f–4. *See* Comment Letter of Guggenheim Investments (Apr. 27, 2020) (''Guggenheim Comment Letter''); *see also* CBOE Comment Letter. We do not believe that further revisions to address these comments are necessary, however, because rule 18f–4's definition of a derivatives transaction is limited to derivatives instruments that involve a future payment obligation.

[88] *See* 2015 Proposing Release, *supra* footnote 1, at paragraph accompanying n.82.

[89] For example, the Commission received a comment on the 2015 proposal addressing a type of total return swap, asserting that ''[t]he Swap operates in a manner similar to a purchased option or structure, in that the fund's losses under the Swap cannot exceed the amount posted to its tri-party custodian agreement for purposes of entering into the Swap,'' and that, in the commenter's view, the swap should be ''afforded the same treatment as a purchased option or structured note'' because ''[a]lthough the Swap involves interim payments through the potential posting of margin from the custodial account, the payment obligations cannot exceed the [amount posted for purposes of entering into the Swap].'' *See* Comment Letter of Dearborn Capital Management (Mar. 24, 2016). Unlike a fund's payment of a one-time non-refundable premium in connection with a standard purchased option or a fund's purchase of a structured note, this transaction appears to involve a fund obligation to make interim payments of fund assets posted as margin or collateral to the fund's counterparty during the life of the transaction in response to market value changes of the underlying reference asset, as this commenter described. The fund also must deposit additional margin or collateral to maintain the position if the fund's losses deplete the assets that the fund posted to initiate the transaction; if a fund effectively pursues its strategy through such a swap, or a small number of these swaps, the fund may as a practical matter be required to continue reestablishing the trade or refunding the collateral account in order to continue to offer the fund's strategy. The transaction therefore appears to involve the issuance of a senior security as the fund may be required to make future payments. *See also infra* section II.I (discussing the characterization of ''unfunded commitment'' agreements for purposes of the rule, and as senior securities).

in isolation. For example, commenters urged that the definition exclude purchased option spread transactions because commenters asserted that the options together would not create a fund payment obligation that will exceed the payment potential of a purchased option involved in the transaction.[90] Commenters also suggested that the scope of the rule should exclude written covered calls, which involves a fund selling a call option where the fund agrees to deliver an asset already held by the fund if the option is exercised.[91] Because the fund holds the asset underlying the option, commenters asserted that the leverage risk of the option is eliminated.[92]

Each of these examples, however, involves derivatives transactions that involve future payment obligations. We do not believe it would be appropriate or feasible to identify in rule 18f–4 combinations of derivatives instruments or other investments that, together, may involve less risk or different risks than the constituent transactions considered in isolation. We believe these kinds of relationships are appropriate to assess as part of a fund's derivatives risk management, but do not support excluding the kinds of transactions commenters identified from the rule's derivatives transaction definition.

Additionally, a commenter urged the Commission to exclude certain foreign exchange derivatives instruments from the scope of transactions covered by the rule because the commenter believes that these instruments have limited exposure to market fluctuations and do not introduce section 18 leverage concerns.[93] However, funds may use foreign currency derivatives to take speculative positions on the relationships between different currencies just as funds may use derivatives to obtain exposures to other rates or metrics or changes in asset prices.[94] Therefore, we do not believe that there is a principled basis to treat foreign currency derivatives, such as foreign currency forwards and swaps, differently than other derivatives that involve a potential future payment obligation and are encompassed within the rule's ''derivatives transaction'' definition.

Short sale borrowings are included in the second prong of the rule's definition of ''derivatives transaction.'' We appreciate that short sales of securities do not involve derivatives instruments such as swaps, futures, and options. The value of a short position is, however, derived from the price of another asset, *i.e.,* the asset sold short. A short sale of a security provides the same economic exposure as a derivatives instrument, like a future or swap, that provides short exposure to the same security. The rule therefore treats short sale borrowings and derivatives instruments identically for purposes of funds' reliance on the rule's exemption.[95] Commenters did not address the treatment of short sale borrowings in the proposal's definition of ''derivatives transactions,'' and we are adopting it as proposed.

The third prong of the definition reflects the final rule's treatment of reverse repurchase agreements and similar financing transactions. In a change from the proposal and as discussed further in section II.H below, a fund may either elect to treat reverse repurchase agreements and similar financing transactions as derivatives transactions under the rule or elect to subject such transactions to the asset coverage requirements of section 18.[96] The final rule's definition of ''derivatives transaction'' therefore includes a conforming change to reflect the final rule's treatment of these transactions.

The final rule, like the proposed rule, does not specifically list firm or standby commitment agreements in the definition of ''derivatives transaction.'' However, as the Proposing Release discussed, we interpret the definitional phrase ''or any similar instrument'' to include these agreements. A firm commitment agreement has the same economic characteristics as a forward contract.[97] Similarly, the Commission has previously stated that a standby commitment agreement is economically equivalent to the issuance of a put option.[98] To the extent that a fund engages in transactions similar to firm or standby commitment agreements, they may fall within the ''any similar instrument'' definitional language, depending on the facts and circumstances.[99]

Several commenters urged the Commission to exclude certain firm and standby commitment agreements from the scope of the rule or to subject them to different conditions.[100] Many commenters urged that money market funds, in particular, engage in these transactions and urged that the Commission clearly permit money market funds to continue to do so.[101] In particular, these commenters identified transactions that trade on a when-issued basis, or that involve a settlement cycle that exceeds the ''T+2'' settlement cycle applicable to most securities transactions but that nonetheless settle within a short period of time. Commenters urged that these transactions limit the ability of funds to leverage their portfolios where the delay between trade date and settlement date is short, this delay is a result of the manner in which the securities are customarily issued or traded, and the fund intends to physically settle the transaction.[102] Commenters explained that funds engage in these transactions to purchase the underlying securities rather than as a means of obtaining an unfunded investment exposure to the underlying security that may be effectively used by funds to leverage their portfolios.[103] Further, commenters stated that the use of when-issued U.S. Treasury securities transactions is an important tool to enhance transparency and pricing stability in the U.S. Treasury market, and subjecting the use

[90] *See* Comment Letter of CBOE Vest Financial LLC (Mar. 24, 2020) (''CBOE Vest Comment Letter'') (stating that a ''purchased-options-spread position is entered by buying and selling an equal number of options of the same class (*i.e.,* options on the same underlying security), same options style (*i.e.,* either only exercisable at expiration or exercisable at times prior to expiry), and same expiration date, but with different strike prices''); *see also* Guggenheim Comment Letter.

[91] *See* Comment Letter of Refinitiv US SEF LLC (Mar. 24, 2020) (''Refinitiv Comment Letter''); *see also* CBOE Vest Comment Letter (stating that ''[a]lthough sold call options in isolation do expose the fund to a potential future obligation, that obligation will be entirely offset by the position in the underlying security'').

[92] Refinitiv Comment Letter.

[93] *Id.* (requesting that FX forwards, FX swaps, non-deliverable forwards involving FX, and FX options be excluded from the scope of the rule).

[94] *See* 2015 Proposing Release, *supra* footnote 1, at paragraph accompanying n.239.

[95] *See* rule 18f–4(b).

[96] *See* rule 18f–4(d); *see also infra* section II.H. Similarly, because rule 18f–4 addresses funds' use of unfunded commitment agreements separately from funds' use of derivatives, the definition of ''derivatives transaction'' does not include unfunded commitment agreements. *See infra* section II.J.

[97] Indeed, the Commission stated in Release 10666 that a firm commitment is known by other names such as a ''forward contract.'' *See* Release 10666, *supra* footnote 14, at nn.10–12 and accompanying text.

[98] *See id.* at ''Standby Commitment Agreements.''

[99] For example, a fund that enters into a binding commitment to make a loan or purchase a note upon demand by the borrower, with stated principal and term and a fixed interest rate, would appear to have entered into an agreement that is similar to a standby commitment agreement or a written put option. This transaction would expose the fund to investment risk during the life of the transaction because the value of the fund's commitment agreement will change as interest rates change. Such an agreement thus would fall within the rule's definition of ''derivatives transaction.''

[100] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter.

[101] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; T. Rowe Price Comment Letter.

[102] *See* SIFMA AMG Comment Letter; *see also* Keen Comment Letter.

[103] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter.

of these transactions to the rule could diminish their use and negatively impact the short-term fixed income market.[104]

We agree with commenters that the potential for leveraging is limited in these transactions, particularly because of the short period of time between trade date and settlement date and the fund's intention to physically settle the transaction rather than to engage in an offsetting transaction. Accordingly, we have included a provision in the final rule that allows funds to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, and the transaction will be deemed not to involve a senior security (''delayed-settlement securities provision'').[105] While the final rule generally excludes money market funds from its scope, the scope of the rule's delayed-settlement securities provision includes money market funds, as well as the other funds to which the rule applies. This provision is subject to two conditions.

First, as some commenters suggested, the fund must intend to settle the transaction physically.[106] Physical settlement may occur electronically through the Depository Trust Company or other electronic platforms. This condition distinguishes these investments from bond forwards and other derivatives transactions where a fund commonly intends to execute an offsetting transaction rather than to actually purchase (or sell) the security. The provision is designed to permit funds to invest in the underlying security rather than to obtain unfunded investment exposure to the underlying security beyond the limited period of time between trade and settlement date.[107]

Second, the transactions must settle within 35 days. Commenters addressing the short-term nature of these transactions offered differing suggestions for the permissible length of their settlement period.[108] Some commenters simply urged that we permit transactions with a ''relatively short'' delay between trade date and settlement date without specifying a particular number of days, while other commenters suggested a more precise 35-day period between trade date and settlement for a threshold.[109] The final rule's 35-day settlement threshold reflects our view that securities that trade on a when-issued or forward-settling basis, or with a non-standard settlement cycle that have a settlement cycle of 35 days or less, more closely resemble regular-way securities transactions that are not covered by the rule rather than forwards and similar transactions that involve a greater potential for leveraging.[110]

We are not subjecting these transactions to an asset segregation requirement, as some commenters suggested, because we believe the conditions discussed above render that additional requirement unnecessary.[111] Because funds will be required to intend to settle these transactions physically, funds must have sufficient assets to meet that obligation regardless of any separate asset segregation requirement in the final rule.

Commenters separately recommended that we provide an asset segregation approach for firm and standby commitment agreements generally.[112] For example, some commenters recommended a specific provision to address securities transactions that settle within a short period of time, similar to the delayed-settlement securities provision in the final rule.[113] These commenters also urged that the Commission should permit funds the option of adopting an alternative asset segregation regime for when-issued securities, to-be-announced investments (''TBAs''), dollar rolls, and bond forwards, that have characteristics that would make them ineligible for such a provision, such as delays between trade date and settlement date that do not settle within a short period of time.[114] Commenters asserted that any risks associated with these firm and standby commitment agreements can be appropriately managed by requiring funds to maintain assets sufficient to cover the obligations of the transactions, similar to the approach the Commission proposed for these transactions in 2015.[115]

Where these firm and standby commitment agreements and similar transactions do not satisfy the conditions in the delayed-settlement securities provision, we do not see a basis to differentiate the transactions from other instruments included in the derivatives transactions definition. For example, this suggested approach would treat a bond forward differently than an equity or currency forward. Moreover, we understand that funds typically settle forward contracts in cash, by an offsetting transaction, or by ''rolling'' the exposure via subsequent transactions. Therefore, bond forward contracts, and other transactions identified by commenters, could involve many of the same kinds of risks as other transactions that are considered derivatives transactions under the rule, such as futures contracts. We believe it is appropriate for the final rule to provide a consistent set of requirements for funds engaging in transactions that present the same kinds of risks rather than providing separate requirements for economically similar transactions.

[104] *See* SIFMA AMG Comment Letter. Investments in when-issued securities enable market participants to contract for the purchase and sale of a new security before the security has been issued. The most common type of when-issued trading involves U.S. Treasury securities. For example, on Monday, October 19th, the U.S. Treasury may announce that it will hold an auction of a specified quantity of new U.S. Treasury bills on Wednesday, October 21st with the securities being issued on Monday, October 25th. Following the announcement, market participants may begin to trade the new security on a when-issued basis. Settlement of the securities purchased on a when-issued basis as well as those purchased at auction will occur on the issue date.

[105] Rule 18f–4(f).

[106] SIFMA AMG Comment Letter; Fidelity Comment Letter. The discussion in this release regarding this condition and any future interpretation of this condition do not apply to the exclusion from the swap and security-based swap definitions for security forwards. *See* section 1a(47)(B)(ii) of the Commodity Exchange Act, 7 U.S.C. 1a(47)(B)(ii) (excluding from the swap and security-based swap definitions ''any sale of a . . . security for deferred shipment or delivery, so long as the transaction is intended to be physically settled'').

[107] Commenters suggested that the final rule also require that these transactions involve a defined delivery obligation, to distinguish these investments from the kinds of instruments included in the derivatives transaction definition. *See* Invesco Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter. Many derivatives transactions, however, such as forwards and futures contracts, involve a delivery obligation fixed at trade date. We therefore do not believe this condition is useful to distinguish when-issued and similar securities, and believe that the requirement that the fund intend to physically settle the transaction will serve to distinguish a fund's intent to invest in the underlying securities from a fund engaging in derivatives transactions.

[108] *See, e.g.,* Invesco Comment Letter; ICI Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter.

[109] *See, e.g.,* Invesco Comment Letter; ICI Comment Letter; Fidelity Comment Letter; SIFMA AMG Comment Letter; Keen Comment Letter.

[110] As one commenter observed, this 35-day period is consistent with the threshold under Regulation T, which provides that a transaction that settles in T+35 or sooner and has an extended settlement date due to the mechanics of the transaction, is not an extension of credit under the rule. *See* SIFMA AMG Comment Letter; *see also* Regulation T, Section 220.8(b)(2).

[111] *See, e.g.,* SIFMA AMG Comment Letter; Dechert Comment Letter I; Keen Comment Letter.

[112] *See, e.g.,* Dechert Comment Letter I; ICI Comment Letter; Comment Letter of Calamos Investments LLC (May 1, 2020) (''Calamos Comment Letter'').

[113] ICI Comment Letter; Calamos Comment Letter; Dechert Comment Letter I.

[114] *See* ICI Comment Letter; Calamos Comment Letter; *see also* Dechert Comment Letter I (urging that, for purposes of the limited derivatives user exception, firm and standby commitment agreements should be excluded from a fund's derivatives exposure threshold if a fund segregates liquid assets sufficient to cover such obligations).

[115] *See* ICI Comment Letter; *see also* 2015 Proposing Release *supra* footnote 1, at section III.C.

The delayed-settlement securities provision also applies to money market funds. Commenters urged that the Commission permit money market funds to continue to invest in eligible securities under rule 2a–7, as they do today, even where those investments may involve when-issued securities or securities with a forward-settling convention or a non-standard settlement cycle.[116] Money market funds today segregate assets in connection with these transactions under Release 10666, which we are rescinding. The delayed-settlement securities provision is designed to address commenters' concerns that the proposed rule would have resulted in uncertainty for money market funds that invest in certain when-issued securities or securities with a forward-settling convention or a non-standard settlement cycle. The final rule permits money market funds to continue to engage in these and the other types of transactions covered by the delayed-settlement securities provision.[117] We have not, however, modified the rule to provide an exemption in rule 18f-4 for any eligible security as defined in rule 2a–7, as some commenters recommended.[118] Rule 2a–7 imposes protective conditions on money market funds tailored to these funds' operations, including requirements for a money market fund to maintain a significant amount of liquid assets and invest in assets that meet the rule's credit quality, maturity, and diversification requirements. Rule 2a–7 is not, however, designed to address senior security concerns and its conditions alone do not provide a basis for an exemption from section 18.

In addition, although a fund or money market fund may invest in TBAs under the delayed-settlement securities provision, we are not excluding TBAs from the scope of the rule generally, as one commenter recommended.[119] The TBA market facilitates the trading of forward-settling mortgage-backed securities by allowing participants to enter into a contract agreeing to purchase mortgage-backed securities issued by Fannie Mae, Freddie Mac and Ginnie Mae at a later date, typically, two or three months from the transaction date.[120] The commenter urged that the Commission reconsider the inclusion of TBAs within the rule's derivatives transaction definition to avoid the possibility of a chilling effect on the market and because these transactions may be subject to margin requirements under FINRA rules.[121] The other commenters who addressed TBAs, however, recommended that we clarify that TBAs are derivatives transactions under the rule.[122]

TBAs and dollar rolls are included in the final rule's derivatives transaction definition because we believe they are forward contracts or ''similar instruments.'' [123] We recognize the importance of TBAs to the market for forward-settling mortgage-backed securities and the importance of the FINRA margin requirements to the TBA market. However, TBAs, like other forwards and similar instruments can be used to leverage a fund's portfolio by permitting funds to take unfunded positions in the underlying reference assets and involve a potential future payment obligation. The investor protection concerns the final rule is designed to address do not turn on the nature of a derivatives transaction's underlying reference assets. We do not see a basis to differentiate TBAs for purposes of the final rule from other types of transactions included in the derivatives transaction definition, where the fund's TBA investment does not satisfy the conditions of the delayed-settlement securities provision.

B. Derivatives Risk Management Program

A fund should manage its derivatives use to ensure alignment with the fund's investment objectives, policies, and restrictions, its risk profile, and relevant regulatory requirements. In addition, a fund's board of directors is responsible for overseeing the fund's activities and the adviser's management of risks, including any derivatives risks.[124] Given the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, and the increased use of derivatives by certain funds and their related risks, we believe that requiring funds that are users of derivatives (other than limited derivatives users) to have a formalized risk management program with certain specified elements (a ''program'') supports exempting these transactions from section 18. A fund's program would be part of an adviser's overall management of portfolio risk and would complement—but would not replace—a fund's other risk management activities, such as a fund's liquidity risk management program adopted under rule 22e–4.

As proposed, under the program requirement we are adopting, a fund will have to adopt and implement a written derivatives risk management program that includes policies and procedures reasonably designed to manage the fund's derivatives risks. A derivatives risk manager whom the fund's board approves will be responsible for administering the program. A fund's derivatives risk management program should take into account the way the fund uses derivatives, whether to increase investment exposures in ways that increase portfolio risks or, conversely, to reduce portfolio risks or facilitate efficient portfolio management.

The program requirement is designed to result in a program with elements that are tailored to the particular types of derivatives that the fund uses and their related risks, as well as how those derivatives impact the fund's investment portfolio and strategy. A

[116] *See, e.g.,* T. Rowe Price Comment Letter; Vanguard Comment Letter; ICI Comment Letter; Dechert Comment Letter I. Several commenters expressed particular concern that the proposed exclusion of money market funds from the scope of the rule would result in uncertainty with respect to the ability of money market funds to continue to invest in when-issued U.S. Treasury securities. *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; T. Rowe Price Comment Letter.

[117] The final rule provides that these transactions are not senior securities, but a money market fund must of course also comply with rule 2a–7 in connection with the investments.

[118] *See, e.g.,* BlackRock Comment Letter; Keen Comment Letter; T. Rowe Price Comment Letter; Vanguard Comment Letter.

[119] *See* Fidelity Comment Letter.

[120] *See* Comment Letter of Putnam Investments (Apr. 1, 2020) (''Putnam Comment Letter'') (stating that ''[i]n a TBA trade, the parties agree on six parameters of the securities to be delivered (issuer, maturity, coupon, price, par amount and settlement date), but the actual identity of the securities to be delivered at settlement is not specified [until 48 hours prior to the settlement]'').

[121] *See* Fidelity Comment Letter. Under amended FINRA Rule 4210, effective March 25, 2021, brokers will be required to collect mark-to-market margin from counterparties engaging in TBA transactions.

[122] *See, e.g.,* Putnam Comment Letter; SIFMA AMG Comment Letter; ICI Comment Letter; *cf.* Invesco Comment Letter (recommending we permit certain short-term when-issued or forward-settling transactions and observing that the settlement periods for these transactions ''are still relatively short compared to TBAs and other forward contracts captured by the Proposed Rule's derivatives transaction definition'').

[123] *See, e.g.,* SIFMA AMG Comment Letter. Some of the commenters who sought clarity that TBAs would be derivatives transactions under the final rule also argued that TBAs are not ''similar financing transactions'' that would be treated like reverse repurchase agreements under the final rule. We agree that TBAs are not reverse repurchase agreements or ''similar financing transactions'' under the rule.

[124] *See, e.g.,* Interpretive Matters Concerning Independent Directors of Investment Companies, Investment Company Act Release No. 24083 (Oct. 14, 1999) [64 FR 59877 (Nov. 3, 1999)]; Role of Independent Directors of Investment Companies, Investment Company Act Release No. 24816 (Jan. 2, 2001) [66 FR 3733 (Jan. 16, 2001)]; Independent Directors Council, *Fund Board Oversight of Risk Management* (Sept. 2011), *available at* http://www.ici.org/pdf/pub_11_oversight_risk.pdf (''2011 IDC Report'').

fund's program must include the following elements:

- *Program administration.* As proposed, the program will have to be administered by an officer or officers of the fund's investment adviser serving as the fund's derivatives risk manager.
- *Risk identification and assessment.* As proposed, the program will have to provide for the identification and assessment of a fund's derivatives risks, which must take into account the fund's derivatives transactions and other investments.
- *Risk guidelines.* As proposed, the program will have to provide for the establishment, maintenance, and enforcement of investment, risk management, or related guidelines that provide for quantitative or otherwise measurable criteria, metrics, or thresholds related to a fund's derivatives risks.
- *Stress testing.* As proposed, the program will have to provide for stress testing of derivatives risks to evaluate potential losses to a fund's portfolio under stressed conditions.
- *Backtesting.* The program will have to provide for backtesting of the VaR calculation model that the fund uses under the rule. We are adopting this requirement largely as proposed, but with a required weekly minimum frequency instead of the proposed daily frequency.
- *Internal reporting and escalation.* The program will have to provide for the reporting of certain matters relating to a fund's derivatives use to the fund's portfolio management and board of directors. We are adopting this requirement largely as proposed, but with conforming amendments to reflect changes we are adopting to the relative VaR test.
- *Periodic review of the program.* A fund's derivatives risk manager will be required to periodically review the program, at least annually, to evaluate the program's effectiveness and to reflect changes in risk over time. We are adopting this requirement largely as proposed, but with conforming amendments to reflect changes we are adopting to the relative VaR test.

The program requirement is drawn from existing fund best practices. We believe it will enhance practices for funds that have not already implemented a derivatives risk management program, while building off practices of funds that already have one in place.

Many commenters expressed their broad support for the proposed derivatives risk management program.[125] In particular, commenters highlighted that the proposed rule would permit funds to tailor the derivatives risk management program to the particular unique needs of a fund.[126] One commenter acknowledged that the proposed derivatives risk management program would codify best practices many funds already have in place, including stress testing, backtesting, and other risk management tools.[127] As discussed below, commenters provided specific feedback regarding the individual elements of the program requirement.

1. Program Administration

The final rule will require an officer or officers of the fund's investment adviser to serve as the fund's derivatives risk manager.[128] The derivatives risk manager may not be a portfolio manager of the fund, and must have relevant experience regarding the management of derivatives risk.[129] We are adopting these requirements specifying what person(s) may be eligible to serve as the derivatives risk manager as proposed.

Persons Eligible To Serve as Derivatives Risk Manager

The proposed rule specified that the derivatives risk manager must be an officer or officers of the fund's investment adviser, and we are adopting this provision as proposed.[130] Many commenters supported allowing multiple officers to serve as the derivatives risk manager, and no commenters suggested that the rule should instead require that a single officer serve in this role.[131] For example, one commenter believed allowing multiple officers would permit the derivatives risk manager to reflect a broader range of expertise.[132] Commenters also noted that permitting multiple officers to serve as the derivatives risk manager would be consistent with the Investment Company Act rule governing the persons who may serve as administrators of funds' liquidity risk management programs.[133] Commenters urged, however, that the final rule also permit non-officer employees of the adviser to serve as the derivatives risk manager.[134] One commenter stated that allowing employees of the adviser to serve as the derivatives risk manager would provide needed flexibility for boards to approve the designation of the best individuals to serve in the role.[135] Some commenters supported allowing a third-party not affiliated with the adviser to serve as the derivatives risk manager.[136]

After considering comments, we have determined to adopt the requirement that the derivatives risk manager must be an officer or officers of the fund's investment adviser as proposed. The person(s) serving in the role of the derivatives risk manager must be able to carry out their responsibilities under the rule, which requires that they administer the derivatives risk management program and policies and procedures in addition to the board reporting requirements.[137] The person(s) serving in this role must have sufficient authority within the investment adviser to carry out these responsibilities. We believe that an officer of the fund's investment adviser would be more likely to have the requisite level of seniority to be effective than a non-officer employee or third-party service provider. We recognize that investment advisers may have personnel who, although not designated as ''officers'' in accordance with the adviser's corporate bylaws, have a comparable degree of seniority and authority within the organization. Such a person therefore could have a comparable ability to carry out a derivatives risk manager's

[125] *See e.g.* ICI Comment Letter; Comment Letter of the Investment Adviser Association (Apr. 30, 2020) (''IAA Comment Letter''); Blackrock Comment Letter; AQR Comment Letter I; Comment Letter of the Mutual Fund Directors Forum (Apr. 9, 2020) (''MFDF Comment Letter''); Dechert Comment Letter I.

[126] ICI Comment Letter; AQR Comment Letter I; MFDF Comment Letter; J.P. Morgan Comment Letter.

[127] Blackrock Comment Letter.

[128] Rule 18f–4(a).

[129] *See infra* section II.C.1 (discussing the requirement that the board approve the designation of the derivatives risk manager, and stating that because the final definition of ''derivatives risk manager'' requires the person fulfilling the role to have ''relevant experience regarding the management of derivatives risk,'' the board's consideration of the designation of the derivatives risk manager would necessarily take into account the candidate's experience, among all other relevant factors).

[130] Rule 18f–4(a); proposed rule 18f–4(a). Allowing multiple officers of the fund's adviser (including any sub-advisers) to serve as the fund's derivatives risk manager is designed to allow funds with differing sizes, organizational structures, or investment strategies to more effectively tailor the programs to their operations.

[131] *See* J.P. Morgan Comment Letter; SIFMA AMG Comment Letter; Blackrock Comment Letter; Chamber Comment Letter; T. Rowe Price Comment Letter; ABA Comment Letter.

[132] J.P. Morgan Comment Letter.

[133] *See, e.g.,* J.P. Morgan Comment Letter.

[134] Dechert Comment Letter I; Fidelity Comment Letter; SIFMA AMG Comment Letter; Comment Letter of Angel Oak Capital (Apr. 30, 2020) (''Angel Oak Comment Letter''); Capital Group Comment Letter; Chamber Comment Letter.

[135] Fidelity Comment Letter; Angel Oak Capital Comment Letter.

[136] Comment Letter of Foreside Financial Group, LLC (Apr. 22, 2020) (''Foreside Comment Letter''); NYC Bar Comment Letter.

[137] *See* rule 18f–4(a); and rule 18f–4(c)(3).

responsibilities under the final rule, if the person otherwise met the qualifications for being a derivatives risk manager. In these circumstances, we believe such a person(s) could be treated as an officer, for purposes of the final rule, and serve as a fund's derivatives risk manager if approved by the fund's board. This person, like any other person serving as a fund's derivatives risk manager, would have a direct reporting line to the board.

We recognize that employees of the adviser may have relevant derivatives risk management experience that would be helpful to the derivatives risk manager in administering the derivatives risk management program. While employees may not serve as the derivatives risk manager, they may provide support to the person(s) serving in the role. Advisory employees also may carry out derivatives risk management activities as discussed below.

Many commenters also urged the Commission to permit the fund's adviser to serve as the derivatives risk manager.[138] Commenters maintained that, because the board has already considered the quality and expertise of the fund's investment adviser, the adviser is well suited to serve as the derivatives risk manager.[139] Commenters also stated that requiring the board to consider and designate a separate individual(s) to serve as the derivatives risk manager is overly burdensome, compared to permitting the adviser to serve in this role.[140] Commenters stated that the adviser as an entity should serve as the derivatives risk manager, which could then designate its employees to staff the administration of the derivatives risk management program.[141] Commenters also suggested that permitting a fund's adviser to serve as the derivatives risk manager would be appropriate in light of the fact that the Commission's liquidity risk management program rule permits a fund's adviser to serve as the liquidity risk management program administrator.[142] Conversely, some commenters expressly supported the Commission permitting a third party, separate from the adviser, to serve as the derivatives risk manager.[143]

We are not allowing an adviser to serve as the derivatives risk manager under the final rule. We continue to believe that requiring the derivatives risk manager to be one or more natural persons, specifically approved by the board, will promote independence and objectivity in this role. We believe that requiring one or more officers of the adviser to serve in this role, rather than the adviser as an entity or a committee created by the adviser and composed of individuals selected by the adviser from time to time, would promote accountability to the board by creating a direct reporting line between the board and the individual(s) responsible for administering the program.[144] Unlike rule 22e–4, where the board is required to approve a fund's liquidity risk management program that contains certain specific program elements, the board is not required to approve the derivatives risk management program.[145] Instead, the board will engage with the derivatives risk management program through its appointment of the derivatives risk manager, who is responsible for administering the program and reporting to the board on the program's implementation and effectiveness.

Moreover, any person serving as a fund's derivatives risk manager is responsible for administering the fund's program under rule 18f–4. The rule does not require, however, that the person be responsible for carrying out all activities associated with the fund's derivatives risk management program, and we do not anticipate that the person necessarily would carry out all such activities. For example, the final rule provides that a fund's derivatives risk management program must provide for risk identification and assessment, the establishment of risk guidelines, and stress testing, but does not require that the individual(s) serving as the derivatives risk manager carry out these activities. The derivatives risk manager also could seek inputs that could help inform risk management from third parties that are separate from the adviser, such as third-party service providers, and may reasonably rely on such inputs. The derivatives risk manager therefore may benefit from the expertise and assistance of third-party service providers even though the service provider (or its employees) may not itself serve as the fund's derivatives risk manager.

Commenters expressed concern that, if an individual were to serve in the role, he or she could face personal liability for his or her administration of the program.[146] The final rule, however, does not change the standards that apply in determining whether a person is liable for aiding or abetting or causing a violation of the federal securities laws. We recognize that risk management necessarily involves judgment. That a fund suffers losses does not, itself, mean that a fund's derivatives risk manager acted inappropriately.

Segregation of Derivatives Risk Management Function From Fund's Portfolio Management

The rule will prohibit the derivatives risk manager position from being filled by the fund's portfolio manager, if a single person serves in this position.[147] Similarly, if multiple officers serve as a derivatives risk manager, a majority of these persons may not be composed of portfolio managers. The rule will require a fund to reasonably segregate the functions of the program from its portfolio management.[148] We are adopting each of these requirements as proposed.

Several commenters supported the proposed requirement that the derivatives risk manager not be the fund's portfolio manager.[149] While one commenter agreed that portfolio managers should not serve as the derivatives risk manager, the commenter stated that portfolio managers do have expertise the derivatives risk management program may need in order to react to market events.[150] Commenters stated that smaller firms may have more difficulty segregating portfolio management from derivatives risk management due to limited

[138] *See, e.g.,* Fidelity Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Comment Letter of Independent Directors Council (Apr. 20, 2020) (''IDC Comment Letter''); SIFMA AMG Comment Letter; BlackRock Comment Letter; Capital Group Comment Letter; Chamber Comment Letter; T. Rowe Price Comment Letter; ABA Comment Letter. One commenter supported the board approving a committee created by the adviser. J.P. Morgan Comment Letter.

[139] *See* Fidelity Comment Letter; Dechert Comment Letter I; ICI Comment Letter.

[140] *See* Fidelity Comment Letter; ICI Comment Letter; IDC Comment Letter. For example, one commenter stated that the proposed designation requirement could require extra board meetings, which is costly. Fidelity Comment Letter. Another commenter stated that having extra board meetings associated with designating the derivatives risk manager could delay the appointment of the derivatives risk manager. Fidelity Comment Letter.

[141] *See* ICI Comment Letter; ABA Comment Letter.

[142] Fidelity Comment Letter; Dechert Comment Letter I; ICI Comment Letter; IDC Comment Letter; SIFMA AMG Comment Letter; BlackRock Comment Letter.

[143] Foreside Comment Letter; NYC Bar Comment Letter; ABA Comment Letter.

[144] *See* Proposing Release, *supra* footnote 1 (discussing the role of the derivatives risk manager).

[145] *See infra* section II.C. *See also* rules 22e–4 and 38a–1. Under rule 38a–1, boards will also be responsible for overseeing compliance with rule 18f–4. *See infra* paragraph accompanying footnote 247.

[146] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; NYC Bar Comment Letter; Chamber Comment Letter.

[147] Rule 18f–4(c)(1).

[148] *Id.*

[149] *See* SIFMA AMG Comment Letter; ABA Comment Letter.

[150] ABA Comment Letter.

personnel qualified to serve in these roles.[151] In order to provide flexibility, one commenter suggested that we should permit a fund's derivatives risk manager to be the portfolio manager of a separate fund.[152]

We continue to believe that it is important to segregate the portfolio management function from the risk management function. Segregating derivatives risk management from portfolio management is designed to promote objective and independent identification, assessment, and management of the risks associated with derivatives use. Accordingly, this element of the derivatives risk manager requirement is designed to enhance the independence of the derivatives risk manager and other risk management personnel and, therefore, to enhance the program's effectiveness.[153] Because a fund may compensate its portfolio management personnel in part based on the returns of the fund, the incentives of portfolio managers may not always be consistent with the restrictions that a derivatives risk management program would impose. Keeping these functions separate in the context of derivatives risk management should help mitigate the possibility that these competing incentives diminish the program's effectiveness.

Separation of the derivatives risk management function and the portfolio management function creates important checks and balances. Separation of functions may be established through a variety of methods, such as independent reporting chains, oversight arrangements, or separate monitoring systems and personnel. While we understand that smaller funds may have more limited employee resources, making it more difficult to segregate the portfolio management and derivatives risk management functions, we continue to believe that segregation of these functions is important and funds may need to hire additional personnel.[154] The reasonable segregation requirement is not meant to indicate that the derivatives risk manager and portfolio management must be subject to a communications ''firewall.'' For example, the internal reporting and escalation requirements we are adopting will require communication between a fund's risk management and portfolio management regarding the operation of the program.[155] We recognize the important perspective and insight regarding the fund's use of derivatives that the portfolio manager can provide and generally understand that the fund's derivatives risk manager would work with the fund's portfolio management in implementing the program requirement.

Relevant Experience Regarding the Management of Derivatives Risk

The final rule, as proposed, requires a fund's derivatives risk manager to have relevant experience regarding the management of derivatives risk.[156] This requirement is designed to reflect the potential complex and unique risks that derivatives can pose to funds and promote the selection of a derivatives risk manager who is well-positioned to manage these risks.

Some commenters requested clarification regarding this requirement. In particular, commenters requested clarification of what ''relevant experience'' means in the context of selecting a derivatives risk manager.[157] One commenter suggested that ''relevant experience'' should not require expertise in all types of derivatives risk.[158] The requirement that the derivatives risk manager must have ''relevant experience'' is designed to provide flexibility such that the person(s) serving in this role may have experience that is relevant in light of the derivatives risks unique to the fund, rather than the rule taking a more prescriptive approach in identifying a specific amount or type of experience that the derivatives risk manager must have. We do not believe it would be practical to detail in our rules the specific experience a derivatives risk manager should hold. We recognize that different funds may appropriately seek out different types of derivatives risk experience from their respective derivatives risk managers, depending on the funds' particular circumstances.

Program Administration in the Context of Sub-Advised Funds

A number of commenters sought clarification about the administration of a fund's derivatives risk management program for sub-advised funds. Commenters supported permitting the derivatives risk manager to delegate certain aspects of the day-to-day management of the derivatives risk management program to the fund's sub-adviser(s).[159] Further, commenters suggested that the derivatives risk manager should develop a program specifying the responsibilities and role of the sub-adviser.[160] One commenter, for example, stated that sub-advisers would provide important support to the derivatives risk manager by identifying and assessing the fund's derivatives risks, to establish, maintain, and enforce certain risk guidelines, and to implement the measures needed if those guidelines are exceeded.[161] Several commenters stated that while the derivatives risk manager should be able to create a role for sub-advisers in the derivatives risk management program, the derivatives risk manager should retain the board reporting responsibilities.[162]

The final rule provides flexibility for funds to involve sub-advisers in derivatives risk management. For example, the rule permits a group of individuals to serve as a fund's derivatives risk manager, which could include officers of both the fund's primary adviser and sub-adviser(s).[163] For a fund in which a sub-adviser manages the entirety of the fund's portfolio (as opposed to a portion, or ''sleeve'' of the fund's assets), the officer(s) of a sub-adviser alone also could serve as a fund's derivatives risk manager, if approved by the fund's board.[164]

In addition, the final rule does not preclude a derivatives risk manager from delegating to a sub-adviser specific derivatives risk management activities that are not specifically assigned to the derivatives risk manager in the final rule, subject to appropriate oversight.

[151] ABA Comment Letter; SIFMA AMG Comment Letter.

[152] ABA Comment Letter.

[153] *See, e.g.,* Comptroller of the Currency Administrator of National Banks, *Risk Management of Financial Derivatives: Comptroller's Handbook* (Jan. 1997), at 9 (discussing the importance of independent risk management functions in the banking context).

[154] *See infra* III.C.1. In addition, and as proposed, the final rule prohibits a portfolio manager from serving as the derivatives risk manager for funds for which he or she is a portfolio manager, but does not prohibit that person from serving as the derivatives risk manager for other funds. *See supra* footnote 152 and accompanying text.

[155] *See infra* section II.B.2.e.

[156] Rule 18f–4(a).

[157] Dechert Comment Letter I; ICI Comment Letter; IDC Comment Letter.

[158] ABA Comment Letter.

[159] *See, e.g.,* ICI Comment Letter; SIFMA AMG Comment Letter; Capital Group Comment Letter; T. Rowe Price Comment Letter. A number of these commenters noted that the staff of the Commission had provided guidance regarding sub-advisers in the context of rule 22e–4.

[160] T. Rowe Price Comment Letter; ICI Comment Letter.

[161] ICI Comment Letter.

[162] T. Rowe Price Comment Letter; ICI Comment Letter.

[163] *See supra* footnote 129 (explaining that the term ''adviser'' as used in this release and rule 18f–4 generally refers to any person, including a sub-adviser, that is an ''investment adviser'' of an investment company as that term is defined in section 2(a)(20) of the Investment Company Act); *see also* Proposing Release, *supra* footnote 1, at n. 107.

[164] *See infra* paragraph accompanying footnote 166 (discussing delegation of risk management activities).

The derivatives risk manager also may reasonably rely on information provided by sub-advisers in fulfilling his or her responsibilities under the rule. The fund, of course, retains ultimate responsibility for compliance with rule 18f–4, and the derivatives risk manager remains responsible under the rule for the reporting obligations to the board and the administration of the derivatives risk management program.[165] Accordingly, where a fund delegates risk management activities to a sub-adviser, in order to be reasonably designed to manage the fund's derivatives risks and achieve compliance with the rule, the fund's policies and procedures generally should address the oversight of any delegated activities, including the scope of and conditions on activities delegated to a sub-adviser(s), as well as oversight of the sub-adviser(s). The same considerations would apply with respect to any sub-delegates.

For certain elements of the derivatives risk management program, delegation to a sub-adviser that manages a sleeve of a fund's assets generally would not be consistent with the fund's obligations to implement a derivatives risk management program under rule 18f–4. For example, certain elements of the derivatives risk management program (*e.g.,* stress testing) must be evaluated at the portfolio level. We therefore believe that the fund's derivatives risk manager and not the sub-adviser may be better suited in this case—in having a portfolio-level view—to administer these program elements.[166] Sub-advisers managing a portion of the fund's assets, however, may be appropriately positioned to assist the derivatives risk manager by providing information relevant to the derivatives risk management program at a more–granular level. Examples of these areas include risk identification, risk assessment, and monitoring the program's risk guidelines.

2. Required Elements of the Program

a. Risk Identification and Assessment

We are adopting, as proposed, the requirement that a fund must identify and assess its derivatives risks as part of the derivatives risk management program.[167] This assessment must take into account the fund's derivatives transactions and other investments.

Commenters supported the proposed risk identification and assessment requirement. One commenter expressed support for the flexible, principles-based nature of this program element.[168] Several commenters agreed that the derivatives risk management program should begin with risk identification and assessment.[169] No commenter opposed this requirement.

We continue to believe that an appropriate assessment of derivatives risks generally involves assessing how a fund's derivatives may interact with the fund's other investments or whether the fund's derivatives have the effect of helping the fund manage risks.[170] As proposed, the rule defines the derivatives risks that must be identified and managed to include leverage, market, counterparty, liquidity, operational, and legal risks, as well as any other risks the derivatives risk manager deems material.[171] In the context of a fund's derivatives transactions:

- Leverage risk generally refers to the risk that derivatives transactions can magnify the fund's gains and losses;[172]
- Market risk generally refers to risk from potential adverse market movements in relation to the fund's derivatives positions, or the risk that markets could experience a change in volatility that adversely impacts fund returns and the fund's obligations and exposures;[173]
- Counterparty risk generally refers to the risk that a counterparty on a derivatives transaction may not be willing or able to perform its obligations under the derivatives contract, and the related risks of having concentrated exposure to such a counterparty;[174]
- Liquidity risk generally refers to risk involving the liquidity demands that derivatives can create to make payments of margin, collateral, or settlement payments to counterparties;
- Operational risk generally refers to risk related to potential operational issues, including documentation issues, settlement issues, systems failures, inadequate controls, and human error;[175] and
- Legal risk generally refers to insufficient documentation, insufficient capacity or authority of counterparty, or legality or enforceability of a contract.[176]

We believe these risks are common to most derivatives transactions.[177] We did not receive any comments regarding the risks that are included in the definition of ''derivatives risks'' under the rule.

The rule does not limit a fund's identification and assessment of derivatives risks to only those specified in the rule. As proposed, the definition of the term ''derivatives risks'' that we are adopting includes any other risks a fund's derivatives risk manager deems material. Some derivatives transactions could pose certain idiosyncratic risks. For example, some derivatives transactions could pose a risk that a complex OTC derivative could fail to produce the expected result (*e.g.,* because historical correlations change or unexpected merger events occur) or pose a political risk (*e.g.,* events that affect currencies). To the extent the derivatives risk manager considers any such idiosyncratic risk to be material,

[165] *See* rule 18f–4(a); rule 18f–4(c)(3)(ii) and (iii); *see also infra* section II.C.

[166] *See infra* section II.B.2.c.

[167] *See* rule 18f–4(c)(1)(i); *compare with* proposed rule 18f–4(c)(1)(i).

[168] J.P. Morgan Comment Letter.

[169] J.P. Morgan Comment Letter; Comment Letter of Morningstar, Inc. (Mar. 24 2020) (''Morningstar Comment Letter'').

[170] For example, the risks associated with a currency forward would differ if a fund is using the forward to hedge the fund's exposure to currency risk associated with a fund investment denominated in a foreign currency or, conversely, to take a speculative position on the relative price movements of two currencies. We believe that by assessing its derivatives use holistically, a fund will be better positioned to implement a derivatives risk management program that does not over- or understate the risks its derivatives use may pose. Accordingly, we believe that this approach will result in a more–tailored derivatives risk management program. *See, e.g.,* Proposing Release, *supra* footnote 1, at section II.B.3 (discussing the goal of promoting tailored derivatives risk management programs).

[171] Rule 18f–4(a); *see also* proposed rule 18f–4(a). In the case of funds that are limited derivatives users under the rule, the definition will include any other risks that the fund's investment adviser (as opposed to the fund's derivatives risk manager) deems material, because a fund that is a limited derivatives user would be exempt from the requirement to adopt a derivatives risk management program (and therefore also exempt from the requirement to have a derivatives risk manager). *See infra* section II.E.

[172] *See, e.g.,* Independent Directors Council, *Board Oversight of Derivatives Task Force Report* (July 2008), at 12 (''2008 IDC Report'').

[173] Funds should consider market risk together with leverage risk because leveraged exposures can magnify such impacts. *See, e.g.,* NAPF, *Derivatives and Risk Management Made Simple* (Dec. 2013), available at *https://www.jpmorgan.com/cm/BlobServer/is_napfms2013.pdf?blobkey=id&blobwhere=1320663533358&blobheader=application/pdf&;blobheadername1=Cache-Control&blobheadervalue1=private&blobcol=urldata&blobtable=MungoBlobs.*

[174] *See, e.g.,* Nils Beier, *et al., Getting to Grips with Counterparty Risk,* McKinsey Working Papers on Risk, Number 20 (June 2010).

[175] *See, e.g.,* 2008 IDC Report, *supra* footnote 172; RMA, *Statement on best practices for managing risk in derivatives transactions* (2004) (''Statement on best practices for managing risk in derivatives transactions''), available at *http://www.rmahq.org/securities-lending/best-practices.*

[176] *See* Proposing Release, *supra* footnote 1, at n.123 (providing additional details and examples regarding each of these elements of legal risk, and describing how, because derivatives contracts that are traded over the counter are not standardized, they bear a certain amount of legal risk in that poor draftsmanship, changes in laws, or other reasons may cause the contract to not be legally enforceable against the counterparty).

[177] *See id.* at n.124.

that risk would be a ''derivatives risk'' for purposes of the rule.

b. Risk Guidelines

We are adopting, as proposed, the requirement that a fund's program provide for the establishment, maintenance, and enforcement of investment, risk management, or related guidelines that provide for quantitative or otherwise measurable criteria, metrics, or thresholds of the fund's derivatives risks (the ''guidelines'').[178] The guidelines must specify levels of the given criterion, metric, or threshold that a fund does not normally expect to exceed and the measures to be taken if they are exceeded.[179] The guidelines requirement is designed to address the derivatives risks that a fund would be required to monitor routinely as part of its program, and to help the fund identify when it should respond to changes in those risks.

Many commenters supported the proposed risk guidelines requirement, specifically expressing their support for a requirement that does not impose specific limits or guidance for how the risk thresholds should be calculated.[180] One commenter, however, stated that the proposed guidelines should be removed because many risks are not susceptible to quantification.[181] The commenter also stated that, for aspects of the required derivatives risk management program where quantitative measures are likely to be used, such as stress testing and backtesting results, the proposed quantitative guidelines requirement would be duplicative.[182] Several other commenters requested clarification. Specifically, one asked for clarification that non-quantifiable risks may be managed through other practices.[183] Other commenters asked for more detailed criteria for how a fund should define its program's risk guidelines.[184]

We continue to believe that risk guidelines are a key component of a fund's derivatives risk management. To manage risks, a fund must identify relevant risks and put in place means to measure them. A fund's risk guidelines are designed to complement, and not duplicate, the stress testing and other aspects of the fund's derivatives risk management program. For example, a fund's risk guidelines would provide information about the fund's portfolio risks in current market conditions, as opposed to the fund's stress testing, which would evaluate the effects of stressed conditions. We recognize, however, that some risks may not be readily quantifiable or measurable and reflected in a risk guideline. For example, certain legal risks may not fit within a quantifiable risk guideline.[185] We agree that one appropriate way to manage these risks is through other practices, such as review and approval procedures for derivatives contracts as suggested by one commenter, consistent with the overall requirement in the final rule that the fund's policies and procedures be reasonably designed to manage the fund's derivatives risks.[186]

The final rule, as proposed, does not impose specific risk limits for these guidelines, but instead requires a fund to adopt guidelines that provide for quantitative thresholds tailored to the fund. We believe that the quantitative thresholds should be those the fund determines to be appropriate and that are most pertinent to its investment portfolio, and that the fund reasonably determines are consistent with its risk disclosure.[187] A fund must establish discrete metrics to monitor its derivatives risks, which will require the fund and its derivatives risk manager to measure changes in the fund's risks regularly, and this in turn is designed to lead to timelier steps to manage these risks. Moreover, a fund must identify its response when these metrics have been exceeded, which should provide the fund's derivatives risk manager with a clear basis from which to determine whether to involve other persons, such as the fund's portfolio management or board of directors, in addressing derivatives risks appropriately.[188]

Funds may use a variety of approaches in developing guidelines that comply with the rule.[189] This draws on the risk identification element of the program and the scope and objectives of the fund's use of derivatives. The rule will allow a fund to use quantitative metrics that it determines would allow it to monitor and manage its particular derivatives risks most appropriately. In developing the guidelines (and determining whether to change the guidelines), a fund generally should consider how to implement them in view of its investment portfolio and the fund's disclosure to investors. For example, a fund could consider establishing corresponding investment size controls or lists of approved transactions across the fund.[190] A fund generally should consider whether to implement appropriate monitoring mechanisms designed to allow the fund to abide by the guidelines, including the guidelines' quantitative metrics.

c. Stress Testing

A fund's program must provide for stress testing to evaluate potential losses to the fund's portfolio.[191] We are adopting this requirement as proposed.[192] Specifically, the fund's stress tests must evaluate potential losses in response to extreme but plausible market changes or changes in market risk factors that would have a significant adverse effect on the fund's portfolio.[193] The stress tests must take into account correlations of market risk factors and resulting payments to derivatives counterparties. Finally, the frequency with which stress testing is conducted must take into account the fund's strategy and investments and current market conditions, provided that stress tests must be conducted no less frequently than weekly.

Many commenters expressed general support for the proposed stress testing requirement.[194] They stated, for example, that stress testing provides funds with valuable information regarding potentially extreme market conditions that the rule's VaR test may not capture.[195] We agree, and we continue to believe that stress testing is an important component to a fund's derivatives risk management

[178] Rule 18f–4(c)(1)(ii); *see also* proposed rule 18f–4(c)(1)(ii).

[179] Rule 18f–4(c)(1)(ii).

[180] *See, e.g.,* J.P. Morgan Comment Letter; Morningstar Comment Letter.

[181] ABA Comment Letter.

[182] *See id.*

[183] J.P. Morgan Comment Letter.

[184] *See* Dechert Comment Letter I; ABA Comment Letter.

[185] J.P. Morgan Comment Letter.

[186] Rule 18f–4(c)(1).

[187] *See, e.g.,* Mutual Fund Directors Forum, *Risk Principles for Fund Directors: Practical Guidance for Fund Directors on Effective Risk Management Oversight* (Apr. 2010), available at *http://www.mfdf.org/images/Newsroom/Risk_Principles_6.pdf.*

[188] *See* rule 18f–4(c)(1)(v).

[189] *See, e.g.,* Comprehensive Risk Management of OTC Derivatives, *supra* footnote 177; Statement on best practices for managing risk in derivatives transactions, *supra* footnote 175; 2008 IDC Report, *supra* footnote 172.

[190] A fund could also consider establishing an approved list of specific derivatives instruments or strategies that may be used, as well as a list of persons authorized to engage in the transactions on behalf of the fund. A fund could consider providing new instruments (or instruments newly used by the fund) additional scrutiny. *See, e.g.,* MFDF Guidance, *supra* footnote 187, at 8.

[191] Rule 18f–4(c)(1)(iii).

[192] *See* proposed rule 18f–4(c)(1)(iii).

[193] The rule requires a fund that is required to establish a derivatives risk management program to stress test its portfolio, that is, all of the fund's investments, and not just the fund's derivatives transactions. Rule 18f–4(c)(1)(iii).

[194] *See, e.g.,* Dechert Comment Letter I; Fidelity Comment Letter; J.P. Morgan Comment Letter; Better Markets Comment Letter; Invesco Comment Letter; Morningstar Comment Letter; AQR Comment Letter I; SIFMA AMG Comment Letter.

[195] *See, e.g.,* Dechert Comment Letter I; J.P. Morgan Comment Letter.

program.[196] We believe stress testing is an important tool to evaluate different drivers of derivatives risks, including non-linear derivatives risks that may be understated by metrics or analyses that do not focus on periods of stress. We also continue to believe that stress testing will serve as an important complement to the VaR-based limit on fund leverage risk, as well as any VaR testing under the fund's risk guidelines.

Commenters generally agreed with the proposed approach not to require stress tests to include certain identified market risk factors. One commenter stated that the stress testing requirement took the ''right approach by not prescribing specific stress testing scenarios, magnitudes, or types of simulations.'' [197] We continue to believe that a principles-based approach to stress testing allows funds to tailor their simulations to a fund's particular relevant risk factors.[198]

As proposed, the rule requires that stress tests take into account correlations of market risk factors and resulting payments to derivatives counterparties.[199] One commenter requested clarification regarding the scope of ''correlations of market risk factors.'' [200] The commenter stated that there were many factors beyond the six factors that the Proposing Release identified—liquidity, volatility, yield curve shifts, sector movements, or changes in the price of the underlying reference security or asset—that could be considered for stress testing. As discussed in the proposal, these requirements are designed to promote stress tests that produce results that are valuable in appropriately managing derivatives risks by focusing the testing on extreme events that may provide actionable information to inform a fund's derivatives risk management. We agree with the commenter that there are factors other than the six specific factors provided as an example in the Proposing Release that could be considered for stress testing. For example, stress testing could also take into account interest rates, credit spreads, volatility, and foreign exchange rates.[201] The specific factors to consider in a particular stress test may vary from fund to fund and will require judgment by fund risk professionals in designing stress tests. The rule's principles-based approach to stress testing will provide flexibility to enable those professionals to exercise their judgment in designing and implementing the stress tests required by the rule.

In terms of the frequency of stress testing, comments were mixed. Some commenters specifically stated their support for the proposed weekly stress testing requirement. For example, some acknowledged that the proposed timing requirement is consistent with many funds' current practice.[202] Several commenters, however, supported decreasing the frequency of the stress testing requirement.[203] Some specifically suggested a monthly stress testing requirement.[204] Alternatively, rather than specifying the frequency of stress tests in the rule, some commenters preferred that the derivatives risk manager be given the discretion to determine the appropriate frequency.[205] Commenters urging less frequent stress testing stated that weekly stress tests are too burdensome, particularly during times of low market stress.[206] One commenter contended that weekly stress testing would not be necessary given the overlay of the rule's VaR-based limit on fund leverage risk.[207]

We continue to believe that weekly stress testing is an important risk management tool. During periods of stress, returns, correlations, and volatilities tend to change dramatically over a very short period of time.[208] These and other variables also can change quickly outside of periods of overall market stress or as stressed conditions begin to materialize. Monthly stress testing may not be frequent enough to observe these trends or to identify risks that may arise or become more acute if market conditions were to change quickly. Weekly or more frequent stress testing may be particularly useful during times of unexpected or unprecedented market stress. Monthly stress testing may not provide a fund's derivatives risk manager adequate and timely insight into the fund's derivatives risk, particularly where the fund has a high portfolio turnover.

We believe that the minimum weekly stress testing frequency balances the attendant costs of establishing a stress testing program with the benefits of frequent testing.[209] While a fund must run stress tests on a weekly basis, the scope of stress testing may vary. Funds may, for example, conduct more–detailed scenario analyses on a less-frequent basis—such as the monthly frequency suggested by some commenters-while conducting more-focused weekly stress tests under rule 18f–4.

In response to commenters that stated that weekly stress testing would not be necessary when complemented by VaR limits, losses under stressed conditions—or ''tail risks''—would not be reflected in VaR analyses that are not calibrated to a period of market stress and that do not estimate losses that occur on the trading days with the highest losses.[210] Requiring funds to stress test their portfolios would provide information regarding these ''tail risks'' that VaR and other analyses may miss. Stress testing allows funds to tailor the hypothetical scenario to the needs of a particular fund. VaR, in contrast, is based on historical data. The rule's VaR test is intended as an outer limit on fund leverage risk. Stress testing may

[196] The Commission also has required certain types of funds to conduct stress tests or otherwise consider the effect of stressed market conditions on their portfolios. *See* rule 2a–7 under the Investment Company Act; *see also* rule 22e–4 under the Investment Company Act (requiring a fund subject to the rule to assess its liquidity risk by considering, for example, its investment strategy and portfolio investment liquidity under reasonably foreseeable stressed conditions).

[197] J.P. Morgan Comment Letter.

[198] *See* Proposing Release, *supra* footnote 1, at paragraphs accompanying nn.138–144.

[199] *See* rule 18f–4(c)(1)(iii).

[200] ICI Comment Letter.

[201] *See* Refinitiv Comment Letter.

[202] J.P. Morgan Comment Letter; Better Markets Comment Letter.

[203] Dechert Comment Letter I; Fidelity Comment Letter, at 13; T. Rowe Price Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; Comment Letter of PIMCO (Apr. 30, 2020) (''PIMCO Comment Letter''); ABA Comment Letter (advocating that the stress testing requirement for UCITs should be used).

[204] Dechert Comment Letter I; Fidelity Comment Letter; T. Rowe Price Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; PIMCO Comment Letter.

[205] Dechert I Comment Letter; Fidelity Comment Letter; T. Rowe Price Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; PIMCO Comment Letter; ISDA Comment Letter.

[206] *See* Dechert Comment Letter I; ICI Comment Letter (stating that, particularly in periods of low market stress, weekly stress testing is not generally necessary and that monthly stress testing would allow a fund to observe trends and changes over time without sacrificing its ability to assess in a timely manner its risk of potential loss).

[207] ICI Comment Letter.

[208] *See supra* footnote 23 and accompanying text.

[209] *See infra* section III.C.1. We recognize that the costs associated with stress testing may increase with the frequency of conducting such tests. We understand, however, that once a fund initially implements a stress testing framework, subsequent stress tests could be automated and, as a result, be less costly.

In establishing the frequency of stress testing, a fund must take into account the fund's strategy and market conditions. *See* rule 18f–4(c)(2). For example, a fund whose strategy involves a high portfolio turnover might determine to conduct stress testing more frequently than a fund with a more static portfolio. A fund similarly might conduct more–frequent stress tests in response to increases in market stress. In determining this minimum frequency, we also took into account that this requirement would only apply to funds that do not qualify for the limited derivatives user exception because they use derivatives in a more limited way.

[210] The rule does not require a fund to implement a stressed VaR test. *See infra* section II.D.1.

identify risks that may not result in a VaR breach, yet may not be appropriate in light of the fund's investment strategy. We continue to believe that stress testing and VaR limits are complementary and important tools to help funds manage their derivatives risk.

d. Backtesting

The rule will require a fund to backtest the results of the VaR calculation model used by the fund in connection with the relative VaR or absolute VaR test, as applicable, as part of the program.[211] As proposed, the backtesting requirement will require that the fund compare its actual gain or loss for each business day with the VaR the fund had calculated for that day, and identify as an exception any instance in which the fund experiences a loss exceeding the corresponding VaR calculation's estimated loss. In a modification from the proposal, the rule will permit a fund to perform this analysis on a weekly instead of a daily basis, comparing the fund's daily gain and loss to the estimated VaR for each business day in the week. This requirement is designed to require a fund to monitor the effectiveness of its VaR model.[212]

Commenters indicated general support for the backtesting requirement but provided mixed views regarding the frequency of backtesting.[213] Several commenters noted that they currently use backtesting as an effective tool in their risk management framework.[214] We continue to believe that backtesting is important for funds to monitor the effectiveness of their VaR models. The backtesting requirements we are adopting will assist a fund in confirming the appropriateness of its model and related assumptions and help identify when a fund should consider model adjustments.

Several commenters, however, supported decreasing the frequency of backtesting from the proposed daily requirement. Some commenters supported a weekly requirement.[215] Several other commenters supported a monthly requirement, with some of these commenters identifying compliance efficiencies that could result for advisers to UCITS funds, which conduct backtesting on a monthly basis.[216] Commenters urging less frequent than daily backtesting stated that a less frequent backtesting requirement in the final rule would serve as a baseline, while permitting the derivatives risk manager to adjust the frequency based on the particular needs of the fund.[217] In supporting weekly backtesting, one commenter stated that it would allow a retroactive comparison of the VaR measure for each business day without incurring the costs and burdens of daily testing.[218] Several commenters went on to say that backtesting should be looked at on a longer time horizon so that the data is analyzed in the context of more than one day's results.[219] Additionally, commenters stated that daily testing does not provide enough data on its own for model validation to allow a derivatives risk manager to adjust a fund's VaR model, and therefore the rule should incorporate a less-frequent backtesting requirement.[220] For example, in order to alter a VaR model, some commenters stated that in addition to backtesting, the fund must consider market trends, risk factors assessed by the risk team, a formal review by the model risk governance committee and approval by a risk forum.[221] In light of these critiques, commenters stated that the value of daily backtesting is not justified by the costs and burdens of implementing the requirement.[222]

In considering these comments, we agree that daily backtesting may not be necessary for funds to gather the information needed in order for a fund to readily and efficiently adjust or calibrate its VaR calculation model. We are therefore requiring funds to conduct backtesting on a weekly, rather than a daily, basis (taking into account the fund's gain and loss on each business day that occurred during the weekly backtesting period).[223] This will ensure that funds collect backtesting data for each business day, while also providing funds with the added flexibility of only running the test weekly. We believe this requirement addresses commenters' concerns while still ensuring that funds gather necessary data for VaR data calibration and derivatives risk management and conduct backtesting analyses to analyze the VaR model's effectiveness at least weekly.

We have not, however, revised the rule to provide for monthly backtesting as some commenters suggested. Although the costs of weekly backtesting will likely be marginally higher than the costs of less-frequent backtesting, we believe that any additional costs associated with a weekly backtesting requirement will be limited because a fund will be required to calculate its portfolio VaR each business day to satisfy the limits on fund leverage risk.[224] We believe the limited additional costs for weekly backtesting relative to monthly testing are justified by the benefits of providing more–recent information regarding the effectiveness of a fund's VaR model. We therefore are requiring weekly backtesting to provide derivatives risk managers more–current information regarding the effectiveness of the fund's VaR model, in line with the requirement under the final rule for weekly stress testing.

Under the final rule, the derivatives risk manager may alter the frequency of backtesting, so long as the frequency is no less frequent than weekly.[225] While backtesting may not provide the only information that a derivatives risk manager should take into account when adjusting a fund's VaR model, we believe it is an important tool for funds to use in validating and adjusting a fund's VaR model. The derivatives risk management program may incorporate additional elements that the derivatives risk manager may find important when assessing whether the fund's VaR model should be adjusted. Market trends, additional risk factors, formal reviews by a model risk governance committee, and approval by a risk forum may be factors that a derivatives risk manager

[211] *See* rule 18f–4(c)(1)(iv).

[212] As we explained in the Proposing Release, if 10 or more exceptions are generated in a year from backtesting that is conducted using a 99% confidence level and over a one-day time horizon, and assuming 250 trading days in a year, it is statistically likely that such exceptions are a result of a VaR model that is not accurately estimating VaR. *See, e.g.,* Philippe Jorion, Value at Risk: The New Benchmark for Managing Financial Risk (3d ed. 2006), at 149–150; *see also* rule 15c3–1e under the Exchange Act (requiring backtesting of VaR models and the use of a multiplication factor based on the number of backtesting exceptions).

[213] *See, e.g.,* J.P. Morgan Comment Letter; AQR Comment Letter I; Morningstar Comment Letter.

[214] *See, e.g.,* J.P. Morgan Comment Letter; MFDF Comment Letter (observing that stress testing and backtesting are critical for the operation of the rule).

[215] Fidelity Comment Letter; PIMCO Comment Letter.

[216] Dechert Comment Letter I; T. Rowe Price Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; *see also* CESR's Guidelines on Risk Measurement and the Calculation of Global Exposure and Counterparty Risk for UCITS (July 28, 2010) (''UCITS Guidelines'') Section 3.6.4, available at *https://www.fsc.gi/uploads/legacy/download/ucits/CESR-10-788.pdf.*

[217] Dechert Comment Letter I; T. Rowe Price Comment Letter; SIFMA AMG Comment Letter.

[218] PIMCO Comment Letter.

[219] PIMCO Comment Letter; Dechert Comment Letter I (''VaR backtesting could provide more meaningful results if smoothed by a longer period of data points.'').

[220] Dechert Comment Letter I; J.P. Morgan Comment Letter; ICI Comment Letter; PIMCO Comment Letter.

[221] J.P. Morgan Comment Letter; ICI Comment Letter.

[222] *See, e.g.,* Dechert Comment Letter I; PIMCO Comment Letter.

[223] Rule 18f–4(c)(1)(iv).

[224] *See infra* section III.C.1.

[225] Rule 18f–4(c)(1)(iv).

would choose to incorporate into the derivatives risk management program.

e. Internal Reporting and Escalation

The final rule will require a fund's derivatives risk management program to address internal reporting and escalation. Specifically, the program must identify the circumstances under which persons responsible for portfolio management will be informed regarding the operation of the program, including guidelines exceedances and the results of the fund's stress testing.[226] The final rule also specifies that a fund's derivatives risk manager must also directly inform the fund's board, as appropriate, of material risks arising from the fund's derivatives use, including risks that exceedances of the guidelines and results of the fund's stress tests indicate.[227] We are adopting these requirements as proposed.

The internal reporting and escalation requirements will require communication between a fund's risk management and portfolio management regarding the operation of the program. We continue to believe that these lines of communication are a key part of derivatives risk management.[228] Providing portfolio managers with the insight of a fund's derivatives risk manager is designed to inform portfolio managers' execution of the fund's strategy and recognize that portfolio managers will generally be responsible for transactions that could mitigate or address derivatives risks as they arise. The rule also will require communication between a fund's derivatives risk manager and its board, as appropriate. We understand that funds today often have a dialogue between risk professionals and fund boards. Requiring a dialogue between a fund's derivatives risk manager and the fund's board provides the fund's board with key information to facilitate its oversight function.

No commenters opposed the proposed requirements, and the Commission received one comment supporting the proposed internal reporting and escalation requirements. This commenter appreciated that the proposed rule for reporting and escalation requirements did not prescribe criteria or thresholds for discussion or escalation.[229] We agree that the internal reporting and escalation program requirement should be principles-based. In light of the breadth of funds' differing strategies and the variety of ways in which we anticipate funds will manage their derivatives risks, we believe that funds should have flexibility when implementing this program requirement.

Several commenters requested clarification regarding what the particular standard for escalating material risks should be under the rule. While the rule requires the derivatives risk manager to inform portfolio managers in a timely manner of material risks arising from the fund's derivatives transactions, the derivatives risk manager has flexibility to inform the board about these material risks ''as appropriate.'' Some commenters urged the Commission to adopt backstops to ensure that funds do not set reporting and escalation standards too low, potentially leading to the escalation of day-to-day issues or over-reporting.[230] One commenter stated that the derivatives risk manager should not have discretion regarding which material risks should be escalated to the board, and that all material risks should be escalated.[231] Another commenter stated that the derivatives risk manager should determine escalation based on a good faith determination.[232] Some commenters stated that exceedances should only be reported when they are material and not remediated promptly (suggesting within five business days) unless the results show material weaknesses.[233] This commenter went on to state that the reporting and escalation requirements should be tailored based on the fund's size, sophistication, and needs.[234] One commenter urged that that the Commission permit funds' boards to work with derivatives risk managers to establish policies and procedures outlining under what circumstances such risks should be communicated.[235] Another commenter, while broadly supporting a derivatives risk manager's ability to communicate material risks directly to the board, similarly stated that the board should work together with the derivatives risk manager to define the circumstances under which the manager would communicate an issue to the fund board.[236]

We continue to believe that the derivatives risk manager should have discretion to determine, as appropriate, when and what material risks escalated to the fund's portfolio management also should be escalated to the board of directors. We believe that a fund's derivatives risk manager is best positioned to determine when it is appropriate to inform the fund's portfolio management and board of material risks. The final rule provides flexibility for the derivatives risk manager to calibrate the escalation framework to suit the needs of the fund and to avoid the over-reporting concern some commenters identified. We agree that the escalation requirements for the fund should be tailored based on the fund's size, sophistication, and needs and believe that these would be appropriate factors for the derivatives risk manager to consider in establishing the fund's escalation requirements.[237] In addition, the rule does not limit a board's ability to engage with the derivatives risk manager on the circumstances under which risks will be communicated to the board. This engagement may help a derivatives risk manager develop an understanding of risks that the board would find most salient, or important to raise outside of a regularly scheduled board meeting.[238]

f. Periodic Review of the Program

The final rule requires a fund's derivatives risk manager to review the program at least annually to evaluate the program's effectiveness and to reflect changes in the fund's derivatives risks over time.[239] The review applies to the overall program, including each of the specific program elements discussed above. The periodic review must include a review of the fund's VaR calculation model and any designated reference portfolio to evaluate whether it remains appropriate. We did not receive any comments on this requirement and are adopting it as proposed apart from conforming

[226] Rule 18f–4(c)(1)(v)(A).

[227] Rule 18f–4(c)(1)(v)(B). For example, an unexpected risk may arise due to a sudden market event, such as a downgrade of an investment bank that is a substantial derivatives counterparty to the fund.

[228] *See* 2011 IDC Report, *supra* footnote 124.

[229] J.P. Morgan Comment Letter. *But see* Comment Letter of North American Securities Administrators Association, Inc. (Mar. 27, 2020) (''NASAA Comment Letter'') (while not clearly addressing the escalation requirement, urging that the Commission require immediate board reporting when a fund ''exceeds the maximum [VaR] threshold during backtesting''). Because a fund is expected to experience a given number of backtesting exceedances, we do not believe it would be appropriate to require a derivatives risk manager to report every such exceedance to a fund's board. *See also infra* footnotes 282–283 and accompanying text.

[230] CFA Comment Letter; ABA Comment Letter; J.P. Morgan Comment Letter.

[231] Morningstar Comment Letter.

[232] NYC Bar Comment Letter.

[233] SIFMA AMG Comment Letter.

[234] *Id.*

[235] Dechert Comment Letter I.

[236] MFDF Comment Letter.

[237] *See* SIFMA AMG Comment Letter.

[238] The final rule also requires a fund's derivatives risk manager to provide certain reports to the fund's board at a frequency determined by the board. Rule 18f–4(c)(3)(iii).

[239] Rule 18f–4(c)(1)(vi).

changes to reflect modifications to the final rule's relative VaR test.

We continue to believe that the periodic review of a fund's program and VaR calculation model is necessary to determine whether the fund is appropriately addressing its derivatives risks. A fund's derivatives risk manager, as a result of the review, could determine whether the fund should update its program, its VaR calculation model, or any designated reference portfolio.[240] The rule does not prescribe review procedures or incorporate specific developments that a derivatives risk manager must consider as part of its review. We believe a derivatives risk manager generally should implement periodic review procedures for evaluating regulatory, market-wide, and fund-specific developments affecting the fund's program so that it is well positioned to evaluate the program's effectiveness.

We believe that a fund should conduct this review on at least an annual basis, because derivatives and fund leverage risks, and the means by which funds evaluate such risks, can change. The rule requires at least an annual review so that there would be a recurring dialogue between a fund's derivatives risk manager and its board regarding the implementation of the program and its effectiveness. This frequency also mirrors the minimum period in which the fund's derivatives risk manager would be required to provide a written report on the effectiveness of the program to the board. A fund's derivatives risk manager could, however, determine that more frequent reviews are appropriate based on the fund's particular derivatives risks, the fund's policies and procedures implementing the program, market conditions, or other facts and circumstances.[241]

C. Board Oversight and Reporting

The final rule will require: (1) A fund's board of directors to approve the designation of the fund's derivatives risk manager; and (2) the derivatives risk manager to provide regular written reports to the board regarding the program's implementation and effectiveness, and analyzing exceedances of the fund's guidelines and the results of the fund's stress testing.[242] We are adopting these requirements with some modifications from the proposal, as we describe in more detail below.

The final rule's requirements regarding board oversight and reporting are designed to further facilitate the board's oversight of the fund's derivatives risk management. We believe that directors should understand the program and the derivatives risks it is designed to manage as well as participate in determining who should administer the program. They also should ask questions and seek relevant information regarding the adequacy of the program and the effectiveness of its implementation. Therefore, we believe that the board should inquire about material risks arising from the fund's derivatives transactions and follow up regarding the steps the fund has taken to address such risks and any change in those risks over time. To facilitate the board's oversight, the rule will require the fund's derivatives risk manager to provide reports to the board.

The Commission received many comments, as discussed throughout this section, regarding the role of the board in overseeing a fund's derivatives risk management program. In addition to the comments on the specific requirements of the rule regarding board approval of the derivatives risk manager and regarding board reports, the Commission received comments regarding the role of the board more broadly. Specifically, commenters requested that the Commission provide guidance reiterating that the board's role is one of oversight and that the board members may exercise their reasonable business judgment in overseeing a fund's program.[243] We believe the role of the board under the rule is one of general oversight, and consistent with that obligation, we expect that directors will exercise their reasonable business judgment in overseeing the program on behalf of the fund's investors.[244]

We continue to believe that the board should view oversight as an iterative process. Several commenters expressed concern over the use of the word ''iterative'' when describing the oversight role of the board.[245] These commenters suggested that this word implies that the Commission expects the board to act in a management capacity, similar to the derivatives risk manager. The use of the word ''iterative'' is not intended to imply that the board is responsible for the day-to-day management of the fund's derivatives risk, but is instead intended to clarify that the board's oversight role requires regular engagement with the derivatives risk management program rather than a one-time assessment. We continue to believe that the board's role should be an active one that involves inquiry into material risks arising from the fund's derivatives transactions and follow-up regarding the steps the fund has taken to address such risks, including as those risks may change over time. Effective board oversight depends on the board receiving sufficient information on a regular basis to remain abreast of the specific derivatives risks that the fund faces. Boards should request follow-up information when appropriate and take reasonable steps to see that matters identified are addressed. Whether a board requests follow-up information, however, will depend on the facts and circumstances. As one commenter noted, ''[d]epending on the circumstances, regular follow-up may or may not be necessary, as the reports provided to the board may already contain sufficient information, or the matter may have been resolved.'' [246]

A fund's board also will be responsible for overseeing a fund's compliance with rule 18f–4. Rule 38a–1 under the Investment Company Act requires a fund's board, including a majority of its independent directors, to approve policies and procedures reasonably designed to prevent violation of the federal securities laws by the fund and its service providers.[247] Rule 38a–

[240] The periodic review requirement applies to a fund's designated reference portfolio, rather than a designated reference index as proposed, because the final rule permits a fund to use either a designated index or its securities portfolio as the fund's reference portfolio for the relative VaR test, subject to conditions.

[241] *See also* rule 18f–4(c)(2)(iii)(A) (requiring, for a fund that is not in compliance with the applicable VaR test within five business days, the derivatives risk manager to report to the fund's board of directors and explain how and by when (*i.e.,* number of business days) the derivatives risk manager reasonably expects that the fund will come back into compliance).

[242] Rule 18f–4(c)(3).

[243] *See, e.g.,* Dechert Comment Letter I; Invesco Comment Letter; T. Rowe Price Comment Letter; MFDF Comment Letter; ICI Comment Letter. Commenters discussed the board's role under other of the Commission's rules—in particular, rule 22e–4 and rule 38a–1—in making observations and suggestions about the board's oversight role in the context of funds' derivatives risk management. *See* SIFMA AMG Comment Letter; BlackRock Comment Letter; Capital Group Comment Letter.

Commenters also requested that the Commission clarify that the board's role does not exceed standards under state law, standards in Release 10666, rule 22e–4, and rule 38a–1. *See* Dechert Comment Letter I; ICI Comment Letter; SIFMA AMG Comment Letter.

[244] *See* Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)], at section III.H.

[245] ICI Comment Letter; IDC Comment Letter; Capital Group Comment Letter.

[246] IDC Comment Letter.

[247] *See* rule 38a–1 under the Investment Company Act; Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (''Compliance Program Release'') (discussing the adoption and implementation of policies and procedures required under rule 38a–1).

1 provides for oversight of compliance by the fund's adviser and other service providers through which the fund conducts its activities. Rule 38a–1 would encompass a fund's compliance obligations with respect to rule 18f–4.

1. Board Approval of the Derivatives Risk Manager

The rule requires a fund's board, including a majority of directors who are not interested persons of the fund, to approve the designation of the fund's derivatives risk manager.[248] We are adopting this provision with one modification from the proposal, as discussed below.[249]

Some commenters expressed concern regarding the role of the board in selecting the derivatives risk manager. Several commenters stated that the fund's adviser—and not its board—should select the derivatives risk manager.[250] Similarly, some commenters stated that requiring the board to select the derivatives risk manager is a management function that should be outside the scope of board responsibilities.[251] Commenters stated that the selection process for approving a specific person or persons to serve as the derivatives risk manager would be unduly burdensome for the board.[252] On the other hand, one commenter stated that the proposed approval requirement was among several responsible measures in the proposal, but expressed concern that the proposal would not ensure appropriate independence of the derivatives risk manager.[253]

We continue to believe that requiring the board to designate the derivatives risk manager is important to establish the foundation for an effective relationship and line of communication between a fund's board and its derivatives risk manager.[254] While the derivatives risk manager is responsible for administering the fund's derivatives risk management program, we believe it is important that the board, in its oversight role, remains engaged with the program by designating a qualified derivatives risk manager who will have a direct reporting line to the board. We believe that a fund's board, in its oversight role, is well-positioned to consider a prospective derivatives risk manager based on all the facts and circumstances relevant to the fund in considering whether to approve the derivatives risk manager's designation, including the derivatives risks particular to the fund.

In response to commenters who suggested that the adviser to the fund is in the best position to evaluate a candidate, we agree that the adviser could play a role in putting forward derivatives risk manager candidates for the board's consideration.[255] The final rule requires that the board approve the designation of the fund's derivatives risk manager but does not preclude the adviser from participating in the selection process. We anticipate that boards generally would request that the adviser carry out due diligence on appropriate candidates and articulate the qualifications of the candidate(s) that the adviser puts forward to the board.[256] The adviser to the fund could, for example, nominate potential candidates, review resumes, conduct initial interviews, and articulate the adviser's view of the candidate. We acknowledge that the selection of the derivatives risk manager has attendant burdens, but nevertheless think it appropriate that the final rule require the board to exercise oversight by designating the derivatives risk manager.

Comments on the proposed requirement that the fund's board consider relevant experience in managing derivatives risk when selecting the derivatives risk manager were mixed. Some commenters expressed support for this proposed requirement.[257] In contrast, several commenters stated that the board should not be required to take into account the relevant experience of managing derivatives risk.[258] One commenter stated that if the board is responsible for selecting the derivatives risk manager, the board should have flexibility in determining what experience it believes is relevant.[259]

After considering comments, we are removing the specific requirement in the proposal that the fund's board ''tak[e] into account the derivatives risk manager's relevant experience regarding the management of derivatives risk'' when approving the designation of the derivatives risk manager. The definition of ''derivatives risk manager'' requires the person fulfilling the role to have ''relevant experience regarding the management of derivatives risk.''[260] We believe that a fund board's consideration of a candidate to serve as a derivatives risk manager necessarily would take into account the candidate's experience, among all other relevant factors, and that a specific requirement in the final rule requiring the board to take the candidate's experience into account is unnecessary.

2. Board Reporting

The rule will require the derivatives risk manager to provide a written report on the effectiveness of the program to the board at least annually and also to provide regular written reports at a frequency determined by the board.[261] This requirement is designed to facilitate the board's oversight role, including its role under rule 38a–1.[262] As discussed below, we are adopting these reporting obligations with some modifications from the proposal.

The Commission received many comments regarding the type and amount of information that is required to be submitted to boards under the board reporting obligations. Specifically, commenters stated their concern that the amount of information that the derivatives risk manager would submit to the board under the proposal may shift the board's role from one of oversight to day-to-day risk management.[263] Some commenters similarly stated their concern that the proposed rule suggests that board members should have a more substantive knowledge of derivatives risks than is reasonable to expect for board members serving in an oversight capacity.[264]

We agree with commenters that the board's role is distinct from that of the derivatives risk manager and is not one that requires the board to be involved in the day-to-day management of the fund. It is the derivatives risk manager, not the board, that is responsible for having

[248] Rule 18f–4(c)(3)(i).

[249] Proposed rule 18f–4(c)(5)(i).

[250] Dechert Comment Letter I; MFDF Comment Letter; T. Rowe Price Comment Letter; SIFMA AMG Comment Letter; ABA Comment Letter.

[251] IDC Comment Letter; T. Rowe Price Comment Letter.

[252] Dechert Comment Letter I; IDC Comment Letter.

[253] Better Markets Comment Letter.

[254] *Cf.* rules 22e–4 and 38a–1 under the Investment Company Act.

[255] MFDF Comment Letter; T. Rowe Price Comment Letter; *see also supra* section II.B.1 (discussing the selection of the derivatives risk manager).

[256] *See* J.P. Morgan Comment Letter; Dechert Comment Letter I; MFDF Comment Letter; ABA Comment Letter.

[257] J.P. Morgan Comment Letter; NYC Bar Comment Letter.

[258] Dechert Comment Letter I; Fidelity Comment Letter; ICI Comment Letter; IDC Comment Letter.

[259] MFDF Comment Letter. Some commenters also requested additional clarity about what experience would be considered ''relevant'' in the context of selecting a derivatives risk manager. *See supra* paragraph accompanying footnotes 157–158.

[260] Rule 18f–4(a).

[261] Rule 18f–4(c)(3)(ii) and (iii).

[262] *See* Compliance Program Release, *supra* footnote 247, at n.33 and accompanying text.

[263] Dechert Comment Letter I; T. Rowe Price Comment Letter; MFDF Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter; ABA Comment Letter.

[264] ICI Comment Letter; ProShares Comment Letter; ABA Comment Letter.

sufficient derivatives experience to administer the derivatives risk management program. The final rule does not place day-to-day responsibility for the fund's derivatives risk management on a fund's board. Board oversight should not, however, be a passive activity. We continue to believe that the board reporting requirements, discussed below, are important to facilitate the board's oversight role. In order for the board members to fulfil their oversight role—and in light of the fact that funds required to establish a program use derivatives more extensively—we believe that it is critically important for a board to be informed of certain derivatives risks faced by the fund. Consistent with that view, we believe that directors should understand the program and the derivatives risks it is designed to manage. They also should ask questions and seek relevant information regarding the adequacy of the program and the effectiveness of its implementation. The board reporting requirements are designed to equip board members with the information they need to provide effective oversight, including their oversight responsibilities under rule 38a–1.

Reporting on Program Implementation and Effectiveness

The rule will require a fund's derivatives risk manager to provide to the fund's board, on or before the implementation of the program and at least annually thereafter, a written report providing a representation that the program is reasonably designed to manage the fund's derivatives risks and to incorporate the required elements of the program.[265] The report must include the basis for the derivatives risk manager's representation along with such information as may be reasonably necessary to evaluate the adequacy of the fund's program and the effectiveness of its implementation. The representation may be based on the derivatives risk manager's reasonable belief after due inquiry. A derivatives risk manager, for example, could form its reasonable belief based on an assessment of the program and taking into account input from fund personnel, including the fund's portfolio management, or data that third parties provide. Additionally, the written report must include, as applicable, the fund's derivatives risk manager's basis for the approval of the designated reference portfolio (or any change in the designated reference portfolio) used under the relative VaR test; or an explanation of the basis for the derivatives risk manager's determination that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test such that the fund relied on the absolute VaR test instead.[266] These requirements are designed to provide a fund's board with information about the effectiveness and implementation of the program so that the board may appropriately exercise its oversight responsibilities, including its role under rule 38a–1. We are adopting these requirements substantially as proposed, with some modifications as discussed below.

Commenters generally supported the derivatives risk manager providing to the fund's board, on or before implementation of the program, and at least annually thereafter, an annual report regarding the program's design.[267] One commenter specifically supported the requirement that the derivatives risk manager determine whether the program is operating effectively.[268] Several commenters, however, suggested modifications to this proposed reporting requirement, expressing concern about the requirement for the derivatives risk manager to make affirmative representations regarding the program due to the burden this would impose.[269] For example, one commenter stated that the reporting requirement should be replaced by a written report, provided at least annually, that addresses operations, adequacy and effectiveness of implementation, and discloses any material changes to the program.[270]

We continue to believe that a derivatives risk manager's affirmative representation that the program is reasonably designed to manage the fund's derivatives risks, incorporating each of the program elements that rule 18f–4 requires, is appropriate to provide the board with the information they need to understand the effectiveness and content of the derivatives risk program. The final rule includes this requirement—rather than a requirement that the board approve the derivatives risk management program, for example—because we believe that the derivatives risk manager, rather than the board, is best positioned to make the determinations underlying the affirmative representations. Requiring the derivatives risk manager to include the information in a board report will also reinforce that the fund and its adviser are responsible for derivatives risk management while the board's responsibility is to oversee this activity.[271]

One commenter expressed concern regarding the requirement that the board report include ''such information as may be reasonably necessary to evaluate the adequacy of the fund's program and the effectiveness of its implementation.'' [272] The commenter supported the rule not requiring the board to make these specific findings and was concerned that this reporting requirement could imply a board obligation to make the findings. This reporting requirement applies to the content of the board reports and is designed to facilitate the board's oversight role, including its role under rule 38a–1. This requirement does not imply any obligation for a board to make any particular findings.

One commenter who supported the proposed requirement that the written report provide the basis for the derivatives risk manager's selection of the designated index also suggested that the board report include the basis for any change in the index.[273] We agree that the basis for a change in a designated reference portfolio that the fund uses in complying with the relative VaR test may be just as important to understanding the operation of the relative VaR test as the basis for a designated reference portfolio's initial approval.[274] Accordingly, in a clarifying change from the proposal, the derivatives risk manager will also be required to include in the report the basis for any change in the designated reference portfolio as well as the basis for the approval of a designated

[265] Rule 18f–4(c)(3)(ii).

[266] *See infra* section II.D.2.b.

[267] *See, e.g.,* J.P. Morgan Comment Letter; ICI Comment Letter; Invesco Comment Letter.

[268] MFDF Comment Letter.

[269] Dechert Comment Letter I; Invesco Comment Letter; T. Rowe Price Comment Letter; MFDF Comment Letter.

[270] Invesco Comment Letter.

[271] One commenter stated that the rule should not require or suggest through an affirmative representation obligation that the derivatives risk manager is certifying or guaranteeing the effectiveness of a fund's program to manage derivatives risks, even if subject to a reasonableness standard and based upon due inquiry. *See* Invesco Comment Letter. The rule does not require or suggest any such certification or guarantee.

[272] MFDF Comment Letter.

[273] Invesco Comment Letter; *see also infra* footnote 319 (discussing the use of the proposed term ''designated reference index'' and the final rule's definition of ''designated index,'' and stating that, for consistency with the final rule, we discuss comments received about the designated reference index as comments about the designated index).

[274] This could include either a change from one designated index to another, or a determination to change from using a designated index to using the fund's own securities portfolio in complying with the relative VaR test (or, vice versa, a change from using the fund's securities portfolio to using a designated index). *See infra* section II.D.2.b.

reference portfolio.[275] The derivatives risk manager's approval of a particular designated reference portfolio or approval of a change in that portfolio, or a determination that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, can affect the amount of leverage risk a fund may obtain under the final rule. We therefore believe it is important that a fund's board have sufficient information to oversee this aspect of the fund's derivatives risk management.

Regular Board Reporting

The rule requires a fund's derivatives risk manager to provide to the fund's board, at a frequency determined by the board, written reports analyzing exceedances of the fund's risk guidelines and the results of the fund's stress tests and backtesting.[276] These reports must include information reasonably necessary for the board to evaluate the fund's response to exceedances and the results of the fund's stress testing. We are adopting this provision with some modification from the proposal, as discussed below. Requiring the derivatives risk manager to provide information about how the fund performed relative to these measures and at a board-determined frequency is designed to provide the board with timely information to facilitate its oversight of the fund and the operation of the program.

The Commission received several comments expressing general support for the proposed requirement that the derivatives risk manager provide regular reports to the board.[277] Commenters expressed concerns, however, regarding both the frequency of board reporting and the detail required to be included in each report. Specifically, one commenter stated that the Commission's rules should require only an annual report and allow the board and the derivatives risk manager to determine the content and format of the report.[278]

We are adopting as proposed the requirement that the derivatives risk manager provide reports to the board at a frequency determined by the board. This aspect of the rule will provide the board with discretion in setting the frequency of reporting. We believe it is important that the board determines for itself how frequently it will receive these reports. This flexibility will permit boards to tailor their oversight to funds' particular facts and circumstances. We also understand that many fund advisers today provide regular reports to fund boards, often in connection with quarterly board meetings, regarding a fund's use of derivatives and their effects on a fund's portfolio, among other information.

Commenters expressed concern regarding the amount of detail that should be included in board reports, with many requesting clarification that the regular board reporting include summaries of guidelines exceedances, stress testing, and backtesting (as opposed to a greater degree of detail). For example, one commenter noted that receiving the results of stress testing and backtesting in summary form are ''critical for the operation of the rule.'' [279] Several commenters suggested the board reports provide executive summaries.[280] Commenters stated that executive summaries would ensure that boards are not overly inundated with details and technical determinations.[281] Some commenters specifically supported a rule that does not require every stress testing or backtesting exceedance be reported to the board, preferring the use of summaries instead.[282]

In a change from the proposal, and to clarify the scope of this reporting obligation in the rule in response to commenters' concerns, the rule we are adopting does not specify the board must receive a report of ''any'' exceedances of the risk guidelines.[283] This change is designed to clarify that the derivatives risk manager need not report every single exceedance to the board. Instead, the reports to the board must include an *analysis* of exceedances that occurred during the period covered by the report, as well as stress testing and backtesting conducted during the period. The written report reflecting this analysis could be in summary form, rather than an itemization of each exceedance, stress test, or backtest exception. As the Commission stated in the Proposing Release, and as clarified by our changes in the final rule, a simple listing of exceedances and stress testing and backtesting results without context, in contrast to an analysis of these matters, would provide less useful information for a fund's board and would not satisfy the requirement that the reports include such information as may be reasonably necessary for the board of directors to evaluate the fund's response to exceedances and the results of the fund's stress testing.

D. Limit on Fund Leverage Risk

Consistent with the proposal, the final rule will generally require funds relying on the rule when engaging in derivatives transactions to comply with a VaR-based limit on fund leverage risk.[284] This outer limit is based on a relative VaR test that compares the fund's VaR to the VaR of a ''designated reference portfolio.'' A fund can use an index that meets certain requirements or its own investments, excluding derivatives transactions, as its designated reference portfolio. If the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, the fund will be required to comply with an absolute VaR test.[285] A fund will satisfy the relative VaR test if its portfolio VaR does not exceed 200% of the VaR of its designated reference portfolio and will satisfy the absolute VaR test if its portfolio VaR does not exceed 20% of the value of the fund's net assets. The final rule also provides relative and absolute VaR limits of 250% and 25%, respectively, for closed-end funds that have issued to investors and have outstanding shares of a senior security that is a stock.[286] We discuss each aspect of the limit on fund leverage risk below.

1. Use of VaR

VaR is an estimate of an instrument's or portfolio's potential losses over a given time horizon and at a specified confidence level. VaR will not provide, and is not intended to provide, an estimate of an instrument's or portfolio's maximum loss amount. For example, if a fund's VaR calculated at a 99% confidence level was $100, this means

[275] The final rule also refers to a fund's designated reference portfolio, rather than its designated reference index as proposed, because the final rule permits a fund to use either a designated index or its securities portfolio as the fund's reference portfolio for the relative VaR test, subject to conditions.

[276] Rule 18f–4(c)(3)(iii).

[277] *See e.g.* J.P. Morgan Comment Letter; ICI Comment Letter; Invesco Comment Letter; MFDF Comment Letter.

[278] ICI Comment Letter.

[279] MFDF Comment Letter.

[280] Dechert Comment Letter I; T. Rowe Price Comment Letter; ICI Comment Letter; IDC Comment Letter; Capital Group Comment Letter.

[281] *See, e.g.,* ICI Comment Letter.

[282] J.P. Morgan Comment Letter; T. Rowe Price Comment Letter; ICI Comment Letter; IDC Comment Letter; Capital Group Comment Letter; Dechert Comment Letter I.

[283] *See* rule 18f–4(c)(3)(iii); *see also* proposed rule 18f–4(c)(5)(iii).

[284] *See* rule 18f–4(c)(2); *see also* proposed rule 18f–4(c)(2).

[285] The final rule provides an exception from the rule's VaR test for limited derivatives users. *See infra* section II.E. In a change from the proposal, the final rule does not provide an exception for funds that met the proposed sales practices rule's definition of a leveraged/inverse investment vehicle. *See infra* section II.F.

[286] In this release, we refer to shares of a class of senior security that is a stock as ''preferred stock.''

the fund's VaR model estimates that, 99% of the time, the fund would not be expected to lose more than $100. However, 1% of the time, the fund would be expected to lose more than $100, and VaR does not estimate the extent of this loss.

Many commenters expressed support for the use of VaR as the rule's means of providing an outside limit on fund leverage risk.[287] Commenters identified benefits of using VaR in the rule, including many of the benefits the Commission identified in the Proposing Release.[288] For example, commenters observed that VaR enables risk to be measured in a reasonably comparable and consistent manner across diverse types of instruments and provides an adequate overall indication of market risk.[289] One commenter highlighted VaR as an analytic metric with broad utilization across the financial services sector.[290] Others stated more generally that VaR is time tested and a familiar risk-analytics tool.[291]

The Commission recognized in the Proposing Release that VaR is not itself a leverage measure.[292] But a VaR test, and especially one that compares a fund's VaR to an unleveraged reference portfolio that reflects the markets or asset classes in which the fund invests, can be used to analyze whether a fund is using derivatives transactions to leverage the fund's portfolio, magnifying its potential for losses and significant payment obligations of fund assets to derivatives counterparties. At the same time, VaR tests can also be used to analyze whether a fund is using derivatives with effects other than leveraging the fund's portfolio that may be less likely to raise the concerns underlying section 18. For example, fixed-income funds use a range of derivatives instruments, including credit default swaps, interest rate swaps, swaptions, futures, and currency forwards. These funds often use these derivatives in part to seek to mitigate the risks associated with a fund's bond investments or to achieve particular risk targets, such as a specified duration. If a fund were using derivatives extensively, but had either a low VaR or a VaR that did not substantially exceed the VaR of an appropriate benchmark, this would indicate that the fund's derivatives were not substantially leveraging the fund's portfolio. One commenter similarly stated that VaR provides helpful information on whether a fund is using derivatives transactions to leverage its portfolio and can be used to analyze whether a fund is using derivatives for other purposes, like hedging its portfolio investments.[293]

While we believe there are significant benefits to using a VaR-based limit on fund leverage risk, we recognize, and the Commission discussed in the Proposing Release, risk literature critiques of VaR (especially since the 2007–2009 financial crisis).[294] Commenters highlighted concerns with one common critique of VaR: That it does not reflect the size of losses that may occur on the trading days during which the greatest losses occur—sometimes referred to as ''tail risks.''[295] A related critique is that VaR calculations may underestimate the risk of loss under stressed market conditions.[296] These critiques often arise in the context of discussing risk managers' use of additional risk tools to address VaR's shortcomings.

We continue to believe that tests based on VaR are appropriate means to limit fund leverage risk as part of rule 18f–4. As the Commission explained in the Proposing Release, the VaR tests in rule 18f–4 are designed to provide a metric that can help assess the extent to which a fund's derivatives transactions raise concerns underlying section 18, but we do not believe they should be the sole component of a derivatives risk management program.[297] We do not intend to encourage risk managers to over-rely on VaR as a stand-alone risk management tool.[298] Instead, the final rule requires a fund to establish risk guidelines and to stress test its portfolio as part of its derivatives risk management program in part because of concerns that VaR as a risk management tool may not adequately reflect tail risks. A fund that adopts a derivatives risk management program under the rule also will have to consider other risks that VaR does not capture (such as counterparty risk and liquidity risk) as part of its derivatives risk management program.[299] We believe that the final rule's derivatives risk management program provides an effective complement to the VaR tests and, in particular, that the stress testing component of the program will require funds to evaluate the ''tail risks'' that VaR by its nature does not capture. A fund's compliance with its VaR test would satisfy the final rule's outside limit on fund leverage risk but is not a substitute for an effective derivatives risk management program. A fund's derivatives risk management program is designed to complement the applicable VaR test as well as the fund's other risk management activities, such as compliance with rule 22e–4 for funds subject to that rule.

We also recognize that there are circumstances where VaR tests may potentially under- or overstate a

[287] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter; Fidelity Comment Letter; Comment Letter of Franklin Resources, Inc. (Apr. 23, 2020) (''Franklin Comment Letter''); J.P. Morgan Comment Letter; SIFMA AMG Comment Letter; Comment Letter of the Managed Funds Association and Alternative Investment Management Association (Apr. 30, 2020) (''MFA Comment Letter''); Comment Letter of Eaton Vance Corp. (May 1, 2020) (''Eaton Vance Comment Letter''); Putnam Comment Letter; Vanguard Comment Letter.

[288] *See* Proposing Release, *supra* footnote 1, at section II.D.1 for a discussion of the benefits of VaR in the context of proposed rule 18f–4.

[289] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter; J.P. Morgan Comment Letter.

[290] *See* Franklin Comment Letter.

[291] *See* Franklin Comment Letter; Vanguard Comment Letter; Chamber Comment Letter. As the Commission observed in the Proposing Release, VaR calculation tools are widely available, and many advisers that enter into derivatives transactions—and particularly those that would not qualify as limited derivatives users—already use risk management or portfolio management platforms that include VaR capability. *See* Proposing Release, *supra* footnote 1, at nn.180–181 and accompanying text.

[292] *See* Proposing Release, *supra* footnote 1, at section II.D.1.

[293] *See* ICI Comment Letter.

[294] *See* Proposing Release, *supra* footnote 1, at nn.182–187 and accompanying paragraph; Chris Downing, Ananth Madhavan, Alex Ulitsky & Ajit Singh, *Portfolio Construction and Tail Risk,* 42 The Journal of Portfolio Management 1, 85–102 (Fall 2015), *available at https://jpm.iijournals.com/content/42/1/85* (''for especially fat-tailed return distributions the VaR threshold value might appear to be low, but the actual amount of value at risk is high because VaR does not measure the mass of distribution beyond the threshold value'').

[295] *See, e.g.,* Better Markets Comment Letter; CFA Comment Letter; Proposing Release, *supra* footnote 1, at n.182 and accompanying text.

With respect to VaR, the ''tail'' refers to the observations in a probability distribution curve that are outside the specified confidence level. ''Tail risk'' describes the concern that losses outside the confidence level may be extreme.

[296] *See* Proposing Release, *supra* footnote 1, at n.183 and accompanying text.

[297] *See supra* section II.B.2.

[298] *See, e.g.,* James O'Brien & Pawel J. Szerszen, *An Evaluation of Bank VaR Measures for Market Risk During and Before the Financial Crisis,* Federal Reserve Board Staff Working Paper 2014–21 (Mar. 7, 2014), *available at https://www.federalreserve.gov/pubs/feds/2014/201421/201421pap.pdf* (''Criticism of banks' VaR measures became vociferous during the financial crisis as the banks' risk measures appeared to give little forewarning of the loss potential and the high frequency and level of realized losses during the crisis period.''); *see also* Pablo Triana, *VaR: The Number That Killed Us,* Futures Magazine (Dec. 1, 2010), *available at http://www.futuresmag.com/2010/11/30/var-number-killed-us* (stating that ''in mid-2007, the VaR of the big Wall Street firms was relatively quite low, reflecting the fact that the immediate past had been dominated by uninterrupted good times and negligible volatility'').

[299] One commenter similarly stated that the VaR tests will be particularly beneficial when used in conjunction with elements of the derivatives risk management program, including stress testing, backtesting, and risk guidelines. *See* BlackRock Comment Letter.

particular fund's leverage risk, which may be particularly restrictive for certain funds in idiosyncratic circumstances.[300] A fund that believes an alternative means of estimating and limiting its leverage risk would be more effective in accomplishing the Commission's stated goals in adopting the final rule given these idiosyncratic circumstances, including addressing the concerns underlying section 18, may raise such issues via the exemptive application process. The exemptive application process would allow the Commission to consider, for example, the details of the fund's derivatives risk management program; the particular circumstances under which the fund believes the final rule's VaR tests may under- or overstate the fund's leverage risk; and alternate means of appropriately limiting that leverage risk under such circumstances.

Several commenters suggested alternatives to the proposed VaR test in light of the fact that VaR does not measure ''tail'' risks. One commenter stated that using VaR as the means of limiting fund leverage risk may create incentives for fund managers to take excessive risks by engaging in derivatives strategies that are ''extremely risky under certain conditions but [the conditions are] highly unlikely to occur.'' [301] A few commenters suggested requiring funds to measure expected shortfall or stressed VaR, in addition to complying with the applicable proposed VaR-based tests, to address this incentive.[302] Although we are not adopting a requirement that funds use stressed VaR or expected shortfall, funds may incorporate these methodologies into their derivatives risk management programs. Stressed VaR refers to a VaR model that is calibrated to a period of market stress. A stressed VaR approach would address some of the VaR test critiques related to tail risk and underestimating expected losses during stressed conditions. Calibrating VaR to a period of market stress, however, can pose quantitative challenges by requiring funds to identify a stress period with a full set of risk factors for which historical data is available. We believe that the stress testing required as part of a fund's derivatives risk management program provides an effective means to analyze stressed market conditions without raising the quantitative challenges that would apply if the final rule were to require VaR tests that incorporate stressed VaR calculations that the fund conducts each trading day.

Expected shortfall analysis is similar to VaR, but accounts for tail risk by taking the average of the potential losses beyond the specified confidence level. For example, if a fund's VaR at a 99% confidence level is $100, the fund's expected shortfall would be the average of the potential losses in the 1% ''tail,'' which are the losses that exceed $100. Because there are fewer observations in the tail, however, there is an inherent difficulty in estimating the distribution of larger losses. As a result, expected shortfall analysis generally is more sensitive to extreme outlier losses than VaR calculations because expected shortfall is based on an average of a small number of observations that are in the tail. This heightened sensitivity could be disruptive to a fund's portfolio management in the context of the final rule because it could result in large changes in a fund's expected shortfall as outlier losses enter and exit the observations that are in the tail or that are used to model the tail's distribution. For all of these reasons, we are adopting an outside limit on fund leverage risk using VaR, which is commonly used and does not present the same quantitative challenges associated with stressed VaR and expected shortfall, complemented by elements in the final rule's derivatives risk management program requirement designed to address VaR's limitations.

In addition to concerns about tail risks, one commenter expressed support for limiting fund leverage risk by adopting an exposure-based limit that tracks the approach proposed by the Commission in 2015.[303] This approach would limit the amount of a fund's derivatives use based on the derivatives' gross notional amounts. A limitation based on gross notional amounts would not differentiate between derivatives transactions that have the same notional amount, but whose underlying reference assets differ and entail potentially very different risks. A fund could have a high amount of gross notional exposure without a commensurately high level of risk. Many commenters opposed using a fund's gross notional amounts as a means of providing an outside limit on fund leverage risk.[304]

After considering comments, we continue to believe that a VaR-based approach is a better means of limiting fund leverage risk because, unlike notional amounts which do not measure risk or leverage, VaR enables risk to be measured in a reasonably comparable and consistent manner, as well as other benefits highlighted by the Commission and many commenters discussed above. We believe that the risk-based approach in the final rule, which relies on VaR, stress testing, and overall risk management, effectively will address concerns about fund leverage risk underlying section 18, while also allowing funds to continue to use derivatives for a variety of purposes. We recognize that an exposure-based approach can be useful, and that it can be a more straightforward calculation. The final rule includes such an approach as means of identifying limited derivatives users as discussed in section II.E below.

In addition and as proposed, we are not adopting a general asset segregation requirement to complement the rule's VaR-based limit on fund leverage risk.[305] The Commission and staff have historically taken the position that a fund may appropriately manage risks that section 18 is designed to address if the fund ''covers'' its obligations in connection with various transactions by maintaining ''segregated accounts.'' [306] Two commenters suggested that we add an asset segregation requirement to the final rule as a means of providing: (1) An additional limit on fund leverage risk with respect to a fund's use of derivatives transactions; and (2) a specific requirement that funds have adequate assets to cover derivatives-related obligations.[307] Many commenters, however, did not support an additional asset segregation requirement, and several of these commenters stated that an asset segregation regime may not be an effective means of addressing undue speculation concerns.[308] For example, one commenter stated that, under the current asset segregation approach, a fund may obtain ''a significant degree of

[300] *See, e.g.,* Gary Strumeyer, The Capital Markets: Evolution of the Financial Ecosystem (2017), at 100.

[301] *See* CFA Comment Letter.

[302] *See* Better Markets Comment Letter; CFA Comment Letter; *see also infra* paragraphs between text accompanying footnotes 300 and 303 (discussing expected shortfall and stressed VaR).

[303] *See* CFA Comment Letter; *see also* 2015 Proposing Release, *supra* footnote 1.

[304] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; T. Rowe Price Comment Letter; Capital Group Comment Letter; AQR Comment Letter I.

[305] *See infra* sections II.H, II.I (discussing specific asset segregation comments received relating to reverse repurchase agreements and unfunded commitment agreements).

[306] *See supra* section I.B.2; *see also* Proposing Release, *supra* footnote 1, at section II.F. The Commission included an asset segregation requirement in the 2015 proposal. *See* 2015 Proposing Release, *supra* footnote 1, at section III.C.

[307] *See* Better Markets Comment Letter; CFA Comment Letter.

[308] *See, e.g.,* AQR Comment Letter I; J.P. Morgan Comment Letter; Invesco Comment Letter; PIMCO Comment Letter.

leverage.'' [309] Another commenter stated that disparate asset segregation practices may create potential adverse results and would not require funds to ''holistically assess and manage the several risks associated with derivatives transactions, including market and counterparty risks.'' [310] One commenter stated that rather than an asset segregation requirement, a formalized risk management program is ''foundational to any effective regulation'' and ''the key to curbing excessive borrowing and undue speculation.'' [311]

After considering comments, we continue to believe that a general asset segregation requirement is not necessary in light of the final rule's requirements, including the requirements that funds must establish derivatives risk management programs and comply with the VaR-based limit on fund leverage risk. A fund relying on rule 18f–4 will be required to adopt and implement a written derivatives risk management program that, among other things, will require the fund to: Identify and assess its derivatives risks; put in place guidelines to manage these risks; stress test the fund's portfolio at least weekly; and escalate material risks to the fund's portfolio managers and, as appropriate, the board of directors.[312] These requirements are designed to require a fund to manage all of the risks associated with its derivatives transactions, including the risk that a fund may be required to sell its investments to generate cash to pay derivatives counterparties. Moreover, a fund's stress testing must specifically take into account the fund's payments to derivatives counterparties, and the rule's VaR-based limit on leverage risk is designed to limit a fund's leverage risk and therefore the potential for payments to derivatives counterparties.

2. Relative VaR Test

The relative VaR test will require a fund to calculate the VaR of the fund's portfolio and compare it to the VaR of a ''designated reference portfolio.'' [313] We are adopting the relative VaR test as proposed with certain modifications discussed below, including the modification to permit a fund to use as its reference portfolio for the VaR test either an index that meets certain requirements (a ''designated index'') or the fund's own investments, excluding derivatives transactions (the fund's ''securities portfolio'').[314] A fund's designated reference portfolio is designed to create a baseline VaR that functions as the VaR of a fund's unleveraged portfolio. To the extent a fund entered into derivatives to leverage its portfolio, the relative VaR test is designed to identify this leveraging effect. If a fund is using derivatives and its VaR exceeds that of the designated reference portfolio, this difference may be attributable to leverage risk.

a. Relative VaR as the Default VaR Test

The final rule, consistent with the proposal, uses the relative VaR test as the default test. Specifically, the final rule requires a fund to comply with the relative VaR test unless the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, taking into account the fund's investments, investment objectives, and strategy.[315] A fund that does not apply the relative VaR test must comply with the absolute VaR test.[316]

Some commenters recommended that the final rule not provide a relative VaR test as the default means of limiting fund leverage risk and instead permit a fund to choose to comply with either the relative VaR test or the absolute VaR test.[317] Some of these commenters were concerned that a relative VaR test default would create ambiguity about the circumstances under which a fund appropriately could use the absolute VaR test.[318] For example, some commenters stated that the proposal is unclear on what it means for a derivatives risk manager to be ''unable to identify'' an appropriate designated index, which could create compliance challenges or differing regulatory determinations for different funds.[319] Some commenters similarly were concerned that this aspect of the proposed rule would raise questions for derivatives risk managers about their process of searching for potential indexes (*e.g.,* the extent to which the derivatives risk manager would need to search for potentially appropriate indexes before determining that the fund would rely on the absolute VaR test).[320] Some commenters stated that either the relative or the absolute VaR tests would protect investors.[321] Other commenters did not object to the proposed rule's relative VaR test default but urged that the Commission provide additional clarity regarding the kinds of funds that appropriately would rely on the absolute VaR test under the rule.[322] For example, commenters identified various fund strategies for which they believed the absolute VaR test should be appropriate under the final rule, including market-neutral funds, multi-alternative funds/non-correlated strategy funds, long-short funds, managed futures funds, and funds that invest in unique asset classes that may not have a broad-based index.[323]

After considering comments, we are adopting a relative VaR test as the default means of limiting fund leverage risk because we believe it resembles the way that section 18 limits a fund's leverage risk. Some commenters disagreed with this assertion in the Proposing Release because, for example, VaR measures risk—including non-leverage-related variables—while section 18 limits the amount of a fund's borrowings.[324] We recognize that a relative VaR test differs from the asset coverage requirements in section 18. Section 18, however, limits the extent to which a fund can potentially increase its market exposure through leveraging by issuing senior securities, but it does not directly limit a fund's level of risk or volatility. For example, a fund that invests in less-volatile securities and borrows the maximum amount permitted by section 18 and uses the

[309] *See* J.P. Morgan Comment Letter.

[310] *See* Invesco Comment Letter; *see also* PIMCO Comment Letter. The Commission similarly observed in the Proposing Release that funds' disparate practices under the current approach could create an un-level competitive landscape and make it difficult for funds and Commission staff to evaluate funds' compliance with section 18. *See* Proposing Release, *supra* footnote 1, at section I.B.3. We continue to make these observations in this release. *See supra* footnote 7 and accompanying text.

[311] *See* AQR Comment Letter I.

[312] Rule 18f–4(c)(1). Funds that rely on the limited derivatives user exception similarly would be required to manage the risks associated with their more limited use of derivatives. *See infra* section II.E.

[313] *See* rule 18f–4(a) (defining the term ''relative VaR test'').

[314] See rule 18f 4(a) (defining the term ''relative VaR test,'' ''designated reference portfolio,'' and ''securities portfolio'').

[315] *See* rule 18f–4(c)(2).

[316] *See id.*

[317] *See, e.g.,* AQR Comment Letter I; MFA Comment Letter; BlackRock Comment Letter; Vanguard Comment Letter.

[318] *See, e.g.,* AQR Comment Letter I; NYC Bar Comment Letter; PIMCO Comment Letter.

[319] *See, e.g.,* Putnam Comment Letter; PIMCO Comment Letter; Dechert Comment Letter I.

As discussed in section II.D.2.b.i below, we are renaming the proposed term ''designated reference index'' as ''designated index'' in the final rule. For consistency with the final rule, we discuss comments received about the designated reference index as comments about the designated index.

[320] *See* Dechert Comment Letter I; ICI Comment Letter; NYC Bar Comment Letter.

[321] *See* Dechert Comment Letter I; PIMCO Comment Letter.

[322] *See, e.g.,* ICI Comment Letter; J.P. Morgan Comment Letter.

[323] *See, e.g.,* ICI Comment Letter; J.P. Morgan Comment Letter; Invesco Comment Letter.

[324] *See, e.g.,* Dechert Comment Letter I; PIMCO Comment Letter; MFA Comment Letter.

borrowings to leverage the fund's portfolio may not be as volatile as a completely unleveraged fund that invests in more-volatile securities. In other words, section 18, like the relative VaR test, limits a fund's potential leverage on a relative rather than absolute basis. We designed the relative VaR test likewise to limit the extent to which a fund increases its market risk by leveraging its portfolio through derivatives, while not restricting a fund's ability to use derivatives for other purposes. For example, if a derivatives transaction reduces (or does not substantially increase) a fund's VaR relative to the VaR of the designated reference portfolio, the transaction would not be restricted by the relative VaR test.

We believe that allowing a fund to use the absolute VaR test may be inconsistent with investors' expectations where there is an appropriate reference portfolio for purposes of the relative VaR test. For example, a fund that invests in short-term fixed-income securities would have a relatively low level of volatility. The fund's investors could reasonably expect that the fund might exhibit a degree of volatility that is broadly consistent with the volatility of the markets or asset classes in which the fund invests, as represented by the fund's designated reference portfolio. This fund's designated reference portfolio would be composed of short-term fixed income securities, and could, for example, have a VaR of 4%. If the fund were permitted to rely on the absolute VaR test, however, the fund could substantially leverage its portfolio five times its designated reference portfolio's VaR to achieve a level of volatility that substantially exceeds the volatility associated with short-term fixed income securities. Although commenters urged that a fund could address investor expectation concerns regarding a fund's leverage risk through disclosure,[325] section 18 limits a fund's ability to obtain leverage through the issuance of senior securities and operates independently of a fund's disclosure. Investors therefore may reasonably expect that a fund will not be highly leveraged. The fixed-income fund in this example, in contrast, would be highly leveraged and the fund's disclosing that risk would not address the leverage risks that section 18 addresses or that the VaR test is designed to limit.

We recognize, however, that the proposed rule's reference to a derivatives risk manager being unable ''to identify'' a designated index that is appropriate for the fund raised questions about the diligence a derivatives risk manager was expected to undertake in considering potential indexes.[326] As noted above, the final rule requires a fund to comply with the relative VaR test unless the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, taking into account the fund's investments, investment objectives, and strategy. This modification from the proposal is designed to make clear that this provision involves a derivatives risk manager's determination after reasonable inquiry and analysis regarding the feasibility of applying a relative VaR test to a fund and the appropriate reference portfolio for that purpose. We believe the final rule provides greater clarity on this point than the proposed rule's reference to an index that is ''appropriate'' for the fund.

We believe that the modification also should address the concern expressed by a commenter that the proposed provision could have created confusion concerning ''whether a derivatives risk manager must in all cases undertake an analysis of how a designated index might work for a fund even where that derivatives risk manager clearly knows that absolute VaR is the most appropriate test.'' [327] For example, some funds may make frequent changes to how they allocate their assets across a varying set of markets and asset classes, where a different, appropriate unleveraged index might be available for each allocation but the appropriate unleveraged index would change frequently. Switching the fund's designated index frequently could be impractical and support a determination that a designated index would not provide an appropriate reference portfolio for purposes of the relative VaR test. Whether the fund's securities portfolio would provide an appropriate reference portfolio would depend on the facts and circumstances and could change from time to time. For example, a fund obtaining its investment exposure through both cash-market investments and derivatives transactions may find that, by excluding its derivative transactions, the fund's securities portfolio does not reflect the overall markets or asset classes in which the fund invests both directly and indirectly through derivatives transactions. The fund is subject to the absolute VaR test if the fund's derivatives risk manager reasonably determines that neither a designated index nor the fund's securities portfolio would provide an appropriate reference portfolio for purposes of the relative VaR test, taking into account the fund's investments, investment objectives, and strategy.

As another example, the derivatives risk manager for a long/short or market neutral fund may determine that, although an index is available that reflects the markets or asset classes in which the fund invests, the funds' strategies do not involve the kind of risk that is associated with the market risk of the index, and the index therefore does not provide an appropriate reference portfolio for purposes of the relative VaR test. As in the prior example, the fund's securities portfolio may not reflect the overall markets or asset classes in which the fund invests or involve the kind of market risk associated with the fund's strategy. The fund, for example, may obtain its long exposure through cash-market investments in securities and its short exposure through derivatives transactions.[328] A final example, which the Commission discussed in the proposal, is that some multi-strategy funds manage their portfolios based on target volatilities but implement a variety of investment strategies, making it difficult to identify a single index (even a blended index) that would be appropriate.[329] The fund's securities portfolio also may not reflect the markets or asset classes in which the fund invests if, for example, the fund pursues certain strategies through investments in derivatives transactions and others through cash-market investments in securities. As some commenters noted, a variety of factors may bear on whether a designated reference portfolio would be appropriate for purposes of the relative VaR test, including a fund's investment strategy.[330]

[325] *See, e.g.,* Dechert Comment Letter I; PIMCO Comment Letter.

[326] *See, e.g.,* Dechert Comment Letter I; ICI Comment Letter; SIFMA AMG Comment Letter; T. Rowe Price Comment Letter.

[327] *See* AQR Comment Letter I.

[328] The fund in this example also could obtain both its long and short exposure through derivatives transactions, with its securities portfolio consisting primarily of cash and cash equivalents. As we observed in the Proposing Release, this would not provide an appropriate comparison for a relative VaR test because the VaR of the cash and cash equivalents would be very low and would not provide a reference level of risk associated with the fund's strategy.

[329] *See* Proposing Release, *supra* footnote 1, at section II.D.3.

[330] *See, e.g.,* J.P. Morgan Comment Letter (including factors such as ''fund composition by

Continued

b. Designated Reference Portfolio

The final rule's relative VaR test compares the fund's VaR to the VaR of a designated reference portfolio. Under the rule, a designated reference portfolio is either a designated index or the fund's securities portfolio, which we discuss in turn below.

i. Designated Index

We are adopting the definition of a ''designated index'' with certain modifications from the proposed definition of a ''designated reference index'' discussed below. We are renaming the proposed definition to ''designated index'' to differentiate it more clearly from the final rule's definition of a ''designated reference portfolio.'' The final rule will define a ''designated index'' as an unleveraged index that is approved by the derivatives risk manager for purposes of the relative VaR test, and that reflects the markets or asset classes in which the fund invests.[331] The definition also will require that the designated index not be an index that is administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, unless the index is widely recognized and used (a ''prohibited index'').[332] In a change from the proposal, the designated index is not required to be an ''appropriate broad-based securities market index'' or an ''additional index'' as defined in Item 27 of Form N–1A or Item 24 of Form N–2.[333] We are making this change in light of the fact that the final rule will not require a fund to disclose its designated index in the annual report, together with a presentation of the fund's performance relative to the designated index.[334] We discuss each of the elements of the final definition of the term ''designated index'' below.

An Unleveraged Index

As proposed, a fund's designated index must be unleveraged. This requirement is designed to provide an appropriate baseline against which to measure a fund's portfolio VaR for purposes of assessing the fund's leverage risk. Conducting a VaR test using a designated index that itself is leveraged would distort the leverage-limiting purpose of the VaR comparison by inflating the volatility of the index that serves as the reference portfolio for the relative VaR test. For example, an equity fund might select as its designated index an index that tracks a basket of large-cap U.S. listed equity securities such as the S&P 500. But the fund could not select an index that is leveraged, such as an index that tracks 200% of the performance of the S&P 500.

A few commenters requested clarification regarding when an index would be ''leveraged.''[335] These commenters urged that an index should be considered leveraged if it seeks to provide a multiple of returns, but not solely because it includes derivatives instruments. Commenters identified certain commodity indexes and currency-hedged equity indexes as examples of indexes that commenters believed were unleveraged, notwithstanding that the indexes included derivatives instruments.[336] We agree that whether a particular index is ''leveraged'' would depend on the economic characteristics of the index's constituents, and not just on whether some or all of the constituents are derivatives. An index would be leveraged if, for example, the derivatives included in the index multiply the returns of the index or index constituents, as suggested by these commenters.

Reflects the Markets or Asset Classes in Which the Fund Invests

As the Commission discussed in the proposal, the requirement that the designated index reflect the markets or asset classes in which the fund invests is designed to provide an appropriate baseline for the relative VaR test.[337] A few commenters raised concerns about scenarios in which a fund may invest in markets and asset classes that are reflected in an index, but the index would not provide an appropriate point of comparison for a relative VaR test because it did not reflect the fund's investment strategy.[338] These commenters therefore suggested that the Commission revise the definition to reference the fund's investment strategy, either in lieu of or in addition to the markets or asset classes in which the fund invests.

We have not made this suggested modification because we believe that the concerns raised by commenters are addressed by the modifications discussed above concerning the derivatives risk manager's reasonable determination that a designated index would not provide an appropriate reference portfolio for purposes of the relative VaR test, which includes taking into account the fund's investment strategy. As discussed above in the context of an example involving a long/short or market neutral fund, a fund's derivatives risk manager may determine that, although an index is available that reflects the markets or asset classes in which the fund invests, the funds' strategies do not involve the kind of risk that is associated with the market risk of the index, and the index therefore does not provide an appropriate reference portfolio for purposes of the relative VaR test. We believe this modification clarifies that a fund's investment strategy is relevant even if an index reflects the markets or asset classes in which the fund invests.

Prohibited Indexes

We are adopting, as proposed, the requirement that a fund's designated index is not a prohibited index. Accordingly, unless it is widely recognized and used, the designated index must not be an index administered by an organization that is an affiliated person of the fund, its investment adviser, or its principal underwriter, or created at the request of the fund or its investment adviser.[339]

security selection, asset class, region, duration or market capitalization, consistency of investment approach over time, internal or disclosed constraints, and ability to materially deviate from its primary investment strategy''); Putnam Comment Letter (including factors such as ''differences in constituents and risk profiles'' between the fund's portfolio and benchmark indexes).

[331] *See* rule 18f–4(a) (defining the term ''designated index''). Under the final rule, a designated index is an index ''approved,'' rather than ''selected,'' by the derivatives risk manager as proposed. As one commenter observed in recommending this modification, advisory personnel may recommend an index to the derivatives risk manager based on their market expertise and knowledge of the fund's investment strategy and seek the derivatives risk manager's approval. *See* J.P. Morgan Comment Letter.

[332] Furthermore, for a blended index, none of the indexes that compose the blended index may be administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, unless the index is widely recognized and used. *See* rule 18f–4(a).

[333] *See* rule 18f–4(a); proposed rule 18f–4(a); *see also* Instructions 5 and 6 to Item 27(b)(7)(ii) of Form N–1A (discussing the terms ''appropriate broad-based securities market index'' and ''additional index''); Instruction 4 to Item 24 of Form N–2 (discussing the terms ''appropriate broad-based securities market index'' and ''additional index'').

[334] *See* rule 18f–4(c)(2)(iv).

[335] *See, e.g.,* BlackRock Comment Letter; Invesco Comment Letter; PIMCO Comment Letter.

[336] *See id.*

[337] *See* Proposing Release, *supra* footnote 1, at section II.D.2.

[338] *See* Franklin Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter.

[339] *See* rule 18f–4(a); *see also* proposed rule 18f–4(a). This ''widely recognized and used'' standard has historically been used to permit a fund to employ affiliated-administered indexes for disclosure purposes, when the use of such indexes otherwise would not be permitted. *See* Instructions 5 and 6 to Item 27(b)(7)(ii) of Form N–1A and Instruction 4 to Item 24 of Form N–2 (discussing the terms ''appropriate broad-based securities market index'' and ''additional index'').

This provision is designed to prevent an actively managed fund from using an index for the purpose of obtaining additional fund leverage risk. In a change from the proposal discussed further below, notwithstanding this requirement, a fund with the investment objective to track the performance (including a leveraged multiple or inverse multiple) of an unleveraged index must use the unleveraged index it is tracking as its designated reference portfolio.[340]

A few commenters suggested that we allow funds to use indexes that would be prohibited by the proposed provision.[341] One commenter suggested that the rule permit an unaffiliated index created at the request of the fund or its investment adviser to be a designated index on the basis that the index provider, in its sole discretion, determines the composition of the index, the rebalance protocols of the index, the weightings of the securities and other instruments in the index, and any updates to the methodology.[342] Similarly, another commenter stated that the proposed prohibited indexes need not present a conflict in the management of the index, as index providers develop and maintain the index methodology independently as their own intellectual property.[343] This commenter suggested the final rule could require the proposed prohibited indexes to comply with principles developed by the International Organization of Securities Commissions and that an index administrator could disclose its policies and procedures with respect to index design and disclose any material conflicts of interest. Another commenter raised concerns that if prohibited indexes are excluded under the rule, a fund may be forced to use a more ''broad-based'' index that does not closely mirror the fund's investment program.[344] This in turn could result in the relative VaR test failing to properly measure the contribution of derivatives to that fund's overall investment exposure, making the VaR test inappropriately restrictive or permissive.[345] On the other hand, one commenter stated that prohibited indexes do not solve this concern because of the administrative and cost burdens associated with bespoke indexes, including index creation, maintenance, and oversight.[346]

The final rule provides flexibility for actively managed funds in identifying designated indexes. As proposed, it permits a fund to use a blended index as its designated index, provided that each constituent index meets the rule's requirements.[347] This provision is designed to provide a fund flexibility to blend indexes to create a designated index that is more closely tailored to the fund's investment program. Solely for the purpose of complying with the relative VaR test, we would not view a designated index blended by the fund's investment adviser as a prohibited index if each of the constituent indexes meets the rule's requirements for a designated index.[348] The final rule also seeks to address potential differences in the composition of a designated index and a fund's portfolio by raising the level of the relative VaR test, as discussed in more detail below. The final rule, with these modifications, is designed to provide funds flexibility in selecting a designated index, while making it less likely that indexes permissible under the final rule will be designed with the intent of permitting a fund to incur additional leverage-related risk.

For all of these reasons, we are not modifying the proposed rule to permit funds to use the prohibited indexes suggested by some commenters. Although commenters suggested additional restrictions discussed above to attempt to address concerns regarding the potential for funds to obtain additional fund leverage risk inconsistent with the rule, we believe that the final rule provides sufficient flexibility for funds to identify appropriate designated indexes without introducing the ''gaming'' and oversight concerns associated with prohibited indexes.[349]

In a change from the proposal, the final rule provides that, if the fund's investment objective is to track the performance (including a leverage multiple or inverse multiple) of an unleveraged index, the fund must use that index as its designated reference portfolio, even if the index otherwise would be a prohibited index that would not be permitted under the rule.[350] Although the limitations on prohibited indexes generally are designed to address concerns about indexes created for the purpose of permitting a fund to incur additional leverage-related risks, these ''gaming'' concerns are not present where the fund's investment objective is to track an unleveraged index. We also agree with the commenters who observed that, where a fund tracks an index, that index will provide the most appropriate reference portfolio for a relative VaR test, regardless of whether the index would otherwise be an impermissible prohibited index under the rule.[351]

Proposed Index Disclosure Requirement in the Fund's Annual Report

In a change from the proposal, the final rule will not require that a fund publicly disclose the designated index in the fund's annual report.[352] The proposed rule would have required an open-end fund and a registered closed-end fund to disclose the fund's designated index in the fund's annual report as the fund's ''appropriate broad-based securities market index'' or an

[340] In this release we refer to funds that do not have the investment objective to track the performance (including a leveraged multiple or inverse multiple) of an unleveraged index as ''actively managed.''

[341] *See, e.g.,* BlackRock Comment Letter; Morningstar Comment Letter; Nuveen Comment Letter.

[342] *See* BlackRock Comment Letter.

[343] *See* Morningstar Comment Letter.

[344] *See* Nuveen Comment Letter.

[345] *Id.*

[346] *See* Comment Letter of Dechert LLP (July 6, 2020) (''Dechert Comment Letter III'').

[347] *See* rule 18f–4(a); proposed rule 18f–4(a). Under the rule, the composition of a blended index is limited to indexes and the rule does not permit a fund to blend one or more indexes and its securities portfolio.

[348] A few commenters sought clarification regarding indexes blended by a fund's adviser. *See, e.g.,* BlackRock Comment Letter; Fidelity Comment Letter; PIMCO Comment Letter. One commenter also sought guidance regarding the circumstances under which a fund could determine to change the composition of a blended index. *See* PIMCO Comment Letter. The final rule does not limit a fund's ability to change its designated index, including a blended index. Any designated index used by a fund, however, is subject to the requirements in the final rule and related reporting requirements. For example, the derivatives risk manager as part of its periodic review of the program will evaluate the appropriateness of the designated index, and if the derivatives risk manager approves a different designated index, it must report the basis for the change and approval of the new designated index in its written report to the board.

[349] One of the commenters suggesting additional restrictions raised the concern that not allowing funds to use a prohibited index unless it is widely recognized and used ''could entrench incumbents, further concentrating monopoly power in the index business, and prevent funds from finding an appropriate derivatives reference index.'' Morningstar Comment Letter. This requirement is not intended to favor incumbents and the ''widely recognized'' qualifier is derived from current disclosure requirements. *See supra* footnote 339. The ''widely recognized'' qualifier does not apply to indexes generally under the final rule. That qualifier only applies if the index is administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, in light of the potential gaming concerns discussed above. In addition, as discussed below, an index-tracking fund will use its index as the fund's designated index, even if that index otherwise would be a prohibited index.

[350] *See* rule 18f–4(a) (defining the term ''designated reference portfolio''); proposed rule 18f–4(a).

[351] *See, e.g.,* BlackRock Comment Letter; Dechert Comment Letter I; ICI Comment Letter.

[352] *See* rule 18f–4(a); proposed rule 18f–4(a); proposed rule 18f–4(c)(2)(iv).

''additional index'' in the context of the fund's performance disclosure.[353] The proposed rule similarly would have required a BDC to disclose its designated index in its annual report filed on Form 10–K. The Commission proposed this requirement to promote the fund's selection of an appropriate index that reflects the fund's portfolio risks and its investor expectations.

After further consideration, we are not adopting this requirement. Disclosing the fund's designated index in the fund's annual report could make the annual report disclosure less effective in serving its primary purpose of showing the investor how his or her fund performed relative to the market. This would not be consistent with our goal of promoting concise fund disclosure to highlight key information to investors, as reflected in the Commission's recent proposal to the disclosure framework for open-end funds.[354] In addition, no commenter suggested that disclosing a fund's designated index would be effective in promoting the selection of appropriate indexes.[355] Moreover, to the extent scrutiny of a fund's performance relative to its designated index would serve this purpose, a fund's designated index will remain publicly available on Form N–PORT. Financial professionals, including research analysts, can still consider and compare a fund's performance with the performance of its designated index and in that way provide a secondary ''check'' on funds' designated indexes.

We also believe that the final rule includes appropriate incentives to promote the fund's selection of an appropriate index that reflects the fund's portfolio risks and its investors' expectations. First, the rule requires the derivatives risk manager to approve the designated index and to review it periodically. Second, the board of directors will receive a written report providing the derivatives risk manager's basis for approving the fund's designated index or a change to that index. Third, the fund will disclose its designated index to the Commission on Form N–PORT, which will be publicly available for the third month of each fund's quarter.

ii. Securities Portfolio

In a change from the proposal, an actively managed fund can use its securities portfolio as the reference portfolio for the relative VaR test. A fund's securities portfolio, as defined in the final rule, is the fund's portfolio of securities and other investments, excluding any derivatives transactions, subject to certain additional requirements discussed below. This provision is limited to actively managed funds because, as discussed above, an index-tracking fund must use the index it tracks as its designated reference portfolio.

In the Proposing Release the Commission requested comment on whether to permit funds to compare their VaRs to their ''securities VaR,'' that is, the VaR of the fund's portfolio of securities and other investments, but excluding any derivatives transactions.[356] This is similar to an approach the Commission proposed in 2015.[357] In not proposing this approach in 2019, the Commission stated that it would not be appropriate for all funds, identifying in particular funds that invest extensively in derivatives and hold primarily cash and cash equivalents and derivatives.

One commenter urged the Commission to adopt this approach as an option that funds could use instead of a relative VaR test that requires a comparison using a designated index.[358] The commenter recommended that a fund compute the VaR of its actual portfolio of securities and other investments, but excluding any derivatives transactions, consistent with the Commission's request for comment. The commenter stated that this approach would help to address instances where the fund's portfolio differed from its designated index, with the fund's own investments serving as a better representation of the fund's unleveraged portfolio for purposes of the relative VaR test. Similar to provisions applicable to the designated index approach, the commenter recommended a fund's use of its securities portfolio be subject to formalized procedures. For example, the commenter suggested that a fund's use of a securities portfolio (or designated index) would be addressed in the fund's derivatives risk management program, which requires the derivatives risk manager to periodically review—and report to the board regarding—a fund's designated reference portfolio. Other commenters, although not recommending this approach specifically, identified challenges funds could face where the fund's VaR deviates from the VaR of the fund's benchmark index due to security selection rather than leveraging.[359]

After considering these comments, we have determined to permit actively managed funds to use their ''securities portfolio'' for purposes of the relative VaR test. A fund's securities portfolio will be the fund's portfolio of securities and other investments, excluding any derivatives transactions. Excluding the fund's derivatives transactions is designed to provide an unleveraged reference portfolio, akin to a designated index, to measure potential leverage risk introduced by the fund's derivatives transactions. The final rule also provides that the securities portfolio is approved by the derivatives risk manager for purposes of the relative VaR test and reflects the markets or asset classes in which the fund invests (*i.e.,* the markets or asset classes in which the fund invests directly through securities and other investments and indirectly through derivatives transactions). The requirement that the fund's securities portfolio reflects the markets or asset classes in which the fund invests is designed to provide an appropriate baseline for the relative VaR test, consistent with the same requirement applicable to designated indexes.[360] Absent this requirement, a fund could, for example, invest in a small number of highly-volatile securities that are not representative of the fund's overall investments for the purpose of obtaining a higher amount of leverage risk. Finally, the final rule includes provisions designed to promote a fund's appropriate use of the securities portfolio approach that are analogous to the requirements for funds' use of designated indexes. These requirements

[353] *See* proposed rule 18f–4(c)(2)(iv).

[354] *See* Tailored Shareholder Reports, Treatment of Annual Prospectus Updates for Existing Investors, and Improved Fee and Risk Disclosure for Mutual Funds and Exchange-Traded Funds; Fee Information in Investment Company Advertisements, Investment Company Act Release No. 33963 (Aug. 5, 2020). We also are not requiring that a fund disclose in its annual report certain additional information related to a fund's adherence to risk metrics, as one commenter suggested, because we similarly do not believe this information would be consistent with our goal of promoting concise fund disclosure to highlight key information to investors. *See* NASAA Comment Letter; *see also infra* section II.G.1.b.

[355] One commenter supported the proposed disclosure requirement generally but did not state that it would be effective in promoting the selection of appropriate indexes. *See* NASAA Comment Letter. Several commenters stated that there should not be a presumption that a fund's performance benchmark will be its designated index. *See, e.g.,* AQR Comment Letter I; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter. We agree, and we believe that the decision not to require a fund to include its designated index in the context of its performance disclosure helps to clarify this. However, as discussed above, an index-tracking fund that tracks an unleveraged index must use that index as its designated reference portfolio.

[356] *See* Proposing Release, *supra* footnote 1, at n.205 and accompanying discussion.

[357] *See* 2015 Proposing Release, *supra* footnote 1.

[358] *See* Invesco Comment Letter.

[359] We discuss these comments in more detail in section II.D.2.c.i.

[360] *See supra* footnote 337 and accompanying text.

include periodic review by the fund's derivatives risk manager and board reporting.[361]

These requirements, taken together, are designed to produce a reference portfolio that, like a designated index, creates a baseline VaR that functions as the VaR of a fund's unleveraged portfolio for purposes of the relative VaR test. Allowing a fund to use its securities portfolio may allow funds to use a VaR reference portfolio that is more tailored to the fund's investments than an index, or allow the fund to avoid the expense associated with blending or licensing an index just for purposes of the final rule's relative VaR test.

The final rule does not require that a fund ''scale down'' the VaR of its securities portfolio if the fund also has issued senior security debt not represented by the fund's derivatives transactions, as a commenter recommended.[362] We do not believe this specific adjustment is necessary in order for a fund's securities portfolio to represent an unleveraged reference portfolio. This is because the final rule provides that VaR must be expressed as a percentage of the value of the relevant portfolio—the scale of the fund's securities portfolio, even if increased by borrowings, would not change the portfolio's VaR when expressed as a percentage.[363] The final rule includes a clarifying edit to make clear that a fund's VaR is measured as a percentage of the value of the fund's net assets, whereas the VaR of a fund's securities portfolio (or designated index) is measured as a percentage of the value of the portfolio.[364]

c. 200% and 250% Limits Under Relative VaR Test

Under the final rule a fund's VaR must not exceed 200% of the VaR of the fund's designated reference portfolio, unless the fund is a closed-end company that has then-outstanding shares of a preferred stock issued to investors.[365] For such closed-end funds, the VaR must not exceed 250% of the VaR of the fund's designated reference portfolio. This requirement is modified from the proposal, which would have limited a fund's VaR, including a closed-end fund's VaR, to 150% of the VaR of the fund's designated index.[366]

i. 200% Limit

In proposing a 150% relative VaR limit, the Commission first considered the extent to which a fund could borrow in compliance with the requirements of section 18.[367] For example, a mutual fund with $100 in assets and no liabilities or senior securities outstanding could borrow an additional $50 from a bank. With the additional $50 in bank borrowings, the mutual fund could invest $150 in securities based on $100 of net assets. This fund's VaR would be approximately 150% of the VaR of the fund's designated index if the fund used the borrowings to leverage its portfolio by investing in securities consistent with the fund's strategy. The proposed 150% relative VaR limit was designed to limit a fund's leverage risk related to derivatives transactions in a way that is effectively similar to the way that section 18 limits a registered open- or closed-end fund's ability to borrow from a bank (or issue other senior securities representing indebtedness for registered closed-end funds) subject to the 300% asset coverage requirement in section 18. The proposed limit also was designed to recognize that, while a fund could achieve certain levels of market exposure through borrowings permitted under section 18, it may be more efficient to obtain those exposures through derivatives transactions. In the proposal, the Commission requested comment on the appropriate relative VaR test limit, including specifically requesting comment on a 200% relative VaR test limit, and discussed the 200% relative VaR limit applicable to UCITS funds.

Many commenters urged the Commission to raise the relative VaR limit from 150% to 200% of a fund's designated index.[368] These commenters stated that this modification would be appropriate to address factors other than a fund's use of derivatives that could cause a fund's VaR to exceed the VaR of a designated index.[369] For example, some commenters stated that a fund's security selection will influence a fund's relative VaR calculation.[370] Commenters stated that the proposed VaR test could be particularly restrictive for actively-managed fixed-income funds.[371] These commenters stated that an actively-managed fixed-income fund will have an expected amount of tracking error against a low-volatility benchmark based on the fund's security selection and concentration levels. Differences between a fund's portfolio and its reference portfolio—rather than leveraging with derivatives—could cause a fund's VaR to exceed the VaR of its designated reference portfolio.

Several commenters suggested that setting the relative VaR limit to 150% as an analogy to the 300% asset coverage requirement for bank borrowings under section 18 is inappropriate because the restriction on bank borrowings isolates leverage related to bank borrowings, whereas a VaR test measures risk from non-derivative instruments and is affected by variables other than leverage risk introduced by a fund's use of derivatives.[372] Some of these commenters provided examples of funds that do not use derivatives but have VaRs exceeding the VaR of their respective indexes, including, as examples, funds with portfolio VaRs equal to 120% or more of their index VaR.[373] While supporting the use of VaR as a means of limiting fund leverage risk, these commenters urged that an incrementally higher VaR limit would be needed to account for the inherent imprecision in using VaR to identify potential leverage relative to a fund's index's VaR.

Commenters also stated that firms would likely set internal VaR thresholds that are lower than the rule would prescribe because of the proposed board and SEC reporting requirements for VaR

[361] *See* rule 18f–4(c)(1)(vi) (requiring periodic review); rule 18f–4(c)(3)(ii) (requiring a written report to the board providing the basis for the derivatives risk manager's approval); item B.10.b.i on Form N–PORT (requiring a fund to report on Form N–PORT that it is using its securities portfolio for purposes of the relative VaR test).

[362] *See* Invesco Comment Letter.

[363] Take, for example, a fund with $100 to invest that borrows $50 and invests its then-$150 in total assets in a portfolio that replicates the S&P 500. If the S&P's VaR is 10%, the fund's securities portfolio would likewise have a VaR of 10%, regardless of the size of the portfolio as a result of borrowing, just as if the fund had used the S&P 500 as its designated index. The fund's own VaR would be 150% of the S&P 500 VaR because the fund's estimated losses would be measured relative to the fund's $100 net asset value, rather than the fund's total assets of $150.

[364] *See* rule 18f–4 (a) (defining the term ''value-at-risk or VaR'').

[365] *See* rule 18f–4(a) (defining the term ''relative VaR test''). A ''closed-end company'' means any management company other than an open-end company, and thus includes both registered closed-end funds and BDCs.

[366] *See* proposed rule 18f–4(a).

[367] *See* Proposing Release, *supra* footnote 1, at section II.D.2.b.

[368] *See, e.g.,* Capital Group Comment Letter; ISDA Comment Letter; Dechert Comment Letter I; ICI Comment Letter; ABA Comment Letter; BlackRock Comment Letter; Chamber Comment Letter; Franklin Comment Letter; J.P. Morgan Comment Letter; Eaton Vance Comment Letter; PIMCO Comment Letter; Putnam Comment Letter; T. Rowe Price Comment Letter; Vanguard Comment Letter.

[369] *See, e.g.,* Capital Group Comment Letter; Franklin Comment Letter; J.P. Morgan Comment Letter.

[370] *See, e.g.,* Dechert Comment Letter I; T. Rowe Price Comment Letter; MFA Comment Letter; SIFMA AMG Comment Letter.

[371] *See* AQR Comment Letter I; SIFMA AMG Comment Letter; Invesco Comment Letter; Dechert Comment Letter III.

[372] *See, e.g.,* Dechert Comment Letter I; ICI Comment Letter.

[373] *See* Nuveen Comment Letter; SIFMA AMG Comment Letter.

exceedances.[374] As one commenter observed ''fund managers for years managed portfolio risks against internal risk tolerance limits using VaR-based metrics, among other tools.'' [375] This is consistent with the design of rule 18f–4, which uses VaR as an outer limit on fund leverage risk for any fund using derivatives transactions that is unable to rely on the limited derivatives user exception. Because the final rule's VaR tests provide an outer limit on fund leverage risk for funds generally, and given the wide range of fund strategies, we expect that many funds will use derivatives transactions in such a manner that their fund's VaR generally is not at or approaching this limit. A fund's derivatives risk management program could incorporate internal VaR thresholds lower than the rule's VaR-based outer limit, as described by commenters, that in conjunction with the other program elements are tailored to appropriately manage a fund's particular derivatives risks.

Many commenters also observed that raising the relative VaR limit to 200% would match the 200% relative VaR limit in the UCITS framework and provide compliance and operational efficiencies.[376] Some commenters stated that more closely aligning with the UCITS framework would permit global fund complexes to streamline their risk management programs and VaR testing across jurisdictions because these firms could rely on existing risk management tools and VaR testing already in use to satisfy UCITS requirements.[377] Two commenters stated that these efficiencies may benefit investors due to lower compliance costs.[378] Two other commenters stated that raising the relative VaR limit to align with UCITS' VaR limits would create operational efficiencies because fund complexes that seek to create similar investment programs could use similar portfolio and risk management for U.S. funds and UCITS funds.[379] Commenters also emphasized that the UCITS framework is an existing regime that they believe provides effective investor protections.[380]

After considering comments, we have determined to increase the relative VaR test's outer limit on fund leverage risk from 150% to 200% (with additional modifications for certain closed-end funds discussed below).[381] We believe that a relative VaR test that first considers the extent to which a fund could borrow in compliance with the requirements of section 18 is appropriate. We recognize, however, that VaR is not itself a leverage measure and factors other than derivatives and leverage can cause a fund's VaR to exceed the VaR of its designated reference portfolio, such as a fund's security selection.[382] Where a fund uses its securities portfolio, the fund's securities investments will reflect the markets or asset classes in which the fund invests. However, there still may be differences between the VaR of the fund's securities portfolio and the VaR of its total portfolio that relate to differences in risks associated with specific securities versus derivatives investments, rather than leverage risk. A fund, for example, might obtain investment exposure to a number of issuers—in some cases through direct investments in the issuer's securities and in other cases indirectly through derivatives transactions referencing the issuer's securities. The derivatives transactions could result in the fund's VaR exceeding the VaR of the fund's securities portfolio, not necessarily because of any leveraging associated with the derivatives transactions, but because of the issuer-specific risk associated with the derivatives transactions' underlying reference assets. Adopting a 200% relative VaR limit decreases the likelihood that security selection and the additional risks VaR measures beyond leverage risk would cause a fund to come out of compliance with the relative VaR test. We also believe that raising the relative VaR test limit to 200% is consistent with the VaR tests providing an appropriate outer bound on fund leverage risk, complemented by a derivatives risk management program tailored to the fund.

The 200% relative VaR limit also may provide compliance and operational efficiencies. We recognize that many advisers to U.S. funds using derivatives transactions also advise, or may have affiliates that advise, UCITS funds that comply with UCITS requirements. Providing a degree of consistency between the final rule and UCITS requirements therefore may provide the compliance and operational efficiencies identified by commenters, including by facilitating advisers' ability to offer similar strategies in the United States and Europe. This may benefit investors by facilitating investor choice and reducing costs (to the extent these efficiencies result in cost savings that are passed on to investors).

Two commenters suggested that the Commission modify the relative VaR test such that a fund would satisfy the test if its VaR did not exceed the greater of: (1) 200% of the VaR of the designated index; or (2) 10% of the fund's net asset value.[383] These commenters stated that this approach would acknowledge that the absolute level of risk-taking by some funds is low and would not represent undue speculation in the commenters' view, while providing an alternative means of providing these funds flexibility where their portfolio composition deviates from the composition of their designated indexes.

We have not incorporated these suggestions into the final rule because we believe that modifications we have made to the final rule should help to address commenters' concerns about the relative VaR test. For example, we are increasing the relative VaR levels from the proposal and modifying the remediation provision, among other changes.[384] In addition, we are permitting actively managed funds to use their securities portfolio, where appropriate, which will allow these funds to use their own non-derivatives investments as the reference portfolio for the relative VaR test. Also, the suggested absolute VaR level of 10% included in these suggestions may permit substantial leverage for funds that invest in less-volatile securities. For example, a low-volatility bond fund and its designated index could each have a VaR of 1.5%, where under a 10% absolute VaR provision, the fund could leverage its portfolio almost seven times

[374] *See* T. Rowe Price Comment Letter; Dechert Comment Letter I; J.P. Morgan Comment Letter; SIFMA AMG Comment Letter.

[375] *See* Vanguard Comment Letter.

[376] *See* NYC Bar Comment Letter; BlackRock Comment Letter; Dechert Comment Letter I.

[377] *See* ABA Comment Letter; BlackRock Comment Letter; Eaton Vance Comment Letter.

[378] *See* Capital Group Comment Letter; SIFMA Comment Letter.

[379] *See* PIMCO Comment Letter; Franklin Comment Letter.

[380] *See, e.g.,* ABA Comment Letter; BlackRock Comment Letter; Eaton Vance Comment Letter.

[381] *See* rule 18f–4(a).

[382] Moreover, as discussed above, the final rule generally does not permit funds to use prohibited indexes as their designated indexes to address the potential for funds to construct indexes for the purpose of increasing potential fund leverage risk. This limitation may, however, increase the likelihood that security selection—rather than derivatives and leverage—may cause the fund's VaR to exceed the VaR of its designated index. This is because an unleveraged broad-based index may include a broader range of securities than those held by the fund.

[383] *See* AQR Comment Letter I; Dechert Comment Letter III (suggesting also an alternate version of this 10% formulation: The fund's portfolio does not exceed the lesser of 300% of the VaR of the designated index or 10% of the fund's net asset value).

[384] *See supra* section II.D.2.c (discussing relative VaR test limits); *infra* sections II.D.3 (discussing absolute VaR test limits), II.D.6.b (discussing remediation provisions).

its designated index's VaR to substantially exceed the volatility associated with the low-volatility securities in its portfolio. Although one of these commenters suggested that a 10% absolute VaR limit could be capped at 300% of the VaR of its designated index, for all the reasons discussed above, we believe the relative VaR test limit should be 200%.

ii. 250% Limit

The Commission considered proposing different relative VaR tests for different types of investment companies, tied to the asset coverage requirements applicable to registered open-end funds, registered closed-end funds, and BDCs.[385] The Commission did not propose a higher VaR limit for registered closed-end funds because, although these funds are permitted to issue preferred stock and open-end funds are not, registered closed-end funds' senior securities representing indebtedness are subject to the same 300% asset coverage requirements applicable to open-end funds.

In response to the proposal's requests for comment, several commenters urged the Commission to provide closed-end funds with a higher relative VaR limit than open-end funds under the rule.[386] These commenters generally reasoned that a higher VaR limit is appropriate for closed-end funds in consideration of the equity-based structural leverage that closed-end funds—and not open-end funds—can obtain through the issuance of preferred stock permitted under section 18 of the Investment Company Act.

Some commenters raised the concern that a closed-end fund that has outstanding preferred stock, before entering into any derivatives transactions, would have a higher starting VaR attributable to the structural leverage obtained through the issuance of preferred stock.[387] Using the example of a fund with $100 in assets and no liabilities or senior securities outstanding, a registered closed-end fund could only borrow $50 through senior securities representing indebtedness, the same amount an open-end fund could borrow from a bank, but would be permitted also to issue an additional $50 in preferred stock. If the closed-end fund raised $50 in preferred stock and invested it in securities, the fund's VaR could potentially equal the proposed 150% relative VaR limit before the fund entered into any derivatives transactions.

Commenters offered a number of methods to provide closed-end funds with a higher VaR limit.[388] For example, commenters suggested that the rule could provide an increase for closed-end funds' relative VaR limit based on the amount of structural leverage that a closed-end fund obtained, either based on the disclosed amount of structural leverage or the liquidation preference of any issued and then-outstanding preferred stock.[389] Other commenters suggested that the rule could provide a relative VaR limit specific to closed-end funds that is higher than the relative VaR limit applicable to open-end funds, with most of these commenters suggesting that a provision specific to closed-end funds reflect the addition of 50% to the relative VaR limit applicable to open-end funds (*i.e.,* 250% of the VaR of its designated index for closed-end funds to reflect their ability to obtain equity-based leverage).[390]

After considering these comments, we are modifying the proposed rule's relative VaR test to include a clause providing a higher VaR limit of 250% of the VaR of a fund's designated reference portfolio for a closed-end fund with outstanding preferred stock. This modification is designed to address the concern, raised by commenters, that providing the same relative VaR limit for open-end funds and closed-end funds does not take into account that closed-end funds may have a higher VaR because of their issuance of preferred stock before entering into any derivatives transactions. Absent a modification in these circumstances, a closed-end fund could potentially have no or limited flexibility to enter into derivatives transactions under the rule. For example, if a closed-end fund with $100 in assets and no liabilities or senior securities outstanding then raised $100 in preferred stock and invested it in securities, the fund's VaR could potentially equal the 200% relative VaR limit before the fund entered into any derivatives transactions.

Increasing the relative VaR test from the 200% relative VaR limit applicable to funds generally under the rule, to the 250% relative VaR limit for closed-end funds with equity-based leverage, is designed to reflect those funds' ability to use equity-based leverage under the Investment Company Act. Adding an additional 50% to the relative VaR limit is designed to reflect the additional extent to which closed-end funds are permitted to obtain equity-based leverage under the Investment Company Act. For example, a closed-end fund, like a mutual fund, with $100 in assets and no liabilities or senior securities outstanding could borrow $50 from a bank. A closed-end fund, unlike a mutual fund, could also raise an additional $50 by issuing preferred stock.

We also believe that, because the Investment Company Act permits closed-end funds to obtain greater leverage than open-end funds, and many closed-end funds take advantage of this flexibility, investors may expect closed-end funds to exhibit a greater degree of leverage risk. We believe these factors support higher VaR limits on fund leverage risk for closed-end funds with equity-based leverage in recognition that the VaR tests are designed to provide an outer bound on fund leverage risk.[391] This provision is designed to provide incrementally higher VaR limits only for closed-end funds that raise capital by issuing preferred stock to investors in the ordinary course of pursuing their investment strategy. If a closed-end fund does not obtain equity-based structural leverage, however, the fund would be subject to the same 200% relative VaR limit as other funds.

We considered the alternative approaches suggested by commenters that would adjust a closed-end fund's relative VaR limit based on the extent to

[385] *See* Proposing Release, *supra* footnote 1, at text accompanying n.210.

[386] *See* PIMCO Comment Letter; Calamos Comment Letter; NYC Bar Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter; Nuveen Comment Letter; Eaton Vance Comment Letter; Comment Letter of Kramer Levin Naftalis Frankel LLP (Mar. 24, 2020) (''Kramer Levin Comment Letter'').

[387] *See* ICI Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter; Nuveen Comment Letter.

[388] *See* Calamos Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter; NYC Bar Comment Letter; PIMCO Comment Letter; SIFMA AMG Comment Letter; Nuveen Comment Letter.

[389] *See, e.g.,* Dechert Comment Letter I; Invesco Comment Letter; PIMCO Comment Letter; Nuveen Comment Letter; Calamos Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter. Commenters suggested a few different ways to effectuate these suggestions, including a preferred stock multiplier that a closed-end fund could apply to the relative VaR limit or to the underlying designated index. *See, e.g.,* ICI Comment Letter; Invesco Comment Letter; Nuveen Comment Letter.

[390] *See* Dechert Comment Letter I; NYC Bar Comment Letter; Nuveen Comment Letter; Invesco Comment Letter (recommending an approach that includes a 50% maximum in additional relative VaR limit for closed-end funds). A few commenters provided, as examples, closed-end funds with higher relative VaR limits than what the Commission proposed, which is consistent with the 250% relative VaR limit supported by other commenters. *See, e.g.,* ICI Comment Letter; PIMCO Comment Letter; *see also* SIFMA AMG Comment Letter (suggesting raising the relative VaR limit applicable to open-end funds by 25% for closed-end funds and BDCs); Nuveen Comment Letter (suggesting also 225% relative VaR limit for closed-end funds).

[391] *See, e.g.,* Nuveen Comment Letter; Invesco Comment Letter; NYC Bar Comment Letter.

which the closed-end fund had preferred stock outstanding (or based on the disclosed intended amount of such issuances). These approaches would result in a relative VaR limit that would be more closely tied to the amount of a closed-end fund's issuance of preferred stock. These approaches, however, would introduce certain compliance and regulatory challenges. For example, approaches based on the percentage of a fund's net asset value represented by preferred stock would result in a fund's relative VaR limit changing each day, which could raise compliance challenges.[392] Although one commenter suggested using an approach that considers a fund's intended issuance of preferred stock to address this concern, that approach also could raise compliance and regulatory concerns by basing a leverage risk limit on a fund's intended characteristics.[393] This could raise questions about the appropriate limit for a fund where the fund's actual structural leverage differs from a purported or intended level, particularly if those differences persist for a long period of time.

Although the final rule's provision for equity-based leverage is available to both registered closed-end funds and BDCs, we are not adopting a separate higher leverage limit for BDCs specifically. Although some commenters urged that their suggestions for registered closed-end funds also should apply to BDCs, commenters did not suggest that the rule should provide higher VaR limits for BDCs than for registered closed-end funds.[394]

As discussed in the proposal, the Investment Company Act provides greater flexibility for BDCs to issue senior securities.[395] BDCs, however, generally do not use derivatives or do so only to a limited extent. In the proposal, the Commission explained that to help evaluate the extent to which BDCs use derivatives, the staff sampled 48 of the current 99 BDCs by reviewing their most recent financial statements filed with the Commission.[396] As discussed in the proposal, based on this analysis the Commission believed that most BDCs either would not use derivatives or would rely on the exception for limited derivatives users. Commission staff updated this analysis by reviewing the most recent financial statements that the same previously-sampled 48 BDCs (or their successor funds) filed with the Commission.[397] The staff's sample included both BDCs with shares listed on an exchange and BDCs whose shares are not listed. The sampled BDCs' net assets ranged from $27 million to $6.6 billion. Of the 48 sampled, 59.1% did not report any derivatives holdings, and a further 31.8% reported using derivatives with gross notional amounts below 10% of net assets.[398] We therefore believe that most BDCs either would not use derivatives or would rely on the exception for limited derivatives users.

In addition, the greater flexibility for BDCs to issue senior securities allows them to provide additional equity or debt financing to the ''eligible portfolio companies'' in which BDCs are required to invest at least 70% of their total assets. Derivatives transactions, in contrast, generally will not have similar capital formation benefits for portfolio companies unless the fund's counterparty makes an investment in the underlying reference assets equal to the notional amount of the derivatives transaction. Allowing BDCs to leverage their portfolios with derivatives to a greater extent than other closed-end funds therefore would not appear to further the capital formation benefits that underlie BDCs' ability to obtain additional leverage under the Investment Company Act. We also understand that, even when BDCs do use derivatives more extensively, derivatives generally do not play as significant of a role in implementing the BDCs' strategies, as compared to many other types of funds that use derivatives extensively. BDCs' ''eligible portfolio companies'' investment requirement may limit the role that derivatives can play in a BDC's portfolio relative to other kinds of funds that would generally execute their strategies primarily through derivatives transactions (*e.g.,* a managed futures fund). The final rule does not restrict a fund from issuing senior securities subject to the limits in section 18 to the full extent permitted by the Investment Company Act.[399]

3. Absolute VaR Test

Under the final rule, a fund complying with the absolute VaR test will satisfy the test if its VaR does not exceed 20% of the value of the fund's net assets, unless the fund is a closed-end fund that has then-outstanding preferred stock.[400] For such closed-end funds, the VaR must not exceed 25% of the value of the fund's net assets.[401] This is a modification from the proposed rule, which would have limited a fund's VaR to 15% of the value of its net assets.[402]

In proposing a 15% absolute VaR limit, the Commission considered the comparison of a fund complying with the absolute VaR test and a fund complying with the relative VaR test. In the proposal, the Commission explained that for funds that rely on the absolute VaR test a 15% absolute VaR limit would provide approximately comparable treatment with funds that rely on the relative VaR test and use the S&P 500 as their designated index during periods where the S&P 500's VaR is approximately equal to the historical mean. In the proposal, the Commission requested comment on the appropriate absolute VaR test limit, including specifically requesting comment on a 20% absolute VaR test limit, and discussed the 20% absolute VaR limit applicable to UCITS funds.[403]

Many commenters urged the Commission to raise the absolute VaR limit from 15% to 20% of a fund's net assets.[404] In urging the Commission to raise the relative VaR limit from 150% to 200%, commenters also urged a parallel increase in the absolute VaR limit from 15% to 20%.[405] They stated that this would be consistent with the analysis in the Proposing Release if, as commenters suggested, the Commission were to increase the relative VaR test to 200%.

[392] *See* ICI Comment Letter.

[393] *See id.*

[394] *See* NYC Bar Comment Letter; SIFMA AMG Comment Letter; Nuveen Comment Letter.

[395] *See* Proposing Release, *supra* footnote 1, at section II.D.2.

[396] *See id.*

[397] As of July 2020, there were 99 BDCs.

[398] *See infra* footnote 512 and accompanying paragraph (discussing BDCs that use derivatives and would qualify as limited derivatives users).

[399] For purposes of calculating asset coverage, as defined in section 18(h), BDCs have used derivatives transactions' notional amounts, less any posted cash collateral, as the ''amount of senior securities representing indebtedness'' associated with the transactions. We believe this approach—and not the transactions' market values—represents the ''amount of senior securities representing indebtedness'' for purposes of this calculation. These issues do not tend to arise with respect to open-end funds and registered closed-end funds. Open-end funds cannot enter into derivatives transactions under section 18, absent relief from that section's requirements, because section 18 limits open-end funds' senior securities to bank borrowings. Section 18(c) also limits a registered closed-end fund's ability to enter into derivatives transactions absent such relief.

[400] *See* rule 18f–4(a) (defining the term ''absolute VaR test'').

[401] *See id.*

[402] *See* proposed rule 18f–4(a).

[403] *See* Proposing Release, *supra* footnote 1, at section II.D.3.

[404] *See* Capital Group Comment Letter; ISDA Comment Letter; Dechert Comment Letter I; ICI Comment Letter; AQR Comment Letter I; ABA Comment Letter; BlackRock Comment Letter; Chamber Comment Letter; Franklin Comment Letter; J.P. Morgan Comment Letter; Eaton Vance Comment Letter; PIMCO Comment Letter; Putnam Comment Letter; T. Rowe Price Comment Letter; Vanguard Comment Letter.

[405] *See, e.g.,* Invesco Comment Letter; MFA Comment Letter; T. Rowe Price Comment Letter.

A number of commenters agreed with the Commission's stated view in the Proposing Release that the VaR tests would serve as an outside limit on fund leverage risk, which would be consistent with the Commission's estimates that only a small number of funds, if any, would have to adjust their portfolios to comply with the VaR-based test.[406] Commenters stated, however, that more funds would fail a 15% absolute VaR limit than the Commission contemplated in the Proposing Release, which commenters suggested indicates that the proposed 15% absolute VaR limit would not function as an outside limit on fund leverage risk as intended.[407] Commenters suggested that a higher absolute VaR limit of 20% would more effectively achieve the Commission's goal of imposing an outside limit on fund leverage risk and would allow a fund's derivatives risk management program to provide day-to-day constraints on fund risk instead of the proposed absolute VaR limit.[408]

To support its urging the Commission to raise the absolute VaR limit to 20%, one commenter analyzed the VaR of the S&P 500 as the risk-based reference point for setting the absolute VaR limit and highlighted that the S&P 500 itself would breach a 15% absolute VaR limit for specific periods of time.[409] The commenter noted that the S&P 500 would continue to breach the proposed 15% limit for a nearly three-year period, including after the volatility of the index came back down to typical historical levels following the 2008–2009 financial crisis. The commenter also observed the magnitude of the S&P 500's breach of the proposed 15% limit, stating that a fund taking risk equivalent to the S&P 500 would need to reduce its risk by 32% to comply with the proposed 15% VaR limit and would need to do this two years after the 2008–2009 crisis.

Other commenters stated that raising the absolute VaR limit to 20% would be consistent with the UCITS framework.[410] Commenters suggested that providing a 20% absolute VaR limit in rule 18f–4 would result in compliance and operational efficiencies for advisers to both UCITS funds and funds subject to rule 18f–4.

After considering comments, we are adopting an absolute VaR limit of 20% of a fund's net assets. The 20% absolute VaR limit is based on the same analysis that the Commission used to propose a 15% absolute VaR limit, as we continue to believe it is an appropriate basis to set this limit, and adjusts the absolute VaR limit to 20% in light of the increases we are adopting to the proposed relative VaR limit. For example, under the final rule, a fund that uses the S&P 500 as its benchmark index, as many funds do, would be permitted to have a VaR equal to 200% of the VaR of the S&P 500 if the fund uses that index as its designated index.[411] Setting the level of loss in the absolute VaR test at 20% of a fund's net assets would therefore provide approximately comparable treatment for funds that rely on the absolute VaR test and funds that rely on the relative VaR test with a 200% limit and use the S&P 500 as their designated index during periods where the S&P 500's VaR is approximately equal to the historical mean. Moreover, we recognize there are some regulatory and compliance efficiencies in setting the absolute VaR limit at 20% because some fund complexes have existing regulatory and compliance infrastructures for UCITS funds that comply with a 20% absolute VaR limit.[412]

We also are modifying the proposed rule to provide a higher absolute VaR test limit of 25% of the fund's net assets in the case of a closed-end fund with then-outstanding shares of preferred stock. This reflects the parallel clause we added to the definition of the term ''relative VaR test.'' We are increasing the absolute VaR limit for certain closed-end funds for the same reasons we are increasing the relative VaR limit for these funds.[413]

One commenter also suggested that the Commission modify the absolute VaR test to provide that a fund complies if it does not exceed either: (1) The absolute VaR limit, which the commenter urged be at least 20%; or (2) 150% of the then-current VaR of the S&P 500.[414] The effect of this suggestion, if we incorporated it into the final rule (which, as adopted, includes a 200% relative VaR limit), would always permit a fund to have a portfolio VaR of 20% or less of the fund's net assets. Moreover, this suggestion would permit a fund to increase its portfolio VaR beyond this level to 200% of the S&P 500's VaR, if the fund's portfolio VaR were to exceed 20%. This suggested approach would therefore allow a fund's permissible VaR to increase in times when market volatility increases and this increase is reflected in the S&P 500's VaR.

We are not including this suggested approach in the final rule. In determining the level of the absolute VaR test, we have used the mean VaR of S&P 500 as a reference point for this analysis to represent the level of risk that investors may understand as inherent in the markets generally. If a fund is relying on the absolute VaR test,

[406] *See, e.g.,* ICI Comment Letter; AQR Comment Letter I; Invesco Comment Letter.

[407] *See, e.g.,* ICI Comment Letter (providing survey data showing that during periods of stressed market conditions, about one in four survey respondents indicated that their fund would breach an absolute VaR limit of 15%); BlackRock Comment Letter (stating that during March 2020 market volatility related to the COVID–19 global health pandemic, most of its funds would have remained under a 20% absolute VaR limit, but some would have breached a 15% absolute VaR limit); *see also* Proposing Release, *supra* footnote 1, at n.516 and accompanying paragraph.

[408] *See, e.g.,* AQR Comment Letter II; ISDA Comment Letter; SIFMA AMG Comment Letter; T. Rowe Comment Letter.

[409] *See* AQR Comment Letter I (stating that other widely-known benchmarks composed of small market capitalization stocks that are more volatile than the S&P 500, such as the Russell 2000, would be in breach more often than the S&P 500, supporting the appropriateness of raising the absolute VaR limit to 20%); *see also* J.P. Morgan Comment Letter (supporting an absolute VaR limit of 20% and suggesting that the S&P 500 volatility since inception as used in the Commission staff's analysis is less relevant than the more recent market conditions that reflect increases in market volatility since the 1980s); MFA Comment Letter.

[410] *See, e.g.,* ABA Comment Letter; BlackRock Comment Letter; Eaton Vance Comment Letter.

[411] The Division of Economic and Risk Analysis (''DERA'') staff analyzed the S&P 500 because funds often select broad-based large capitalization equities indexes such as the S&P 500 for performance comparison purposes, including funds that are not broad-based large capitalization equity funds. This is based on staff experience and analysis of data obtained from Morningstar. Many investors may therefore understand the risk inherent in these indexes as the level of risk inherent in the markets generally.

DERA staff calculated the VaR of the S&P 500, using the parameters specified in this rule over various time periods. DERA staff's calculation of the S&P 500's VaR since inception, for example, produced a mean VaR of approximately 10.5%, although the VaR of the S&P 500 varied over time.

DERA staff calculated descriptive statistics for the VaR of the S&P 500 using Morningstar data from March 4, 1957 to June 30, 2020, based on daily VaR calculations, each using three years of prior return data and calculated using historical simulation at a 99% confidence level for a 20-day horizon using overlapping observations.

[412] As discussed in section II.D.2.c.i above, we recognize that many advisers to U.S. funds using derivatives transactions also advise, or may have affiliates that advise, UCITS funds that comply with UCITS requirements. Providing a degree of consistency between the final rule and UCITS requirements therefore may provide the compliance and operational efficiencies identified by commenters, including by facilitating advisers' ability to offer similar strategies in the United States and Europe.

[413] *See supra* section II.D.2.c.ii (discussing the 250% relative VaR limit for closed-end funds that have shares of preferred stock outstanding).

[414] *See* AQR Comment Letter I. The commenter raised concerns that in particular funds pursuing a volatility-targeting strategy would be adversely affected by the absolute VaR test under the proposal because of the counter-cyclical investment nature of these funds, which the commenter suggested may be addressed by this modification. The commenter also suggested an alternative method of calculating VaR to address these concerns, which we discuss below in section II.D.5.

it is because its derivatives risk manager reasonably determined that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test. It would be inconsistent with the rule's framework to include a provision that effectively uses the S&P 500 as a fund's designated index regardless of the fund's investments and only during periods where this relative VaR approach permits a fund's VaR to exceed 20%, but not during other market conditions. This approach also could result in a fund being permitted to take on substantial additional risk—and potentially substantially additional leverage depending on the fund's investments—in periods when market risks already are elevated.

The relative VaR test is designed to address concerns about compliance with the VaR test during stressed periods because, although the fund's VaR may increase during these periods, the VaR of the fund's designated reference portfolio would be expected to increase as well. A fund can rely on the relative VaR test if the fund's designated reference portfolio reflects the markets or asset classes in which the fund invests and meets the rule's other requirements. This is true even if the fund's strategy is focused on an absolute return rather than a level of return relative to an index or market. We believe such a portfolio would provide a more appropriate reference portfolio for a fund's relative VaR test than prescribing the S&P 500 in all cases.

4. Funds Limited to Certain Investors

The final rule does not provide an exemption from the rule's VaR-based limit for funds that limit their investors to ''qualified clients,'' as defined in rule 205–3 under the Advisers Act, and/or are sold exclusively to ''qualified clients,'' ''accredited investors,'' or ''qualified purchasers.'' [415] A few commenters urged the Commission to exempt closed-end funds that limit their investor base in this way from the rule's VaR limits.[416] One of these commenters urged that, instead of being subject to the VaR tests, these funds should be permitted to set and disclose limits of their own choosing.[417]

Commenters asserted that complying with the VaR-based limit on fund leverage risk would negatively affect how these funds operate and the investment strategies they can pursue.[418] Commenters asserted that because their investors are sophisticated, with the ability to understand the risks associated with a fund obtaining significant derivatives exposure, the funds should not be subject to VaR testing because these investors do not require the same investor protections as other registered funds.[419] Commenters urged that failing to provide these funds an exemption would encourage their investors to move to private funds, losing investor protections that the Investment Company Act provides.[420]

The final rule does not provide an exemption for these funds from the rule's VaR test. To the extent a fund that limits its investor base as described by these commenters is able to qualify for the exclusions from the investment company definition in sections 3(c)(1) or 3(c)(7), the fund can operate as a private fund under those exclusions and will not be subject to section 18.[421] Private funds can pursue complex derivatives strategies with significant leverage. Where a fund is registered under the Investment Company Act (or regulated under the Act in the case of BDCs), however, the fund remains subject to all applicable provisions of the Act and its rules, notwithstanding its investor base.[422] The Investment Company Act's requirements for registered investment companies and BDCs generally do not vary based on the nature of the fund's investors.

5. Choice of Model and Parameters for VaR Test

We are adopting the VaR model and parameters for the VaR test as proposed. The final rule will require a VaR model to take into account and incorporate certain market risk factors associated with a fund's investments and provide parameters for the VaR calculation's confidence level, time horizon, and historical market data. The final rule also will not require a fund to use the same VaR model for calculating its portfolio's VaR and the VaR of its designated reference portfolio. We discuss each of these requirements below in addition to certain VaR calculation considerations raised by commenters.

Risk Factors and Methodologies

As proposed, the final rule will require that any VaR model a fund uses for purposes of the relative or absolute VaR test take into account and incorporate all significant, identifiable market risk factors associated with a fund's investments.[423] The rule includes a non-exhaustive list of common market

[415] An ''accredited investor'' is defined in rules 215 and 501(a) under the Securities Act of 1933 and is intended to identify ''investors that have sufficient knowledge and expertise to participate in investment opportunities that do not have the rigorous disclosure and procedural requirements, and related investor protections, provided by registration under the Securities Act of 1933.'' *See, e.g.,* Amending the ''Accredited Investor'' Definition, Securities Act Release No. 10824 (Aug. 26, 2020) [85 FR 64234 (Oct. 9, 2020)].

A ''qualified purchaser'' is defined in section 2(a)(51) of the Investment Company Act and includes natural persons who own not less than $5 million in investments, family-owned companies that own not less than $5 million in investments, certain trusts, and persons, acting for their own accounts or the accounts of other qualified purchasers, who in the aggregate own and invest on a discretionary basis, not less than $25 million in investments (*e.g.,* institutional investors). *See id.* at n.8.

[416] Some of these commenters recommended an exemption from the VaR tests for closed-end funds that limit their investors to qualified clients. *See* Comment Letter of Dechert LLP (Mar. 24, 2020) (''Dechert Comment Letter II''); Kramer Levin Comment Letter. Other commenters urged exemptions more broadly for closed-end funds sold exclusively to accredited investors, qualified purchasers, or qualified clients. *See* NYC Bar Comment Letter; ABA Comment Letter.

[417] *See* ABA Comment Letter.

[418] *See* Dechert Comment Letter II (stating that compliance with the rule ''could significantly and negatively impact investment performance and create unnecessary costs for investors [of qualified client funds]''); Kramer Levin Comment Letter.

[419] *See* Kramer Levin Comment Letter (stating that ''[u]nlike mutual funds, [closed-end funds that limit their investors to ''qualified clients''] are only offered to sophisticated, high net worth investors (with a $2.1 million net worth minimum), who not only certify as to their financial wherewithal but also acknowledge all of the risks involved in investing in such [funds]''); Dechert Comment Letter II; *contra* CFA Comment Letter at 9 (stating that that these ''exotic-hedge fund like strategies that use extensive leverage . . . . are more appropriately reserved for the unregistered space where, at least in theory, investors are sophisticated, can withstand losses resulting from risky strategies, and are able to access information that would enable them to make informed investment decisions'').

[420] *See* ABA Comment Letter; Dechert Comment Letter II; Kramer Levin Comment Letter.

[421] Section 3(c)(1) of the Investment Company Act excludes from the definition of ''investment company'' any issuer whose outstanding securities (other than short-term paper) are beneficially owned by not more than 100 persons, and which is not making and does not presently propose to make a public offering of its securities. Section 3(c)(7) of the Investment Company Act excludes from the definition of ''investment company'' any issuer whose outstanding securities are owned exclusively by persons who, at the time of acquisition of such securities, are ''qualified purchasers,'' and which is not making and does not at that time propose to make a public offering of its securities.

[422] The final rule does include modifications to the proposed VaR tests, including commenter suggestions to raise the VaR limits from the proposed levels. *See* Kramer Levin Comment Letter (recommending that closed-end funds under the rule be subject, as applicable, to a limit of 200% relative VaR or 20% absolute VaR). We also modified the proposed rule to take account of closed-ends' funds ability to issue preferred stock by providing these funds a higher VaR limit. We believe these and other modifications to the final rule should help to address the concerns commenters raised about the final rule's impact on the funds' strategies.

[423] *See* rule 18f–4(a) (defining the term ''value-at-risk'' or ''VaR'' in the final rule); proposed rule 18f–4(a) (defining the term ''value-at-risk'' or ''VaR'' in the proposed rule).

risk factors that a fund must account for in its VaR model, if applicable. These market risk factors are: (1) Equity price risk, interest rate risk, credit spread risk, foreign currency risk and commodity price risk; (2) material risks arising from the nonlinear price characteristics of a fund's investments, including options and positions with embedded optionality; and (3) the sensitivity of the market value of the fund's investments to changes in volatility.[424] VaR models are often categorized according to three modeling methods—historical simulation, Monte Carlo simulation, or parametric models.[425] Each method has certain benefits and drawbacks, which may make a particular method more or less suitable, depending on a fund's strategy, investments and other factors. In particular, some VaR methodologies may not adequately incorporate all of the material risks inherent in particular investments, or all material risks arising from the nonlinear price characteristics of certain derivatives.[426] By specifying certain parameters but not prescribing particular VaR models, the final rule is designed to allow each fund to use a VaR model that is appropriate for the fund's investments. The commenters who addressed this provision supported it.[427]

Confidence Level and Time Horizon

As proposed, the final rule requires a fund's VaR model to use a 99% confidence level and a time horizon of 20 trading days.[428] VaR models that use relatively high confidence levels and longer time horizons—as the final rule parameters reflect—result in a focus on more-''extreme'' but less-frequent losses. This is because a fund's VaR model will be based on a distribution of returns, where a higher confidence level would go further into the tail of the distribution (*i.e.,* more-''extreme'' but less-frequent losses) and a longer time horizon would result in larger losses in the distribution (*i.e.,* losses have the potential to be larger over twenty days than over, for example, one day). The VaR tests in the final rule, as proposed, are designed to measure, and seek to limit the severity of, these less-frequent but larger losses.

Many commenters provided general support for a 99% confidence level for the rule's VaR test.[429] Several commenters that supported this parameter suggested providing guidance regarding confidence interval rescaling, specifically from a 95% confidence level to a 99% confidence level.[430] Under this approach, a fund would first compute its VaR at a 95% confidence level, which will involve more observations because this approach looks to losses in 5% of the distribution rather than 1%. The fund would then use the statistical relationship of the normal distribution between the 99th percentile and the 95th percentile, using the ratio of their respective Z-scores, in calculating a fund's VaR consistent with the VaR model and parameters requirements under the rule.[431]

Commenters stated that this approach would produce more stable results because the VaR calculation would be based on a larger number of observations. For example, one commenter stated that while there are benefits to selecting a 99% confidence level, one of the tradeoffs is that being so far into the ''tail'' of the distribution of returns for VaR calculations implies an inherently imprecise, unstable, and unnecessarily sensitive metric of risk.[432] The commenter stated that, for example, if a fund calculated a 3-year VaR with 20-day non-overlapping periods, the 99% VaR is based on less than one observation. Rescaling a VaR calculated at a 95% confidence to a 99% confidence level would address the effects of having a limited number of observations.[433] Two commenters similarly stated that permitting rescaling from a 95% confidence level to a 99% confidence level is useful as another means for obtaining additional observations, when compared to increasing the number of observations by using overlapping periods, because it better addresses concerns with small sample bias in estimating VaR at higher confidence levels.[434] One commenter stated that this confidence level scaling would ensure that the VaR outputs are appropriately representative and take into account unusual volatility periods, and in this commenter's view, ensure greater reliability of the model outputs.[435] A few commenters stated that this also would align with other regulatory regimes, creating regulatory compliance efficiencies for funds complying with the rule.[436] Commenters also supported the Commission's statement in the Proposing Release that funds could scale a one-day VaR calculation to a 20-day calculation for purposes of the rule under appropriate circumstances and urged that permitting confidence level scaling would likewise be appropriate. With respect to the proposed time horizon of 20 trading days, the Commission received one comment that supported the proposed parameter and another that did not object to it and noted that this and other parameters generally are in line with UCITS requirements.[437]

We agree with commenters that it is a commonly used technique in performing VaR calculations to determine a 99% confidence level VaR

[424] *See id.*

[425] Historical simulation models rely on past observed historical returns to estimate VaR. Historical VaR involves taking a fund's current portfolio, subjecting it to changes in the relevant market risk factors observed over a prior historical period, and constructing a distribution of hypothetical profits and losses. The resulting VaR is then determined by looking at the largest (100 minus the confidence level) percent of losses in the resulting distribution.

Monte Carlo simulation uses a random number generator to produce a large number (often tens of thousands) of hypothetical changes in market values that simulate changes in market factors. These outputs are then used to construct a distribution of hypothetical profits and losses on the fund's current portfolio, from which the resulting VaR is ascertained by looking at the largest (100 minus the confidence level) percent of losses in the resulting distribution.

Parametric methods for calculating VaR rely on estimates of key parameters (such as the mean returns, standard deviations of returns, and correlations among the returns of the instruments in a fund's portfolio) to create a hypothetical statistical distribution of returns for a fund, and use statistical methods to calculate VaR at a given confidence level.

See Proposing Release, *supra* footnote 1, at n.227.

[426] For example, some parametric methodologies may be more likely to yield misleading VaR estimates for assets or portfolios that exhibit non-linear returns, due, for example, to the presence of options or instruments that have embedded optionality (such as callable or convertible bonds). *See, e.g.,* Thomas J. Linsmeier & Neil D. Pearson, *Value at Risk,* 56 Journal of Financial Analysts 2 (Mar.–Apr. 2000) (''Linsmeier & Pearson'') (stating that historical and Monte Carlo simulation ''work well regardless of the presence of options and option-like instruments in the portfolio. In contrast, the standard [parametric] delta-normal method works well for instruments and portfolios with little option content but not as well as the two simulation methods when options and option-like instruments are significant in the portfolio.'').

[427] *See* J.P. Morgan Comment Letter; BlackRock Comment Letter; Franklin Comment Letter.

[428] *See* rule 18f–4(a); proposed rule 18f–4(a).

[429] *See, e.g.,* J.P. Morgan Comment Letter; AQR Comment Letter I; BlackRock Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter. *But see* ISDA Comment Letter (suggesting the rule permit a fund to determine its own confidence level from 95% to 99% for purposes of the rule's VaR test).

[430] *See* AQR Comment Letter I; BlackRock Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter.

[431] The Z-scores for these confidence levels are: (1) The value of the 99th percentile minus the population mean and (2) the value of the 95th percentile minus the population mean, both divided by the population standard deviation.

[432] *See* AQR Comment Letter I.

[433] *See id.*

[434] *See* ICI Comment Letter; Invesco Comment Letter.

[435] *See* SIFMA AMG Comment Letter.

[436] *See* BlackRock Comment Letter; Dechert Comment Letter I; ICI Comment Letter.

[437] *See* J.P. Morgan Comment Letter; ICI Comment Letter.

by rescaling a calculation initially performed at a 95% confidence level. Like the time-scaling technique the Commission discussed in the proposal, it may be beneficial in that it would allow a fund's VaR calculation to take into account additional observations while still complying with the final rule's VaR tests calibrated to a 99% confidence level and a time horizon of 20 trading days.[438] We believe that both approaches are appropriate for purposes of the final rule.

Historical Market Data

We are adopting the requirement, as proposed, that the fund's chosen VaR model must be based on at least three years of historical market data. As discussed in the proposal, we understand that the availability of data is a key consideration when calculating VaR, and that the length of the data observation period may significantly influence the results of a VaR calculation. When proposing this requirement, the Commission recognized that a shorter observation period means that each observation will have a greater influence on the result of the VaR calculation (as compared to a longer observation period), such that periods of unusually high or low volatility could result in unusually high or low VaR estimates.[439] Longer observation periods, however, can lead to data collection problems, if sufficient historical data is not available.[440]

The Commission received a few comments on this aspect of the proposal. One commenter suggested that the rule should require at a minimum five years of historical data rather than the proposed three years of historical data requirement.[441] This commenter stated that five years would be more representative of market conditions, but not so long as to mute the effects of extreme market events. Another commenter, however, stated that it supported the proposed three years of historical data requirement.[442] Another commenter expressly stated that it did not object to the proposed three-year historical data requirement.[443]

We are not persuaded to extend the requirement, as suggested by one commenter, to at least five years of historical data.[444] Funds with newer or novel investment exposures, for example, may experience challenges in collecting this data set. The rule's historical market data requirement is designed to permit a fund to base its VaR estimates on a meaningful number of observations, while also recognizing that requiring a longer period could make it difficult for a fund to obtain sufficient data to estimate VaR for the instruments in its portfolio.[445] We believe requiring a fund's chosen VaR model to be based on at least three years of historical market data strikes an appropriate balance.[446] Derivatives risk managers can base their VaR calculations on additional historical data if they choose.

VaR Models for the Fund's Portfolio and Its Designated Reference Portfolio

The final rule, as proposed, does not require a fund to apply its VaR model consistently (*i.e.,* the same VaR model applied in the same way) when calculating (1) the VaR of its portfolio and (2) the VaR of its designated reference portfolio. The rule will, however, require that VaR calculations comply with the same VaR definition under the rule and its specified model requirements.

As proposed, we have determined not to adopt a model consistency requirement because it could prevent funds from using less-costly approaches. For example, under the final rule's approach, in many cases a fund could calculate the VaR of a designated index based on the index levels over time without having to obtain more-detailed information about the index constituents. A fund also may obtain the VaR from a third-party vendor instead of analyzing it in-house. A model consistency requirement could preclude these approaches, however, because a fund might not be able apply the same approach to its portfolio.[447] Commenters supported this approach.[448] We believe similar considerations apply to funds using their securities portfolios in lieu of a designated index. For example, such a fund may have a securities portfolio composed solely of listed equities securities while also writing options or entering into other derivatives transactions with non-linear returns. A simpler VaR model may be appropriate to calculate the VaR of the fund's securities portfolio, and a comparatively more complex VaR model could be more appropriate for calculating the VaR of the fund's total portfolio that includes the fund's derivatives transactions.

Other VaR Calculation Considerations

Funds of funds. One commenter requested guidance on how the VaR tests should be applied to investments by a fund that invests in other registered investment companies (''underlying funds'').[449] This commenter observed that calculating VaR based on the acquiring fund's holdings can be challenging because an acquiring fund's adviser may not have daily transparency into the holdings of underlying funds. Accordingly, the commenter suggested we confirm that a fund need only comply with the rule if the fund itself directly engages in derivatives transactions and need not look through to the holdings of underlying funds. The commenter also sought confirmation

[438] *See* Proposing Release, *supra* footnote 1, at n.230.

[439] *See* Linsmeier & Pearson, *supra* footnote 426 (stating that, because historical simulation relies directly on historical data, a danger is that the price and rate changes in the last 100 (or 500 or 1,000) days might not be typical. For example, if by chance the last 100 days were a period of low volatility in market rates and prices, the VaR computed through historical simulation would understate the risk in the portfolio).

[440] *See* Proposing Release, *supra* footnote 1, at n.178 and accompanying text (citing Kevin Dowd, *An Introduction to Market Risk Measurement* (Oct. 2002) at 68 (stating that ''[a] long sample period can lead to data collection problems. This is a particular concern with new or emerging market instruments, where long runs of historical data don't exist and are not necessarily easy to proxy'').

[441] *See* Better Markets Comment Letter. This commenter also suggested stressed VaR, as discussed above (suggesting that the historical data include a one-year period of extreme but plausible market conditions). *See supra* section II.D.1.

[442] *See* J.P. Morgan Comment Letter.

[443] *See* ICI Comment Letter.

[444] *See* Better Markets Comment Letter.

[445] *See* Michael Minnich, *Perspectives On Interest Rate Risk Management For Money Managers And Traders* (Frank Fabozzi, ed.) (1998) (stating that for historical simulation, ''[l]onger periods of data have a richer return distribution while shorter periods allow the VAR to react more quickly to changing market events'' and that ''[t]hree to five years of historical data are typical''); *see also* Darryll Hendricks, *Evaluation of Value-at-Risk Models Using Historical Data,* FRBNY Economic Policy Review (Apr. 1996) (finding that, when using historical VaR, ''[e]xtreme [confidence level] percentiles such as the 95th and particularly the 99th are very difficult to estimate accurately with small samples'' and that the complete dependence of historical VaR models on historical observation data ''to estimate these percentiles directly is one rationale for using long observation periods'').

[446] The three-year data requirement applies to all VaR calculations under the rule, as proposed, rather than only historical simulation as the Commission proposed in 2015. All VaR models—not just historical simulation—rely on historical data. The Commission received no comments on this aspect of the proposal.

[447] For example, if a fund invested significantly in options, it generally would not be appropriate to use certain parametric VaR models. The fund might instead use Monte Carlo simulation, which is more computationally intensive and takes more time to perform. A model consistency requirement would require the fund to apply the same Monte Carlo simulation model to its unleveraged designated index or securities portfolio, for which a parametric or other simpler and less costly VaR model might be appropriate.

[448] *See* BlackRock Comment Letter; Franklin Comment Letter (stating its support for the proposed VaR model calculation flexibility and noting that it is supported by the Commission's discussion in the proposal regarding index licensing fees).

[449] *See* Fidelity Comment Letter.

that, when an acquiring fund does enter into derivatives transactions and also holds shares of underlying funds, that the acquiring fund may calculate its VaR by taking into account the historic return of the acquiring fund rather than determining the acquiring fund's VaR based on the aggregate VaR of the underlying funds.

We agree that, in general, an acquiring fund that does not use derivatives transactions would not be required to comply with the final rule or to look through to an underlying registered investment company or BDC's use of derivatives transactions for purposes of determining the acquiring fund's derivatives exposure. These underlying funds, themselves, will be subject to rule 18f–4 with respect to their investments in derivatives.[450] If a fund enters into derivatives transactions indirectly through controlled foreign corporations, these derivatives transactions are treated as direct investments of the fund for regulatory and other purposes, including for purposes of section 18 and therefore for rule 18f–4.

When an acquiring fund does engage in derivatives transactions beyond the 10% limited derivatives user threshold and also holds shares of underlying funds, the acquiring fund will be required under the rule to calculate its own VaR. In these circumstance we believe that it would be sufficient for the acquiring fund to use the historic returns of the underlying funds when determining the acquiring fund's VaR, in recognition of the compliance challenges associated with obtaining daily transparency into the holdings of the underlying funds. We do not believe it would be appropriate, however, for the acquiring fund (or any other fund under the rule) to use its own historic return for calculating VaR. The acquiring fund will have information about its own direct investments and can calculate its VaR taking these investments into account rather than looking to the fund's historic return, which will include return information that may be based on investments that differ from those in the fund's current portfolio.

Volatility-targeting funds. One commenter suggested that the Commission permit different VaR parameters for funds that target a constant volatility or volatility range (''volatility-targeting funds'').[451] Such funds generally will increase the size of their positions when market risks are lower and decrease the size of their positions when market risks are higher. The commenter expressed concerns about applying a VaR test to such funds, particularly in periods of low volatility that follow high-volatility periods. In this case, the fund would increase the size of its position because of the low volatility in the market but, when calculating the fund's VaR, effectively would be simulating how the fund's current portfolio would perform during the past high-volatility period. The commenter believed that this would not measure effectively the fund's risk because during the prior high-volatility periods simulated in the VaR model, the fund's positions would have been smaller than in its current portfolio because volatility was higher.

The commenter urged that the final rule permit this fund's derivatives risk manager to use a VaR model that, in simulating the fund's performance over the look-back period, would reflect the way in which the fund would change its position sizes based on the fund's publicly-disclosed investment strategy.[452] The commenter explained that this alternative VaR model adjusts historical returns data by considering the ex-ante volatility of the holdings on each day in the lookback window and scaling those returns to reflect the target volatility of the fund. The commenter acknowledged that this VaR model modification would not be appropriate for all funds and could be misused by funds that do not effect these strategies during high volatility market conditions, but suggested the Commission could address such concerns by providing guidance that this methodology would be limited to only those funds that have an explicit strategy of targeting a specific volatility level or range that is disclosed as a principal investment strategy.

We recognize that the VaR of a fund's current portfolio is based on past trading conditions and that this can affect volatility-targeting funds as this commenter discussed. Where these high-volatility periods are in the VaR lookback period and market volatility currently is low, VaR may limit the size of the fund's positions. We have not, however, modified the proposed rule to permit the alternative method suggested. The VaR test is designed to measure the leverage risk in a fund's portfolio. The suggested method appears to measure the risk in the fund's strategy. It also assumes that the fund effectively achieves the targeted volatility each day, which may not be the case. In addition, allowing a fund to adjust historical returns when measuring the current leverage risk in a fund's portfolio would appear to introduce ''gaming'' concerns that we do not believe can be fully addressed by limiting such a method to only those funds that have an explicit strategy of targeting a specific volatility level or range that is disclosed as a principal investment strategy. We have, however, incorporated a number of other modifications suggested by the commenter to other aspects of the rule that may help to address the concerns the commenter expressed.[453]

6. Implementation

a. Testing Frequency

Under the final rule, a fund must determine its compliance with the applicable VaR test at least once each business day, as proposed.[454] Although we believe that funds will calculate their VaRs at a consistent time each day, which would generally be either in the mornings before markets open or in the evenings after markets close, the rule does not require one at the exclusion of the other.

The Commission proposed a daily testing frequency because, if this testing requirement were less frequent, a fund could satisfy the condition only on business days requiring a VaR test and modify its trading strategy to circumvent the purpose of the test on other business days. Testing each business day also reflects the potential for market risk factors associated with a fund's investments to change quickly. The Commission received one comment on this aspect of the rule, which supported it, and we are adopting it as proposed.[455]

b. Remediation

If a fund determines that it is not in compliance with the applicable VaR test, then under the rule a fund must

[450] However, section 48(a) of the Act provides that it shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of the Investment Company Act or any rule, regulation, or order thereunder. This provision prevents a fund from investing through a registered investment company or BDC, or a private fund or other pooled investment vehicle, as a means of directly or indirectly causing to be done any act or thing through or by means of any other person which it would be unlawful under section 18 and the final rule for the acquiring fund to do directly.

[451] *See* AQR Comment Letter I.

[452] The commenter also suggested a modification to the absolute VaR test designed to address concerns for volatility-targeting funds as discussed at *supra* footnote 414 and accompanying text.

[453] *See, e.g., supra* sections II.D.2.c, II.D.3, II.D.4 (discussing raising VaR limits and confidence level re–scaling).

[454] Rule 18f–4(c)(2)(ii).

[455] *See* J.P. Morgan Comment Letter.

come back into compliance promptly after such determination, in a manner that is in the best interests of the fund and its shareholders.[456] If the fund is not in compliance within five business days:

- The derivatives risk manager must provide a written report to the fund's board of directors and explain how and by when (*i.e.,* the number of business days) the derivatives risk manager reasonably expects that the fund will come back into compliance;[457]
- The derivatives risk manager must analyze the circumstances that caused the fund to be out of compliance for more than five business days and update any program elements as appropriate to address those circumstances;[458] and
- The derivatives risk manager must provide a written report within thirty calendar days of the exceedance to the fund's board of directors explaining how the fund came back into compliance and the results of the derivatives risk manager's analysis of the circumstances that caused the fund to be out of compliance for more than five business days and any updates to the program elements.[459]

If the fund remains out of compliance with the applicable VaR test at that time, the derivatives risk manager's written report must update the report explaining how and by when he or she reasonably expects the fund will come back into compliance, and the derivatives risk manager must update the board of directors on the fund's progress in coming back into compliance at regularly scheduled intervals at a frequency determined by the board.[460]

The proposed rule would have required the derivatives risk manager to satisfy the additional reporting and analysis requirements if the fund was out of compliance for three consecutive business days.[461] Additionally, the proposed rule would have prohibited a fund from entering into any derivatives transactions (other than derivatives transactions that, individually or in the aggregate, are designed to reduce the fund's VaR) until the fund has been back in compliance with the applicable VaR test for three consecutive business days (the ''proposed derivatives entry restriction''), among other requirements.[462] The Commission requested comment in the Proposing Release on whether the remediation provision would exacerbate fund or market instability and harm investors.[463] The Commission also requested comment on whether there was a more–effective means for the remediation provision to balance investor protection concerns regarding compliance with the VaR-based limit on fund leverage risk and not forcing asset sales or unwinding transactions.

Many commenters urged the Commission to extend the remediation period from three business days to five business days or seven calendar days.[464] These commenters suggested that the proposed three business days is too short to ensure an orderly process of getting back into compliance.[465] In particular, commenters raised concerns that during periods of high market volatility and dislocation, funds would engage in sales and other actions to get back into compliance with the VaR test that may have adverse effects on a fund and its shareholders.[466] Moreover, some commenters pointed out that a five–business-day remediation period would align better with respect to over-the–counter derivatives contracts' termination provisions that, based on industry market practices, are often set at seven calendar days.[467]

Commenters similarly urged that the Commission eliminate or modify the proposed derivatives entry restriction.[468] Commenters urged that this restriction could be disruptive to a fund's execution of its strategy and could adversely affect a fund and its shareholders.[469] Several commenters urged that it should be eliminated because the other provisions requiring reporting to the fund's board of directors and to the Commission under the rule provide sufficient incentives for funds to come back into compliance promptly with the rule's VaR test.[470] A few commenters also expressed concerns with the proposed derivatives entry restriction because of the challenges with predicting whether a new derivatives transaction will be VaR reducing.[471]

After considering comments, we are making several modifications from the proposal. We are extending from three business days to five business days the time period during which a fund may be out of compliance with its VaR test without being required to report to the fund's board and confidentially to the Commission.[472] We appreciate that investigating a VaR breach and taking steps to remediate it may take more time than reducing a fund's outstanding bank borrowings, which was the basis for the three–day period at proposal.

We also are modifying the rule to provide that a fund out of compliance with its VaR test must reduce its VaR promptly, in a manner that is in the best interests of the fund and its shareholders, which may exceed this five-business day period. Although a fund remaining out of compliance with the applicable VaR test raises investor protection concerns related to fund leverage risk, if the rule were to force a fund to exit derivatives transactions immediately or at the end of the five-day period, this could result in greater harm to investors. For example, it could require the fund to realize trading losses that could have been avoided under a more-flexible approach. Requiring the fund to come back into compliance promptly, in a manner that is in the best interests of the fund and its shareholders, is designed to require a

[456] *See* rule 18f–4(c)(2)(ii).

[457] The final rule clarifies that this report must be in writing. *See* rule 18f–4(c)(2)(iii)(A); proposed rule 18f–4(c)(2)(iii)(A). The Commission did not receive comment on whether this reporting requirement must be in writing.

[458] *See* rule 18f–4(c)(2)(iii)(B).

[459] *See* rule 18f–4(c)(2)(iii)(C).

[460] *See id.; see also infra* section II.G.2 (discussing the requirement to submit a confidential report to the Commission if the fund is out of compliance with the applicable VaR test for five business days).

[461] *See* proposed rule 18f–4(c)(2)(iii).

[462] *See* proposed rule 18f–4(c)(2)(iii)(A) through (C).

[463] *See* Proposing Release, *supra* footnote 1, at section II.D.5.b.

[464] *See, e.g.,* AQR Comment Letter I; Capital Group Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Franklin Comment Letter; Putnam Comment Letter; SIFMA AMG Comment Letter; *see also* ISDA Comment Letter (suggesting seven business days); Dechert Comment Letter III (suggesting ten business days in light of concerns relating to funds fire selling assets to avoid VaR test compliance issues that may trigger reporting requirements to the Commission).

[465] *See, e.g.,* Franklin Comment Letter; Putnam Comment Letter; T. Rowe Price Comment Letter.

[466] *See, e.g.,* AQR Comment Letter I; Capital Group Comment Letter; ICI Comment Letter.

[467] *See, e.g.,* Dechert Comment Letter I; ICI Comment Letter; MFA Comment Letter.

[468] *See, e.g.,* AQR Comment Letter I; Capital Group Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Franklin Comment Letter; Putnam Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter III.

[469] *See, e.g.,* AQR Comment Letter I; Franklin Comment Letter; ISDA Comment Letter.

[470] *See, e.g.,* SIFMA AMG Comment Letter; Nuveen Comment Letter; Putnam Comment Letter. *But see* CFA Comment Letter (stating that the proposed remediation provisions did not have enough incentives for funds to comply with the rule's VaR-based test).

[471] *See, e.g.,* Franklin Comment Letter; Dechert Comment Letter I; ICI Comment Letter (suggesting that the implication is that a fund must engage in pre-trade monitoring). *But see* J.P. Morgan Comment Letter (suggesting pre-trade documentation by the portfolio management team of the intended impact of the derivatives transaction should satisfy this proposed requirement).

[472] Under the rule, a fund that is not in compliance within five business days also will be required to file a report to the Commission on Form N–RN. *See* rule 18f–4(c)(7); *infra* section II.H.2.

fund to reduce its VaR promptly but without requiring the fund to engage in deeply discounted transactions (sometimes known as ''fire sales'') or otherwise incur trading losses that reasonably might be avoided while coming back into compliance in a deliberate manner that is in the best interests of the fund and its shareholders.[473]

If a fund does not come back into compliance within five business days, the remediation provision requires the fund to satisfy three additional requirements. First, the derivatives risk manager must provide a written report to the fund's board of directors and explain how and by when (*i.e.,* the number of business days) the derivatives risk manager reasonably expects that the fund will come back into compliance.[474] A few commenters expressed general support for this remediation provision because it incentivizes funds to stay in compliance or come back into compliance with the applicable VaR limit.[475] However, one commenter suggested eliminating the proposed board reporting prong of the remediation provision and replacing it with a rule requiring funds out of compliance with the VaR-based test to ''reduce risk in the best interest of investors and in line with an adviser's fiduciary responsibilities.'' [476]

After considering the comments received, we are adopting this requirement as proposed other than the change from three to five business days discussed above and a modification to require that the board report be in writing. This requirement is designed to facilitate the fund coming back into compliance promptly by requiring the derivatives risk manager to develop a specific remediation course of action and to facilitate the board's oversight by requiring the derivatives risk manager to report this information to the board.

Second, the derivatives risk manager must analyze the circumstances that caused the fund to be out of compliance for more than five business days and update any program elements as appropriate to address those circumstances.[477] Commenters did not address this aspect of the remediation provision. We are adopting this provision as proposed, other than a conforming change from three to five business days discussed above. This provision is designed to address any deficiencies in the fund's program, which the fund's inability to come back into compliance with the applicable VaR test within five business days may suggest exist.

Third, the derivatives risk manager, in a change from the proposal, must provide a written report within thirty calendar days of the exceedance (*i.e.,* thirty calendar days of the fund's determination that it is out of compliance with its applicable VaR test) to the fund's board of directors explaining: (1) How the fund came back into compliance; (2) the results of the derivatives risk manager's analysis of the circumstances that caused the fund to be out of compliance for more than five business days; and (3) any updates to the program elements. Under the rule, if the fund remains out of compliance with the applicable VaR test at that time, the derivatives risk manager's written report must update the report that explained how and by when he or she reasonably expects the fund will come back into compliance, and the derivatives risk manager must update the board of directors on the fund's progress in coming back into compliance at regularly scheduled intervals at a frequency determined by the board.

In the proposal, the Commission requested comment on whether the remediation provision should include any changes that would distinguish funds that have more frequent or longer periods of non-compliance with the VaR test from other funds and potentially subject them to additional remediation provisions.[478] A few commenters addressed this concern.[479] For example, one commenter stated that because of the proposed reporting requirements to the Commission and the fund's board of directors, any fund that has more frequent or longer periods of non-compliance would ''immediately stand apart as an outlier'' and the fund's board and the Commission staff could address it.[480] Another commenter stated that it would be unlikely a fund would intentionally exceed the VaR limits for a specific period because of the burdens and ''potentially costly and embarrassing consequences'' of exceeding the VaR limit beyond the remediation period.[481] A commenter also stated that in lieu of the proposed restriction that may address this concern, the Commission ''has many other tools'' that can address these types of funds including requiring reporting to the fund's board of directors.[482]

After considering the comments received, we are adopting this new written reporting requirement. This provision is designed to facilitate appropriate board engagement and oversight when a fund is out of compliance with its VaR test. The rule provides for this follow-up within thirty calendar days because we anticipate that funds generally would have mitigated VaR breaches by that time and would be in a position to report to the board regarding the process.

For funds that are out of compliance beyond that time period, by requiring the derivatives risk manager to update the initial board report, the rule is designed to facilitate appropriate board oversight and incentivize compliance with the rule's VaR-based fund leverage risk limit. For the same reasons, the rule requires the fund's board of directors to determine regularly scheduled intervals to meet with the derivatives risk manager until the fund has come back into compliance with its VaR-based test. If a fund is repeatedly out of compliance with its applicable VaR test for more than five business days, we would expect the fund and its board of directors to reconsider whether the fund's derivatives risk management program is appropriately designed and operating effectively.

Finally, we are eliminating the proposed restrictions on a fund's ability to enter into derivatives transactions while out of compliance with the VaR test. We appreciate the concerns commenters raised about the negative effects this could have on a fund's ability to pursue its strategy, to the potential detriment of shareholders. We also believe that the requirement that the fund report to the fund's board and the Commission when a fund's VaR exceeds the limits in its VaR test for five business days, as well as the other aspects of the remediation provisions, will create a strong incentive for funds to come back into compliance without the need for the final rule to limit a fund's investment activities in ways that could be detrimental to shareholders. We do not believe that additional mandatory Commission reporting is necessary because Commission staff can determine whether and how to follow up with a fund after receiving an initial report on Form N–RN. The fund also must report confidentially to the Commission on Form N–RN once it

[473] *Cf.* Dechert Comment Letter III (suggesting that the final rule require a fund to reduce risk in the best interest of investors and in line with an adviser's fiduciary responsibilities).

[474] Rule 18f–4(c)(2)(iii)(A).

[475] *See, e.g.,* T. Rowe Price Comment Letter; AQR Comment Letter I.

[476] *See, e.g.,* Dechert Comment Letter III.

[477] Proposed rule 18f–4(c)(2)(iii)(B).

[478] *See* Proposing Release, *supra* footnote 1, at section II.D.5.b.

[479] *See, e.g.,* MFA Comment Letter; ISDA Comment Letter; AQR Comment Letter I.

[480] *See* AQR Comment Letter I.

[481] *See* ISDA Comment Letter; *but see* CFA Comment Letter.

[482] *See* MFA Comment Letter.

comes back into compliance. This allows the Commission to monitor the length of time that a fund has been out of compliance and the fund's progress in coming back into compliance. We expect that this monitoring would include staff outreach to a fund concerning its remediation plans where the fund has remained out of compliance for a longer period of time.

Many commenters supported the Form N–RN reporting requirement as an appropriate adjunct to the rule's remediation provision, facilitating regulatory monitoring by the Commission.[483] One commenter, however, suggested removing the Form N–RN reporting requirement due to fund sensitivities regarding having to immediately report to the Commission.[484] This commenter expressed concern that to avoid this reporting requirement a fund may engage in ''fire sales'' during stressed market conditions that may contribute to additional systemic risk from portfolio managers selling into a volatile market and realizing losses during a period where transaction costs may be higher.

After considering comments, the final rule, consistent with the proposal, will require a fund that is not in compliance with the applicable VaR test within five business days after determining it is out of compliance to report this to the Commission on Form N–RN.[485] We believe this requirement is important for facilitating appropriate regulatory oversight of fund leverage risk and compliance with the rule. This requirement is designed to provide the Commission with current information regarding potential increased risks and stress events (as opposed to delayed reporting on Form N–PORT), as discussed in more detail below.[486] We have modified the rule expressly to require a fund that is promptly coming back into compliance with the applicable VaR test to do so in a manner that is in the best interests of the fund and its shareholders. A fund engaging in ''fire sales'' to avoid filing a report on Form N–RN would violate the final rule.

E. Limited Derivatives Users

Consistent with the proposal, rule 18f–4 includes an exception from the rule's requirements to adopt a derivatives risk management program, comply with the VaR-based limit on fund leverage risk, and comply with the related board oversight and reporting provisions for funds that use derivatives in a limited manner (collectively, the ''VaR and program requirements'').[487] Requiring funds that use derivatives only in a limited way to comply with these requirements could potentially require funds (and therefore their shareholders) to incur costs and bear compliance burdens that may be disproportionate to the resulting benefits.[488] We recognize that the risks and potential effect of derivatives transactions on a fund's portfolio generally increase as the fund's level of derivatives usage increases and when a fund uses derivatives for speculative purposes. The rule's limited derivatives user exception is designed to provide an objective standard to identify funds that use derivatives in a limited manner.

Commenters supported the proposed limited derivatives user exception, and we are adopting it with certain modifications in response to comments.[489] Under the final rule, the exception will be available to a fund that limits its derivatives exposure to 10% of its net assets. A fund may exclude from the 10% threshold derivatives transactions that are used to hedge certain currency and/or interest rate risks and positions closed out with the same counterparty.[490] A fund that relies on the exception will be required to adopt policies and procedures that are reasonably designed to manage its derivatives risks.[491] The rule also contains remediation provisions to address instances in which a fund exceeds the 10% threshold.[492] We discuss each element of the exception below.

1. Derivatives Exposure

The final rule defines the term ''derivatives exposure'' to mean the sum of: (1) The gross notional amounts of a fund's derivatives transactions such as futures, swaps, and options; and (2) in the case of short sale borrowings, the value of any asset sold short.[493] We are adopting this aspect of the rule as proposed, except with a modification clarifying that derivatives instruments that do not involve future payment obligations—and therefore are not a ''derivatives transaction'' under the rule—are not included in a fund's derivatives exposure.[494] Further, although commenters seemed to assume that derivatives exposure was to be calculated on a gross basis in the proposed rule, the final rule expressly requires derivatives exposure to be based on ''gross'' notional amounts.[495] This is designed to make clear that a fund's derivatives exposure must include the sum of the absolute values of the notional amounts of the fund's derivatives transactions, rather than a figure based on calculations that net long and short positions. In addition, because the final rule permits a fund to treat reverse repurchase agreements or similar financing transactions as derivatives transactions under certain circumstances, a fund treating these transactions as derivatives transactions also must include in its derivatives exposure the proceeds that the fund received but has not yet repaid or returned, or for which the associated liability has not been extinguished, in connection with each such transaction.[496] The derivatives exposure definition is designed to provide a measure of the market exposure associated with a limited derivative user's derivatives transactions.

Using gross notional amounts to measure market exposure could be

[483] *See, e.g.,* J.P. Morgan Comment Letter; Dechert Comment Letter I; ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter; Nuveen Comment Letter. *But see* ISDA Comment Letter (suggesting that the board reporting requirement under the proposed remediation provision is sufficient and SEC reporting on Form N–RN is not necessary).

[484] *See* Dechert Comment Letter III (suggesting that some of the proposed Form N–RN reporting information could be required on Form N–PORT, which would provide this information to the Commission on a more time delayed basis). Although this commenter stated that it ''would eliminate the SEC reporting requirement on Form N–RN and the board reporting requirement immediately post a [VaR] limit breach,'' the commenter's concern appeared focused on filing Form N–RN because the commenter later observed in its letter that ''[i]t is the immediate SEC posting [on Form N–RN], not the [b]oard reporting requirement, which creates the sense of urgency and may cause forced selling not in the best interest of the fund.''

[485] *See infra* section II.G.2 (discussing Form N–RN disclosure reporting requirements).

[486] *Id.*

[487] One commenter observed that if a limited derivatives user is exempt from the rule's requirements to establish a derivatives risk management program and comply with the VaR-based limit on fund leverage risk, it seems implicit that the fund also would be exempt from the related board oversight and reporting requirements that are only relevant to funds that are required to establish a derivatives risk management program. *See* NYC Bar Comment Letter. The final rule clarifies this point by expressly providing that a limited derivatives user is not subject to the related board oversight and reporting requirements in rule 18f–4. *See* rule 18f–4(c)(4)(i).

[488] The cost burden concern extends to smaller funds as well, which could experience an even more disproportionate cost than larger funds.

[489] *See, e.g.,* ICI Comment Letter; Comment Letter of Gateway Investment Advisers, LLC (Mar. 24, 2020) (''Gateway Comment Letter''); SIFMA AMG Comment Letter; Comment Letter of TPG Specialty Lending (Apr. 2, 2020) (''TPG Comment Letter''); T. Rowe Price Comment Letter.

[490] *See* rule 18f–4(c)(4).

[491] *See* rule 18f–4(c)(4)(i).

[492] *See* rule 18f–4(c)(4)(ii).

[493] *See* rule 18f–4(a).

[494] *See* rule 18f–4(a).

[495] *Id.*

[496] *See* rule 18f–4(a); *see also* rule 18f–4(d)(1)(ii); Item B.9.e of Form N–PORT.

viewed as a relatively blunt measurement, as discussed in the Proposing Release.[497] The derivatives exposure threshold in the limited derivatives user exception, however, is not designed to provide a precise measure of a fund's market exposure or to serve as a risk measure. Rather it is designed to serve as an efficient way to identify funds that use derivatives in a limited way. Commenters supported permitting the inclusion of an exception from the VaR and program requirements for funds that engage in derivatives transactions to a limited extent, based on a fund's derivatives exposure.[498]

a. Adjustments for Interest Rate Derivatives and Options

Like the proposed rule, the final rule permits funds to make two adjustments designed to address certain limitations associated with notional measures of market exposure. The commenters who addressed these adjustments supported them.[499] Specifically, the first adjustment permits a fund to convert the notional amount of interest rate derivatives to 10-year bond equivalents, and the second adjustment permits a fund to delta adjust the notional amounts of options contracts.[500] Converting interest rate derivatives to 10-year bond equivalents will provide for greater comparability of the notional amounts of different interest rate derivatives that provide similar exposure to changes in interest rates but that have different unadjusted notional amounts. Absent this adjustment, short-term interest rate derivatives in particular can produce large unadjusted notional amounts that may not correspond to large exposures to interest rate changes. Permitting funds to convert these and other interest rate derivatives to 10-year bond equivalents is designed to result in adjusted notional amounts that better represent a fund's exposure to interest rate changes. Similarly, permitting delta adjusting of options is designed to provide for a more tailored notional amount that better reflects the exposure that an option creates to the underlying reference asset. Further, providing these adjustments also would be efficient for some funds because the adjustments are consistent with the reporting requirements in Form PF and Form ADV.[501]

b. Closed-Out Derivatives Positions

Several commenters stated that the rule should allow for netting of offsetting derivatives transactions when calculating a fund's derivatives exposure.[502] They asserted that permitting a fund to calculate its derivatives exposure by netting offsetting derivatives positions is necessary to more accurately identify the fund's market exposure through derivatives.[503] Commenters stated that a derivatives transaction previously executed by a fund is often exited through the fund's execution of an identical but offsetting transaction and that this process is a useful tool in controlling a fund's derivatives exposure.[504] Some commenters favored incorporating a broad use of netting, for instance, allowing netting of offsetting derivatives holdings with different counterparties.[505] Other commenters suggested that the rule should allow for netting only for offsetting transactions with the same counterparty.[506]

We recognize that, in certain circumstances, funds seeking to exit a derivatives position may enter into a directly offsetting position to eliminate the fund's market exposure. Accordingly, we are modifying the proposed ''derivatives exposure'' definition in the final rule to allow a fund to exclude from its derivatives exposure any closed-out positions. These positions must be closed out with the same counterparty and must result in no credit or market exposure to the fund.[507]

The final rule does not, however, permit a fund to exclude offset positions across different counterparties. This could result in the fund having a large volume of open derivatives positions subject to their own margin and other requirements with various counterparties. For example, when a fund must make margin or collateral payments on a derivatives transaction to one counterparty, and has not yet received payments from an offsetting transaction from a different counterparty, the fund might have to sell investments to raise cash for these purposes. This could result from differences in the timing of required payments, effects of margin thresholds or minimum transfer amounts for the exchange of margin or collateral, or other reasons. These transactions could involve a scale of derivatives positions and related operational and counterparty risks that we believe should be managed as part of a fund's derivatives risk management program.

2. Limited Derivatives User Threshold

A fund will qualify as a limited derivatives user under the rule if its derivatives exposure does not exceed 10% of its net assets. As discussed in more detail above, a fund's derivatives exposure is based primarily on the gross notional amounts of a fund's derivatives transactions such as futures, swaps, and options, subject to certain adjustments. In addition, and in a change from the proposal, the final rule permits a fund to exclude certain currency and interest rate hedges from the 10% threshold. This threshold is designed to provide an objective standard to identify funds that use derivatives in a limited manner.

a. 10% Derivatives Exposure Threshold

The Commission proposed a 10% derivatives exposure threshold based in part on staff analysis of funds' practices regarding derivatives use based on Form N–PORT filings. Specifically, DERA staff's analysis in connection with the proposal showed that 78% of funds had adjusted notional amounts below 10% of NAV; 80% of funds had adjusted notional amounts below 15% of NAV; 81% of funds had adjusted notional amounts below 20% of NAV; and 82% of funds had adjusted notional amounts below 25% of NAV.[508] One commenter conducted a survey of funds' derivatives

[497] *See* Proposing Release *supra* footnote 1, at 149.

[498] *See, e.g.,* Comment Letter of the Options Clearing Corporation (Apr. 15, 2020) (''OCC Comment Letter''); T. Rowe Price Comment Letter.

[499] *See* OCC Comment Letter (stating that ''allowing a fund to delta-adjust the notional amount of a listed options contract allows the fund to get a more accurate picture of its exposure to the underlying security or index''); *see also* ISDA Comment Letter.

[500] Delta refers to the ratio of change in the value of an option to the change in value of the asset into which the option is convertible. A fund would delta adjust an option by multiplying the option's unadjusted notional amount by the option's delta.

[501] *See, e.g.,* General Instruction 15 to Form PF; Item B.30 of Section 2b of Form PF; Glossary of Terms, Gross Notional Value of Form ADV; Schedule D of Part 1A of Form ADV.

[502] *See, e.g.,* Angel Oak Comment Letter; Dechert Comment Letter I; Guggenheim Comment Letter; T. Rowe Price Comment Letter.

[503] *See, e.g.,* Guggenheim Comment Letter; ICI Comment Letter; Invesco Comment Letter; ISDA Comment Letter; Angel Oak Comment Letter; Dechert Comment Letter I.

[504] *See, e.g.,* T. Rowe Price Comment Letter; Invesco Comment Letter; Guggenheim Comment Letter.

[505] *See, e.g.,* ICI Comment Letter; Invesco Comment Letter.

[506] Guggenheim Comment Letter; SIFMA AMG Comment Letter.

[507] Rule 18f–4(a). In addition, the final rule's approach to offsetting positions is consistent with the way advisers report derivatives exposures on Form PF, which may provide some efficiencies where these advisers also manage funds that are limited derivatives users.

[508] *See* Proposing Release *supra* footnote 1, at 151 (citing data based on Form N–PORT filings from September 2019). These figures, as well as the updated figures provided below, include funds that did not report any derivatives transactions.

exposure and found similar results.[509] Although BDCs are not required to file reports on Form N–PORT, our staff separately analyzed a sampling of 48 BDCs and found that of the sampled BDCs, 54% did not report any derivatives holdings and a further 29% reported using derivatives with gross notional amounts below 10% of net assets.[510] Commenters did not provide alternative data regarding the extent to which BDCs use derivatives in the context of the limited derivatives user exception.

The 10% threshold the Commission proposed took these findings into account, including the Commission's observation that setting the threshold at 10%, 15%, 20%, or 25%, for example, seemed likely to result in nearly the same percentages of funds qualifying for the exception. Since the proposal, DERA staff updated their analysis of funds' use of derivatives based on September 2020 Form N–PORT filings. The results of the updated analysis are similar to the findings at proposal, with the updated analysis reflecting that 79% of funds had adjusted notional amounts below 10% of NAV; 81% of funds had adjusted notional amounts below 15% of NAV; 82% of funds had adjusted notional amounts below 20% of NAV; and 83% of funds had adjusted notional amounts below 25% of NAV. Similarly, our staff updated their analysis of the use of derivatives by BDCs. Of the 48 BDCs sampled at proposal (or their successor funds), updated data reflects that 59.1% did not report any derivatives holdings, and a further 31.8% reported using derivatives with gross notional amounts below 10% of net assets. Four of the BDCs sampled used derivatives more extensively, when measured on a gross notional basis, mainly due to their use of currency forwards and/or interest rate swaps. However, as proposed, the final rule permits a fund to convert the notional amount of interest rate derivatives to 10-year bond equivalents.[511] Further, as discussed in more detail below, and in a change from the proposal, a fund may exclude currency and interest rate derivatives from the 10% derivatives exposure threshold if these transactions meet certain criteria for hedging under the final rule. Most commenters generally supported the limited derivatives user exception but did not comment specifically on the proposed 10% threshold. One commenter, however, suggested that a fund with derivatives exposure up to 20% or 25% of net assets should be permitted to rely on this exception absent data indicating harm would result from a higher threshold.[512] This commenter stated that distressed or volatile market conditions could make it difficult for funds to consistently maintain a derivatives exposure of less than 10%.

We are adopting the proposed 10% derivatives exposure threshold rather than a higher figure, like 25%, because we believe the 10% exposure level is likely to result in nearly the same percentage of funds qualifying for the exception based on current practices. The 10% threshold will provide greater investor protections than a 25% threshold, for example, without a materially greater compliance burden on funds, since only 4% more funds would be subject to the derivatives risk management program at the 25% threshold. Further, we believe that a fund that maintains derivatives exposure at 10% or below is using derivatives in a limited manner, whereas a fund that has derivatives exposure near 20% or 25% of its net assets is more likely to present risks that we believe should be managed as part of a derivatives risk management program. For instance, we believe that it is important that a fund with derivatives exposure near 20% or 25% is subject to the periodic stress testing requirement of the derivatives risk management program.[513] For example, although the final rule permits a fund to delta adjust options because we believe this provides for a more tailored notional amount, delta-adjusting options also creates the risk that the size of a fund's investment exposure can increase quickly as market conditions change, including in times of stress. The final rule's stress testing requirement will result in the fund manager developing a more complete understanding of the fund's potential losses during distressed or volatile market conditions, such as those related to the recent COVID–19 global health pandemic.

b. The 10% Derivatives Exposure Threshold Excludes Certain Hedging Transactions

In a modification of the proposal, the final rule allows a fund to exclude certain hedging transactions from the 10% derivatives exposure threshold. The proposed rule, in contrast, included two mutually-exclusive bases for relying on the limited derivatives user exception. The first prong of the proposed exception would have excluded funds when their derivatives exposure is less than 10% of net assets. The second prong would have excluded funds that limited their derivatives use solely to certain currency hedging transactions. The Commission observed that using currency derivatives solely to hedge currency risk does not raise the policy concerns underlying section 18.

Commenters urged the Commission to combine the proposed exposure-based and currency hedging exceptions by allowing a fund to exclude currency hedges from the derivatives exposure calculation.[514] Commenters stated that requiring a limited derivatives user to choose between these exceptions could require funds that use derivatives in a limited way nevertheless to incur the costs and compliance burdens of complying with the VaR and program requirements.[515] For example, several commenters were concerned that, under the proposal, a fund with currency derivatives exposure exceeding 10% of the fund's net assets would be unable to use a single derivative for any other purpose while remaining a limited derivatives user.[516] The fund would have to either leave its foreign-currency denominated investments unhedged or, if it hedged its currency risk, forgo even a limited use of non-currency hedging derivatives.[517] Commenters also stated that, because they believed that currency hedging derivatives permitted in the proposed exception do not raise section 18 policy concerns, excluding currency hedging derivatives from the 10% derivatives exposure threshold would not raise additional risks that need to be managed under a derivatives risk management program.[518]

Several commenters also suggested broadening the scope of the exclusion to

[509] *See* ICI Comment Letter (asserting that ''75 percent of respondents (3,940 out of 5,228 funds) indicated that, as of December 31, 2019, they would have qualified as limited derivative users'').

[510] *See* Proposing Release *supra* footnote 1, at 151–52.

[511] *See* rule 18f–4(a); *see also supra* section II.E.1.a. Our staff did not have access to sufficient information to adjust the notional amounts of the BDCs' interest rate derivatives.

[512] *See* ISDA Comment Letter.

[513] *See infra* section II.B.2.c (discussing the stress testing requirements of the derivatives risk management program).

[514] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter I; TPG Comment Letter.

[515] *See, e.g.,* ICI Comment Letter; Calamos Comment Letter.

[516] *See, e.g.,* ICI Comment Letter; T. Rowe Price Comment Letter; TPG Comment Letter.

[517] Dechert Comment Letter I; ICI Comment Letter (stating that this ''is inefficient and likely detrimental to a fund's returns and could create more risk for the fund'').

[518] *See, e.g.,* Vanguard Comment Letter; ICI Comment Letter.

include interest rate hedging that corresponds directly to a specific cash-market instrument held by the fund.[519] Some commenters stated that they routinely enter into fixed-to-floating interest rate swaps (or vice versa) and that these transactions are matched to the notional amount and maturity of a specific security in the fund's portfolio.[520] These commenters asserted that such matched interest rate hedging is conceptually the same as the currency hedging that the proposed exception would permit because the transactions are easily identified as a hedge, offset a single risk (interest rate risk), and are tied to a specific instrument in a fund's portfolio.[521]

After considering comments, we are permitting funds to exclude certain currency and interest rate hedges from the 10% derivatives exposure threshold, in the final rule.[522] While distinguishing most hedging transactions from leveraged or speculative derivatives transactions is challenging, the rule limits this exclusion to interest rate or currency hedging transactions directly matched to particular investments held by the fund, or the principal amount of borrowings by the fund. We believe these currency and interest rate derivatives are appropriate for limited derivatives users because they will predictably and mechanically provide the anticipated hedging exposure without giving rise to basis risks or other potentially complex risks that should be managed as part of a derivatives risk management program.

Accordingly, under the final rule a fund may exclude currency and interest rate derivatives used to hedge the respective currency and interest rate risks associated with specific equity or fixed-income investments held by the fund or borrowings by the fund. In the case of currency hedges, the equity or fixed-income investments being hedged must be foreign-currency-denominated. These derivatives must be entered into and maintained by the fund for hedging purposes. The notional amounts of such derivatives may not exceed the value of the hedged instruments (or the par value thereof, in the case of fixed-income investments, or the principal amount, in the case of borrowings) by more than 10%. These requirements are substantially similar to the proposal's currency hedging exception, except the proposal provided that the derivative's notional amount could not exceed the value of the hedged investment by more than a ''negligible amount'' instead of 10%.[523]

Several commenters urged that we replace a ''negligible amount'' with a fixed numerical value to provide greater clarity and facilitate compliance.[524] Many commenters suggested that a 10% numerical value would be consistent with the limited derivatives user exception's 10% derivatives exposure threshold.[525] Commenters stated that there are situations, such as shareholder redemptions or fluctuations in the market value of a hedged investment, that can temporarily cause the notional amounts of the hedges to exceed the value of the hedged investments by more than a negligible amount.[526]

After considering these comments, we have modified the proposal to replace ''negligible amount'' with a 10% threshold in the final rule. We are not taking the position that this threshold reflects a negligible amount. Rather, this change is designed to provide an unambiguous numerical value to facilitate compliance. Setting the level at 10%, as opposed to a lower value like 5% or 3%, also will avoid funds frequently trading (and incurring the attendant costs) to resize their hedges in response to small changes in value of the hedged investments. If the notional amount of a derivatives transaction exceeds the value of the hedged investments by more than 10%, however, it will no longer qualify as a hedge under the limited derivatives user exception.

One commenter urged that the final rule refer simply to foreign-currency denominated ''investments,'' rather than ''foreign-currency-denominated equity or fixed-income investments.'' [527] The commenter stated that certain investments, such as foreign currency itself, may not constitute an equity or fixed-income investment. We have not made this modification because we understand, based on our staff's analysis of Form N–PORT filings, that funds rarely hold foreign currency in such significant amounts, and for an extended period, that they would hedge this currency risk. Moreover, we believe that a rule that refers specifically to ''equity or fixed-income investments'' is appropriate because, absent this limitation, a fund could enter into derivatives transactions to hedge the risks associated with other derivatives transactions. We view using derivatives to hedge the risks of a fund's cash-market investments, in contrast, as more consistent with ''limited'' derivatives use.

c. Certain Suggested Transactions Not Excluded From the 10% Derivatives Exposure Threshold

We have not further expanded the limited derivatives user exception as some commenters urged to include additional hedging or other transactions. We understand that certain other derivatives strategies could mitigate funds' portfolio risks. The exception is not meant to provide parameters for hedging generally or to provide a comprehensive list of transactions that may pose more limited or defined risks. The final rule's limited derivatives user exception, however, is designed to provide an objective standard to identify funds that use derivatives in a limited manner and help facilitate compliance with the rule.[528] Unlike the currency and interest rate hedges discussed above, other transactions commenters suggested may not always predictably and mechanically provide the anticipated hedging exposure without giving rise to basis risks or many other potentially complex risks that we believe should be managed as part of a derivatives risk management program. Moreover, if we were to permit funds to engage in some or all of these transactions, as some commenters suggested, that could result in a fund obtaining derivatives exposure up to the 10% threshold while also engaging in a range of other transactions. We do not believe this would represent a limited use of derivatives that should be exempted from the rule's derivatives

[519] *See, e.g.,* SIFMA AMG Comment Letter; ISDA Comment Letter.

[520] *See, e.g.,* SIFMA AMG Comment Letter; TPG Comment Letter.

[521] *See, e.g.,* Guggenheim Comment Letter; TPG Comment Letter.

[522] *See* rule 18f–4(c)(4)(i)(B).

[523] *See* proposed rule 18f–4(c)(3).

[524] *See, e.g.,* BlackRock Comment Letter; Dechert Comment Letter I.

[525] *See, e.g.,* BlackRock Comment Letter; ICI Comment Letter.

[526] *See* Invesco Comment Letter.

[527] Invesco Comment Letter. This commenter also asserted that, although denominated in U.S. dollars, investors in American depositary receipts (''ADRs'') are exposed to currency risk equivalent to that incurred by investing directly in the foreign security held in the ADR and that it would therefore be appropriate to ''look through'' the ADR to the underlying foreign security for purposes of identifying currency hedges under the rule. We agree.

[528] The challenges of distinguishing between hedging and speculative activity have been considered in numerous regulatory and financial contexts. For example, the exemption for certain risk-mitigating hedging activities from the prohibition on proprietary trading by banking entities in the rules implementing section 13 of the Bank Holding Company Act (commonly known as the ''Volcker Rule''). *See* Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, Release No. BHCA–1 (Dec. 10, 2013) 79 FR 5536 (Jan. 31, 2014), at 5629, 5627. The complexity of distinguishing hedging from speculation in this context is notable because the exemption is designed for entities that would not otherwise be engaged in speculative activity.

risk management program and VaR requirements. We discuss commenters' specific suggestions below.

Some commenters stated that certain derivatives transactions used for hedging purposes but not directly matched to a particular instrument in the fund's portfolio should be excluded from a fund's 10% derivatives exposure threshold. For instance, a few commenters requested an exclusion for duration hedging, which is used primarily by fixed-income funds to manage their exposure to interest rate fluctuations.[529] We are not including duration hedging and similar transactions in the rule because, in contrast to the currency and interest rate hedging permitted under the exclusion, duration hedging is not directly matched to a particular instrument in a fund's portfolio, but rather seeks to modify a portfolio's general interest rate exposure. Duration hedging can involve more complex hedging activities than the hedging transactions permitted under the final rule, which are tied to specific securities held by the fund. Duration hedging therefore can require a degree of sophistication to implement and manage.[530] For these reasons, we believe that a fund that engages in these transactions, to a sufficient degree, should address these transactions as part of the fund's derivatives risk management program and in its compliance with the final rule's VaR requirements.

Further, several commenters requested that purchased single–name credit default swaps be excluded.[531] Commenters asserted that these swaps are used to hedge a single risk factor, credit risks.[532] Although these derivatives transactions may be tied to a particular reference asset held by the fund, we are not excluding these transactions from a fund's 10% derivatives exposure threshold. Market value changes in the fund's investment in the reference asset may not be offset precisely by changes in value of, or payment amounts under, the credit default swap. Further, credit default swaps are typically administered and governed by procedures and documents established by the International Swaps and Derivatives Association (''ISDA''), a third party separate from the parties to the transaction. The ISDA procedures may determine whether the issuer has experienced a credit event that triggers a payment from the seller of protection. These determinations will affect whether a fund receives a payment from the protection seller in the event of a possible credit event. The specific credit events for a given credit default swap also can affect the swap's value or its payment amount and, accordingly, can introduce basis risk between the swap and an investment held by the fund. These mismatches can occur particularly if the fund holds a security issued by the entity referenced in the credit default swap but not the exact reference obligation used by the relevant ISDA procedure. A credit default swap therefore will not always predictably and mechanically provide the anticipated hedging exposure without giving rise to basis risks or other risks that, if incurred in sufficient size, should be managed as part of a derivatives risk management program.

Separately, one commenter asserted that after the initial premium, a purchased single–name credit default swap only obligates a fund to pay a regularly-scheduled coupon at a rate fixed on trade date.[533] The commenter urged treating this transaction as an unfunded commitment agreement under the rule. We are not taking this approach. We believe that purchased single–name credit default swaps are derivatives instruments and are distinguishable from unfunded commitment agreements. For example, they involve investment risks during the life of the transaction as the value of the swap changes as perceptions of the credit risk of the entity that the swap references change.[534] Credit default swaps, including purchased credit default swaps, provide the ability to take unfunded positions in an issuer's credit risk with a future payment obligation that can create leverage and other risks.[535] We therefore are not excluding purchased credit default swaps from a fund's 10% derivatives exposure threshold the final rule.

Additionally, commenters suggested that covered call options and certain purchased option spreads should be excluded from a fund's 10% derivatives exposure threshold.[536] Commenters asserted that for these transactions, the potential future payment obligation is fully covered either by shares the fund already owns, in the case of a covered call option, or by offsetting purchased options, in the case of a purchased option spread.[537] Although these transactions have a defined risk tied to an investment held by the fund, they may be used for speculative purposes, which makes it difficult to categorically classify these derivatives transactions as hedges. Further, we do not believe that it is appropriate or feasible for the limited derivatives user exception to identify all derivatives instruments or combinations of derivatives instruments that may mitigate a defined risk in the fund or a fund position considered in isolation. We therefore have not modified the rule as these commenters suggested.

Similarly, one commenter expressed the view that the Commission should exclude any derivatives transactions from the 10% derivatives exposure threshold if a fund earmarks liquid assets equal to the derivatives' full notional obligations.[538] The commenter suggested that this approach would allow funds to engage in hedging transactions while keeping fund leverage ratios low, at 200% or below. The approach suggested by the commenter would allow a fund to engage in a potentially significant amount of derivatives transactions while remaining a limited derivatives user. Although these transactions may be ''unelaborate'' in some cases, as described by the commenter,[539] these transactions could be used to leverage a fund's portfolio and could be used to introduce significant risk. We believe that funds engaging in such a level of derivatives activity should comply with the VaR and program requirements. We therefore have not modified the rule as the commenter suggested.

One commenter also requested that the exclusion include synthetic positions where a fund holds cash with

[529] For example, if a portfolio has a duration of five (meaning that for every 1% increase in interest rates, the value of the portfolio will decline by 5%), interest rate derivatives could be used to reduce that sensitivity to a lower rate (for example, 2% or 3%). *See* Guggenheim Comment Letter; *see also* SIFMA AMG Comment Letter.

[530] *See, e.g.,* Robert Daigler, Mark Copper, *A Futures Duration-Convexity Hedging Method,* 33 The Financial Review 61 (1998) (discussing the limitations and complexities of duration hedging).

[531] *See, e.g.,* ICI Comment Letter, ISDA Comment Letter; SIFMA AMG Comment Letter.

[532] *See, e.g.,* SIFMA AMG Comment Letter; *see also* Guggenheim Comment Letter.

[533] *See* Guggenheim Comment Letter (further stating that if ''the reference issuer fails during the term of the trade, an auction settlement process will unfold pursuant to which the fund will receive a cash payment equal to the difference (if greater than zero) between the par value of the reference issuer's debt and the auction-determined price of such debt'').

[534] *See* footnote 751 and accompanying text for further discussion of the differences between derivatives transactions and unfunded commitment agreements.

[535] *See, e.g.,* In the Matter of UBS Willow Management L.L.C. and UBS Fund Advisor L.L.C., Investment Company Act Release No. 31869 (Oct. 16, 2015) (settled action) (involving a registered closed-end fund that incurred significant losses due in part to large losses on the fund's purchased credit default swap portfolio).

[536] *See, e.g.,* Dechert Comment Letter I; Franklin Templeton Comment Letter; ICI Comment Letter.

[537] *See* Franklin Templeton Comment Letter.

[538] Keen Comment Letter.

[539] *Id.*

a value equal to the notional amount of derivatives held by the fund, less any posted margin.[540] This commenter asserted that a fund's use of synthetic derivatives should be excluded because they do not create leverage. We understand that funds may use derivatives to create synthetic positions to replicate a cash-market exposure in a given security or group of securities. However, based on Commission staff's experience, we understand that there could be events that cause these synthetic positions to behave differently than the equivalent cash-market position. For instance, an equity swap may contain a complex merger event or potential adjustment event where the consequences diverge from the desired consequences available to a cash-market investor. For example, a swap contract may terminate upon a valid tender offer for the underlying stock. A swap dealer also may terminate a transaction due to the dealer's inability to continue to hedge its market exposure under the swap or due to increased hedging costs. These kinds of events could lead to an early termination of a synthetic position prior to the desired liquidation of the related cash-market investment. Further, the ability to adjust a fund's position in such a swap may be more limited than its adjustment of cash-market investments.

Moreover, although we believe that a derivatives transaction's notional amount is an appropriate means of measuring derivatives exposure for purposes of the limited derivatives user exception, the notional amount is not a risk measure and may not appropriately reflect the derivative's market exposure in all cases, such as with respect to certain complex derivatives.[541] This commenter's suggestion would permit a fund to obtain substantially more derivatives exposure than permitted under the 10% threshold—with exposure theoretically up to 100% of the fund's net assets—increasing the likelihood that the fund could incur substantial derivatives risks without establishing a derivatives risk management program or complying with the rule's VaR test requirements. We do not believe this would be a sufficiently limited use of derivatives that it should not be subject to those requirements. For these reasons we are not excluding synthetic positions from the 10% derivatives exposure threshold in the exception.

One commenter suggested calculating each derivatives transaction's impact on VaR as an alternative method for identifying hedging transactions that a fund would exclude from its 10% derivatives exposure threshold. If the incremental VaR calculation is negative, the derivatives transaction reduces the fund's risk profile and should therefore be deemed to fall within the hedging-based exclusion.[542] As we discuss above, VaR can be used to analyze whether a fund is using derivatives transactions to leverage the fund's portfolio. VaR is just one risk management tool, however, and we believe that it is more effective if supplemented with other measures.[543] This commenter's suggestion could involve funds taking on substantial derivatives exposure based on VaR calculations without complying with the other aspects of the rule, like stress testing, that are designed to complement VaR. This is because an approach based solely on VaR could identify derivatives transactions as reducing a fund's risk based on historical correlations that could break down, including in periods of market stress or the trading days during which the greatest losses occur (*i.e.,* the ''tail risks'' that VaR does not measure).

Finally, one commenter urged that we expand the limited derivatives user exception to exclude commodity hedging from a fund's derivatives exposure.[544] Funds typically do not invest directly in commodities, however, and this suggestion could, for example, involve funds hedging the exposure created from investments in commodity derivatives with other commodity derivatives. We recognize that the parties to certain commodity derivatives transactions (like commodity futures and options on those futures) may view these transactions as hedged in that they may be delta neutral.[545] If these positions remain delta neutral, losses on one of the positions will be offset by gains on the other. However, these transactions continue to pose risks that may be significant. For instance, as certain factors change over time, such as the price of the underlying asset and/or the interest rate, the underlying delta can change quickly, introducing risk that will no longer be offset by the other position. Accordingly, we believe these transactions, if incurred in sufficient size, should be addressed through the rule's derivatives risk management program and VaR test requirements.

3. Risk Management

A fund relying on the limited derivatives user exception, as proposed, will be required to manage the risks associated with its derivatives transactions by adopting and implementing written policies and procedures that are reasonably designed to manage the fund's derivatives risks.[546] The requirement that funds relying on the exception manage their derivatives risks recognizes that even a limited use of derivatives can present risks that a fund should manage.

For example, a fund that uses derivatives to hedge currency risks would not be introducing leverage risk, but could still introduce other risks, including counterparty risk and a risk of selling investments to meet margin calls. As another example, certain derivatives, and particularly derivatives with non-linear or path-dependent returns, may pose risks that require monitoring even when the derivatives' delta-adjusted notional amount represents a small portion of net asset value. In such case, because of the non-linear payout profiles associated with put and call options, changes in the value of the option's underlying reference asset can increase the option's delta, and thus a fund's derivatives exposure from the option. An options transaction that represents a small percentage of a fund's net asset value can rapidly increase to a larger percentage.

The policies and procedures that a fund relying on the limited derivatives user exception adopts should be tailored to the extent and nature of the fund's derivatives use. For example, a fund that uses derivatives only occasionally and for a limited purpose, such as to equitize cash, is likely to have limited policies and procedures commensurate with this limited use. A fund that uses more complex derivatives with derivatives exposure approaching 10% of net asset value, in contrast, should

[540] Fidelity Comment Letter (stating that these synthetic positions are ''routinely used by funds to fully invest shareholder funds where access to a particular market may be limited at any given time, or to manage large flows into a fund'').

[541] *See, e.g.,* 2015 Proposing Release, *supra* footnote 1, at n.175 and accompanying discussion.

[542] Angel Oak Comment Letter (stating that the ''risk of [the] overall portfolio should be reduced after the hedging transactions are executed'').

[543] *See supra* section II.D.1, at footnotes 297–299 and the accompanying paragraph.

[544] *See* Guggenheim Comment Letter.

[545] As an example, if a fund sells a put option on natural gas futures and also sells those same futures contracts, and the amount of the sold futures contracts equals the delta of the sold option, these positions will be ''delta neutral.''

[546] *See* rule 18f–4(c)(4)(i)(A). We are adopting the definition of derivatives risks as proposed, including the requirement that, in addition to the enumerated risks, a fund's derivatives risks include any other risks a fund's investment adviser deems material in the case of a limited derivatives user. *See supra* section II.B.2.a (discussing the derivatives risks definition).

have more extensive policies and procedures.

Commenters generally supported the proposed requirement that a fund relying on the limited derivatives user exception should adopt and implement written policies and procedures reasonably designed to manage the funds' derivatives risks.[547] One commenter requested that the Commission provide further guidance on the contents of these required policies and procedures.[548] This commenter specifically requested additional clarity on the minimum frequency of testing for continued compliance with the exception.

The final rule is designed to require a fund relying on the limited derivatives user exception to manage all risks associated with its derivatives transactions. Moreover, this approach allows funds to scale their policies and procedures to address the different strategies funds may pursue, the different level of derivatives exposure they may seek (so long as they remain below the 10% derivatives exposure threshold), and the different risks associated with their derivatives transactions. In contrast, although a more prescriptive approach regarding a fund's policies and procedures, such as a minimum frequency of testing as one commenter suggested, would provide clearer guidelines to facilitate compliance, this approach may be over- or under-inclusive considering the breadth of funds' use of derivatives and the derivatives' particular risks.

4. Exceedances of the Limited Derivatives User Exception

In the Proposing Release, the Commission stated that if a fund's derivatives exposure were to exceed the 10% threshold for any reason, the fund would have to reduce its derivatives exposure promptly or establish a derivatives risk management program and comply with the VaR-based limit on fund leverage risk as soon as reasonably practicable.[549] The Commission also requested comment on whether the rule should otherwise address exceedances and remediation.

Many commenters requested further clarity on issues related to exceedances and remediation of the exception in the final rule, including to prevent confusion and divergent practices.[550] As discussed in more detail below, commenters sought additional clarity and made suggestions regarding cases where a fund's derivatives exposure were to exceed the 10% threshold temporarily, as well as cases where a fund exceeded the derivatives exposure threshold and determined to come into compliance with the VaR and program requirements rather than reduce the fund's derivatives exposure.

To address commenters' concerns, we have determined to modify the final rule to address exceedances of the 10% derivatives exposure threshold. The final rule includes two alternative paths for remediation. If a fund's derivatives exposure exceeds the 10% derivatives exposure threshold for five business days, the fund's investment adviser must provide a written report to the fund's board of directors informing it whether the investment adviser intends either to: (1) Promptly, but within no more than thirty calendar days of the exceedance, reduce the fund's derivatives exposure to be in compliance with the 10% threshold (''temporary exceedance''); or (2) establish a derivatives risk management program, comply with the VaR-based limit on fund leverage risk, and comply with the related board oversight and reporting requirements as soon as reasonably practicable (''derivatives risk management program adoption'').[551] In either case the fund's next filing on Form N–PORT must specify the number of business days, in excess of the five-business-day period that the final rule provides for remediation, that the fund's derivatives exposure exceeded 10% of its net assets during the applicable reporting period.[552]

The two paths that the final rule permits for remediation are designed to balance providing a clear framework for addressing exceedances that persist beyond five business days with investor protection concerns related to fund leverage risk and potential harm to a fund if it were required to sell assets or exit positions quickly to remain a limited derivatives user. We discuss each of the two paths for remediation below.

a. Temporary Exceedance

Several commenters who addressed temporary exceedances urged that we provide greater clarity by including in the final rule a specific cure period for a fund to remediate a breach.[553] A commenter also urged us to consider including an exception for temporary exceedances that result from certain ''routine'' fund events, such as large redemptions and fund rebalancings.[554] This commenter suggested that the investment adviser would determine the appropriate duration of the fund's exceedance based on the fund's risk guidelines and market convention.

After considering comments, we are providing an initial five-business-day period for a fund to address any temporary exceedance of the threshold.[555] We recognize that there can be circumstances that could cause a fund's derivatives exposure temporarily to exceed the 10% threshold. These might include circumstances that are consistent with the fund generally using derivatives in a limited way, for example, a decrease in the fund's net asset value while its derivatives' notional amounts remain relatively constant. This could happen more frequently during periods of volatile market conditions. The five-business-day remediation period is designed to provide funds with some flexibility in coming back into compliance with the limited derivatives user exception without triggering an obligation to inform the fund's board of directors or a Form N–PORT reporting requirement.

[547] *See, e.g.,* Gateway Comment Letter; Franklin Comment Letter.

[548] *See* SIFMA AMG Comment Letter.

[549] *See* Proposing Release *supra* footnote 1, at 155.

[550] *See, e.g.,* BlackRock Comment Letter; Nuveen Comment Letter; Invesco Comment Letter; Dechert Comment Letter I; *see also* ICI Comment Letter (urging that further confusion could result without clear guidance in situations in which the Commission's exam staff questions whether a fund's remediation activities were timely).

[551] *See* rule 18f–4(c)(4)(ii). A fund with derivatives exposure exceeding the 10% threshold that complies with the remediation provision and other requirements of rule 18f–4 applicable to a limited derivatives user will still qualify as a limited derivatives user. Under these circumstances the fund's derivatives transactions therefore will not affect a fund's computation of asset coverage, a concern that one commenter raised. *See* Calamos Comment Letter. This is because the final rule provides that a fund's derivatives transactions entered into in compliance with the rule will not be considered for purposes of computing asset coverage under section 18(h). *See* rule 18f–4(b).

[552] *See* section II.G.1.a. For example, if a fund relying on the limited derivatives user exception were to determine, on the evening of Monday, June 1, that its derivatives exposure exceeded 10% of its net assets, and this exceedance were to persist through Tuesday (June 2), Wednesday (June 3), Thursday (June 4), Friday (June 5), Monday (June 8), and Tuesday (June 9), the fund would specify on its next Form N–PORT filing that it had exceeded the 10% derivatives exposure threshold for 1 day (because five business days following the determination on June 1 is June 8, and the fund is required to report the number of business days in excess of the five-business-day remediation period, therefore the fund will only report the exceedance on Tuesday, June 9). Information provided in response to this new Form N–PORT reporting item will not be made public.

[553] *See* ICI Comment Letter (requesting a 14-calendar-day cure period for a temporary breach, stating that such cure period ''is a sufficient and reasonable period of time for funds to unwind, close out, or terminate such transactions in order to come back into compliance with the exception''); *see also* Invesco Comment Letter (requesting a 7-calendar-day cure period); SIFMA AMG Comment Letter (requesting a 5-business-day cure period).

[554] Fidelity Comment Letter.

[555] *See* rule 18f–4(c)(4)(ii).

This time period is consistent with the time period that the final rule permits for a fund to come back into compliance with the VaR test before the fund reports a breach to its board and the Commission.

This provision also provides some flexibility for a fund that cannot reduce its exposure within five business days in a manner that is in the best interests of the fund and its shareholders.[556] For example, a fund with derivatives exposure that exceeds the 10% threshold because of rebalancing activities as identified by one commenter would have flexibility either to reduce derivatives exposure below 10% within five business days, or to take more time to reduce exposure (up to thirty calendar days of the fund's determination that it is out of compliance with the 10% threshold) if the adviser reports to the fund's board.[557]

Although this provision provides flexibility, if a fund were to exceed the 10% threshold repeatedly, and particularly if those exceedances occurred over a long period of time and did not occur in connection with extreme market events that may cause rapid and significant changes in a fund's net asset value, the fund would not appear to be using derivatives in a limited manner. In order for a fund's compliance policies and procedures under rule 38a–1 to be reasonably designed to achieve compliance with the final rule, they should be designed to prevent such repeated exceedances. The fund's policies and procedures likewise should be reasonably designed generally to address the fund's compliance with the 10% threshold and support the fund's reliance on the exclusion.

b. Derivatives Risk Management Program Adoption

The alternate path will require a fund to establish a derivatives risk management program and comply with the related requirements as soon as reasonably practicable. Commenters requested greater clarity of the meaning of ''reasonably practicable'' in the Proposing Release's discussion of the timing to establish a derivatives risk management program and comply with the rule's VaR requirements after an exceedance.[558] Some commenters requested that we provide a particular remediation period to allow a fund to implement a derivatives risk management program.[559] One commenter suggested that instead of providing more definitive regulatory guidance, the Commission should provide assurances that it will not second-guess reasonable actions and interpretations.[560]

We understand that there are practical considerations that would prevent a fund that is no longer a limited derivatives user from coming into immediate compliance with the VaR and program requirements. Compliance with the rule requires a fund to adopt a written derivatives risk management program that a board-approved derivatives risk manager administers. The program includes mandatory stress testing, backtesting, internal reporting and escalation, and program review elements, among other requirements. We recognize that some funds may be able to comply with the VaR and program requirements relatively quickly. Their ability to comply quickly would vary based on a variety of factors, including the complexity of a fund's derivatives use. Other funds may require additional time. For these reasons, the final rule provides, as the Commission stated in the proposal, that a fund transitioning from a limited derivatives user to full compliance with the rule's other requirements must do so as soon as reasonably practicable.[561] We continue to believe this standard is more appropriate than specifying in the rule the specific time periods commenters suggested or some other period. Any prescribed period might provide more or less time than a particular fund may need.

F. Approach to Leveraged/Inverse Funds

Proposed rule 18f–4 included an alternative set of requirements for leveraged/inverse funds. Under the proposal, a leveraged/inverse fund would not have been required to comply with rule 18f–4's VaR-based leverage risk limit if: (1) Transactions in the fund's shares would be subject to the proposed sales practices rules, discussed below; (2) the fund limited the investment results it seeks to 300% of the return (or inverse of the return) of the underlying index; and (3) the fund disclosed in its prospectus that it was not subject to rule 18f–4's leverage risk limit.[562] As discussed in more detail below, after considering comments, we are not adopting the proposed sales practices rules or the proposed exception from the VaR-based limit on leverage risk that was predicated on those rules. Leveraged/inverse funds will be subject to all of the provisions of rule 18f–4, including the relative VaR test. Rule 18f–4 will provide, however, an exception from the VaR test requirement for leveraged/inverse funds in operation as of October 28, 2020 that seek an investment result above 200% of the return (or inverse of the return) of an underlying index and satisfy certain additional conditions.

1. Proposed Alternative Requirements for Leveraged/Inverse Funds

As the Commission stated in the Proposing Release, leveraged/inverse funds present unique considerations. In contrast to other funds that use derivatives as part of their broader investment strategy, the strategy of a leveraged/inverse fund is predicated on the use of derivatives to amplify the returns (or to correspond to the inverse of the returns) of an underlying index by a specified multiple.[563]

Leveraged/inverse funds also rebalance their portfolios on a daily (or other predetermined) basis in order to maintain a constant leverage ratio. This reset, and the effects of compounding, can result in performance over longer holding periods that differs significantly from the leveraged or inverse performance of the underlying reference index over those longer holding periods.[564] This effect can be more

[556] *See* Fidelity Comment Letter (identifying certain events that could cause a fund's derivatives exposure to exceed the 10% threshold temporarily).

[557] *Id.*

[558] *See, e.g.,* BlackRock Comment Letter; Dechert Comment Letter I; SIFMA AMG Comment Letter.

[559] *See* ICI Comment Letter (requesting a 90-calendar-day period); *see also* SIFMA AMG Comment Letter (requesting a 60-calendar-day period); T. Rowe Price Comment Letter (requesting a 45-calendar-day period).

[560] Dechert Comment Letter I.

[561] A fund transitioning from a limited derivatives user to full compliance with the rule's other requirements may be able to reduce its exposure below the 10% threshold. If the fund were able to resume operating below the 10% threshold as a limited derivatives user, the fund could do so rather than finalizing the fund's derivatives risk management program and complying with the rule's VaR test. As noted above, however, if a fund were to exceed the 10% threshold repeatedly, and particularly if those exceedances occurred over a long period of time and did not occur in connection with extreme market events that may cause rapid and significant changes in a fund's net asset value, the fund would not appear to be using derivatives in a limited manner. *See supra* discussion following footnote 557.

[562] *See* Proposing Release, *supra* footnote 1, at section II.G.3.

[563] Proposing Release, *supra* footnote 1, at section II.G.1. The term ''multiple'' as used in rule 18f–4 has the same meaning as in rule 6c–11. *See* ETFs Adopting Release, *supra* footnote 76, at section II.A.3. As such, leveraged/inverse funds that seek returns over a predetermined time period that are not evenly divisible by 100 (*e.g.,* 150% of the performance of an index), or that seek returns within a specified range of an index's performance (*e.g.,* 200% to 300% of an index's performance or −200% to −300% of an index's performance), are ''leveraged/inverse funds'' for the purposes of rule 18f–4.

[564] For example, as a result of compounding, a leveraged/inverse fund can outperform a simple

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pronounced in volatile markets.[565] As a result, buy-and-hold investors in a leveraged/inverse fund who have an intermediate or long-term time horizon—and who may not evaluate their portfolios frequently—may experience large and unexpected losses or otherwise experience returns that are different from what they anticipated.[566]

As discussed in the Proposing Release, the Commission's Office of Investor Education and Advocacy and FINRA have issued alerts in the past decade to highlight issues investors should consider when investing in leveraged/inverse funds.[567] In addition, some commenters on the 2015 proposal indicated that at least some segment of investors may hold leveraged/inverse funds for long periods of time, which can lead to significant losses under certain circumstances.[568] FINRA has sanctioned a number of brokerage firms for making unsuitable sales of leveraged/inverse ETFs.[569] More recently, the Commission has brought enforcement actions against investment advisers for, among other things, soliciting advisory clients to purchase leveraged/inverse ETFs for their retirement accounts with long-term time horizons, and holding those securities in the client accounts for months or years.[570]

The proposal, as well as market volatility following the onset of COVID–19, each elicited feedback from investors in leveraged/inverse funds. As discussed below, the Commission received many comments on the proposal from individual investors asserting they understand the risks involved in these funds,[571] as well as some comments suggesting that retail investors do not understand the unique risks of leveraged/inverse funds.[572] The Commission's Office of Investor Education and Advocacy has received complaints and other communications from investors following the onset of the market volatility related to COVID–19 expressing concerns that these funds did not behave as these investors had expected, with some of these investors experiencing significant losses. Furthermore, several leveraged/inverse funds with 3x leverage or inverse multiples recently reduced their leverage multiples to 2x due to the increased market volatility caused by COVID–19.[573]

As the Commission recognized in the Proposing Release, most leveraged/inverse funds provide leveraged or inverse market exposure that exceeds 150% of the return or inverse return of the relevant index.[574] Such funds would not have been able to comply with the proposed limitation on leverage risk under rule 18f–4 because they would not have been able to satisfy the proposed relative VaR test, and would not have been eligible to use the proposed absolute VaR test. As such, requiring these funds to comply with the proposed limit on leverage risk

multiple of its index's returns over several days of consistently positive returns, or underperform a simple multiple of its index's returns over several days of volatile returns.

[565] *See supra* footnotes 23–26 and accompanying text (discussing effects of market volatility caused by COVID–19 pandemic on issues related to funds' use of derivatives). *See also* FINRA Regulatory Notice 09–31, Non-Traditional ETFs–FINRA Reminds Firms of Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds (June 2009) (''FINRA Regulatory Notice 09–31'') (''Using a two-day example, if the index goes from 100 to close at 101 on the first day and back down to close at 100 on the next day, the two-day return of an inverse ETF will be different than if the index had moved up to close at 110 the first day but then back down to close at 100 on the next day. In the first case with low volatility, the inverse ETF loses 0.02 percent; but in the more volatile scenario the inverse ETF loses 1.82 percent. The effects of mathematical compounding can grow significantly over time, leading to scenarios such as those noted above.'').

[566] *See* Regulation Best Interest Adopting Release, *supra* footnote 12, at discussion following n.597 (stating leveraged and inverse exchange-traded products ''may not be in the best interest of a retail customer absent an identified, short-term, customer-specific trading objective''); *see also* FINRA Regulatory Notice 09–31, *supra* footnote 565 (reminding member firms of their sales practice obligations relating to leveraged/inverse ETFs and stating that leveraged/inverse ETFs are typically not suitable for retail investors who plan to hold these products for more than one trading session); *see also* Fiduciary Interpretation, *infra* footnote 564 (stating that ''leveraged exchange-traded products are designed primarily as short-term trading tools for sophisticated investors . . . [and] require daily monitoring . . . .''); Securities Litigation and Consulting Group, *Leveraged ETFs, Holding Periods and Investment Shortfalls* (2010), at 13 (''The percentage of investors that we estimate hold [leveraged/inverse ETFs] longer than a month is quite striking.''); ETFs Adopting Release, *supra* footnote 76, at n.78 (discussing comment letters submitted by Consumer Federation of America (urging the Commission to consider additional investor protection requirements for leveraged/inverse ETFs) and by Nasdaq (stating that ''there is significant investor confusion regarding existing leveraged/inverse ETFs' daily investment horizon'')).

[567] SEC Investor Alert and Bulletins, *Leveraged and Inverse ETFs: Specialized Products with Extra Risks for Buy-and-Hold Investors* (Aug. 1, 2009), *available at http://www.sec.gov/investor/pubs/leveragedetfs-alert.htm.* This investor alert, jointly issued by SEC staff and FINRA, followed FINRA's June 2009 alert, which raised concerns about retail investors holding leveraged/inverse ETFs over periods of time longer than one day. *See* FINRA Regulatory Notice 09–31, *supra* footnote 565.

[568] *See, e.g.,* Comment Letter of the Consumer Federation of America (Mar. 28, 2016) (''There is evidence that suggests investors are incorrectly using certain alternative investments that use derivatives extensively. For example, despite the fact that double and triple leveraged ETFs are short-term trading vehicles that are not meant to be held longer than one day, a significant number of shares are held for several days, if not weeks.''). *But cf.* Comment Letter of Rafferty Asset Management (Mar. 28, 2016) (asserting that there is no evidence that investors do not understand the leveraged/inverse ETF product, citing, for example, an analysis of eight of its leveraged/inverse ETFs between May 1, 2009 and July 31, 2015, and finding an average implied holding period ranging from 1.18 days to 4.03 days and suggesting, therefore, that investors understand the products are designed for active trading). We note, however, that the analysis relied upon in the Comment Letter of Rafferty Asset Management did not analyze shareholder-level trading activity or provide any information on the distribution of shareholder holding periods.

[569] *See* FINRA News Release, *FINRA Sanctions Four Firms $9.1 Million for Sales of Leveraged and Inverse Exchange-Traded Funds* (May 1, 2012), *available at https://www.finra.org/newsroom/2012/finra-sanctions-four-firms-91-million-sales-leveraged-and-inverse-exchange-traded;* FINRA News Release, *FINRA Orders Stifel, Nicolaus and Century Securities to Pay Fines and Restitution Totaling More Than $1 Million for Unsuitable Sales of Leveraged and Inverse ETFs, and Related Supervisory Deficiencies* (Jan. 9, 2014), *available at https://www.finra.org/newsroom/2014/finra-orders-stifel-nicolaus-and-century-securities-pay-fines-and-restitution-totaling;* FINRA News Release, *FINRA Sanctions Oppenheimer & Co. $2.9 Million for Unsuitable Sales of Non-Traditional ETFs and Related Supervisory Failures* (June 8, 2016), available at *http://www.finra.org/newsroom/2016/finra-sanctions-oppenheimer-co-29-million-unsuitable-sales-non-traditional-etfs. See also* ProEquities, Inc., FINRA Letter of Acceptance, Waiver and Consent (''AWC'') No. 2014039418801 (Aug. 8, 2016), available at *http://disciplinaryactions.finra.org/Search/ViewDocument/66461;* Citigroup Global Markets Inc., FINRA Letter of AWC No. 20090191134 (May, 1, 2012), *available at http://disciplinaryactions.finra.org/Search/ViewDocument/31714. See also* Regulation Best Interest Adopting Release, *supra* footnote 12, at paragraph accompanying nn.593–98.

See also, e.g., SEC. v. *Hallas,* No 1:17–cv–2999 (S.D.N.Y. Sept. 27, 2017) (default judgement); *In the Matter of Demetrios Hallas,* SEC. Release No. 1358 (Feb. 22, 2019) (initial decision), Exchange Act Release No 85926 (May 23, 2019) (final decision) (involving a former registered representative of registered broker-dealers purchasing and selling leveraged ETFs and exchange-traded notes for customer accounts while knowingly or recklessly disregarding that they were unsuitable for these customers, in violation of section 17(a) of the Securities Act and section 10(b) and rule 10b–5 thereunder of the Exchange Act).

[570] *See, e.g.,* In the Matter of Wells Fargo Clearing Services, LLC, *et al.,* Investment Advisers Act Release No. 5451 (Feb. 27, 2020) (settled action); In the Matter of Morgan Stanley Smith Barney, LLC, Investment Advisers Act Release No. 4649 (Feb. 14, 2017) (settled action).

[571] *See, e.g.,* Comment Letter of Kerry Copple (Apr. 17, 2020); Comment Letter of Praveen Lobo (Apr. 7, 2020); Comment Letter of Arlene Hellman (Mar. 25, 2020); Comment Letter of Sean Ward (Apr. 27, 2020); Comment Letter of Stephen Cecchini (Apr. 22, 2020).

[572] *See, e.g.,* Comment Letter of Steve Woeste (Mar. 17, 2020); Comment Letter of James Reichl (Mar. 17, 2020); Comment Letter of Steven Bell (Mar. 18, 2020); Comment Letter of Richard Herber (Mar. 17, 2020); Comment Letter of Daniel P. Smith (Jan. 29, 2020).

[573] *See, e.g.,* Direxion Press Release, *supra* footnote 24; *see also* paragraph accompanying *supra* footnotes 23–26 (discussing effects of COVID–19 related volatility on funds' use of derivatives).

[574] *See* Proposing Release, *supra* footnote 1, at nn.317–318 and accompanying text.

effectively would have precluded sponsors from offering the funds in their current form.

The Commission proposed a set of alternative requirements for leveraged/inverse funds that, if satisfied, would have excepted such funds from the leverage risk limit in proposed rule 18f–4. These proposed alternative requirements were designed to address the investor protection concerns that underlie section 18 of the Investment Company Act, in part, by helping to ensure that retail investors in leveraged/inverse funds are limited to those investors who are capable of evaluating the risks these products present. They also would have limited the amount of leverage that leveraged/inverse funds subject to rule 18f–4 can obtain to 300% of the return (or inverse of the return) of the underlying index.

Proposed rule 15*l*–2 under the Exchange Act and rule 211(h)–1 under the Advisers Act would have required broker-dealers and investment advisers, respectively, to exercise due diligence on retail investors before approving retail investor accounts to invest in ''leveraged/inverse investment vehicles.'' As defined in the proposed sales practices rules, leveraged/inverse investment vehicles include leveraged/inverse funds and certain exchange-listed commodity- or currency-based trusts or funds that use a similar leveraged/inverse strategy.[575]

The proposed due diligence requirements provided that a broker-dealer or investment adviser must exercise due diligence to ascertain the essential facts relative to the retail investor, his or her financial situation, and investment objectives before approving his or her account to invest in leveraged/inverse investment vehicles. This requirement would have required the broker-dealer or investment adviser to seek to obtain certain information about the retail investor, including, at a minimum, information about his or her financial status (*e.g.,* employment status, income, and net worth (including liquid net worth)); and information about his or her investment objectives generally and his or her anticipated investments in, and experience with, leveraged/inverse investment vehicles (*e.g.,* general investment objectives, percentage of liquid net worth intended for investment in leveraged/inverse investment vehicles, and investment experience and knowledge).

The proposed due diligence requirement was designed to provide the broker-dealer or investment adviser with a comprehensive picture of the retail investor on which to evaluate whether the retail investor has the financial knowledge and experience to be reasonably expected to be capable of evaluating the risks of buying and selling leveraged/inverse investment vehicles.[576]

The proposed sales practices rules were generally modeled after current FINRA options account approval requirements for broker-dealers, in part based on the Commission's belief that leveraged/inverse investment vehicles, when held over longer periods of time, may have certain similarities to options.[577] Under the FINRA rules for options, a broker-dealer may not accept a customer's options order unless the broker-dealer has approved the customer's account for options trading.[578] This account-approval requirement applies to all customers who wish to trade options, including self-directed investors who do not receive advice or recommendations from the broker-dealer.

The Commission received significant comment on the proposed alternative requirements for leveraged/inverse funds. Most commenters categorically opposed the adoption of the proposed sales practices rules. These commenters provided numerous reasons for their opposition, including:

- The proposed sales practices rules would restrict investor choice because retail investors who wish to invest or continue to invest in leveraged/inverse investment products, including investors who understand their unique risks, might not be approved for trading in those products by a broker-dealer or investment adviser.[579]
- The proposed sales practices rules would provide few additional protections for investors because their requirements are duplicative of existing Commission requirements for the activities of broker-dealers and investment advisers in the recommended transaction context, including rule 15*l*–1 under the Exchange Act (''Regulation Best Interest'') and investment advisers' fiduciary obligations to their clients.[580]
- The Commission should not address the investor protection concerns underlying section 18 of the Investment Company Act by imposing sales practice requirements on financial intermediaries rather than placing requirements on leveraged/inverse funds themselves.[581]
- The operational burden and expense of implementing the due diligence and account approval requirements, as well as the potential legal liability arising from the performance of those requirements, could cause broker-dealers and investment advisers simply to stop offering leveraged/inverse investment vehicles to retail investors, causing harm to leveraged/inverse fund sponsors and restricting investor choice.[582]
- The FINRA options account-approval framework is not well suited as a model for leveraged/inverse investment vehicles because options trading strategies are significantly more complex and have significantly more risk, including the risk that an investor could lose more than the amount invested, than investments in leveraged/inverse investment vehicles.[583]
- The proposed sales practices rules, because they would apply to only two categories of leveraged/inverse products—leveraged/inverse funds and

[575] *See* Proposing Release, *supra* footnote 1, at section II.G.2.

[576] In addition, the proposed sales practices rules would have required broker-dealers and investment advisers to adopt and implement written policies and procedures addressing compliance with the applicable sales practices rule, and would have required broker-dealers and investment advisers to retain certain records arising from the due diligence and account approval requirements. *See* Proposing Release, *supra* footnote 1, at sections II.G.2.b–c.

[577] *See, e.g.,* FINRA rule 2360(b)(16)–(17) (requiring firm approval, diligence and recordkeeping for options accounts); *see also* Proposing Release, *supra* footnote 1, at nn.325–327 and accompanying text.

[578] FINRA rule 2360(b)(16).

[579] *See, e.g.,* Comment Letter of Nathaniel Reynolds (Apr. 28, 2020); Comment Letter of Steve Ludwig (Apr. 22, 2020); Comment Letter of Jesse Underwood (Apr. 17, 2000); Comment Letter of Angie Hall (Apr. 17, 2020); Comment Letter of Barbara Kalib (Mar. 22, 2020).

[580] *See, e.g.,* Comment Letter of TD Ameritrade (May 4, 2020) (''TD Ameritrade Comment Letter''); SIFMA Comment Letter. *See also* Regulation Best Interest Adopting Release, *supra* footnote 12; Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (June 5, 2019) [84 FR 33669 (July 12, 2019)] (''Fiduciary Interpretation'').

[581] *See* Direxion Comment Letter; *see also* Comment Letter of Charles Schwab & Co., Inc. (Mar. 24, 2020) (''Schwab Comment Letter'').

[582] *See, e.g.,* Comment Letter of Americans for Limited Government (Mar. 24, 2020) (''Americans for Limited Government Comment Letter''); SIFMA Comment Letter; Direxion Comment Letter; ProShares Comment Letter; Schwab Comment Letter.

[583] *See, e.g.,* Schwab Comment Letter; SIFMA Comment Letter. Several commenters stated that the FINRA options rule, unlike the proposed sales practices rules, applies only to transactions for which there is a broker-dealer recommendation. *See, e.g.,* Direxion Comment Letter. Although the proposed sales practice rules incorporated one element from the FINRA rule that applies to recommended options transactions, FINRA rule 2360(b)(19), the FINRA rule on which the proposed sales practices rules principally were based, rule 2360(b)(16), applies regardless of whether the broker-dealer has made a recommendation.

listed commodity pools that use leveraged/inverse strategies—would not sufficiently advance the Commission's investor protection goals. Exchange-traded notes (''ETNs''), for example, would not be subject to the proposed sales practices rules, but can use leveraged/inverse strategies with a nearly identical risk/return profile to leveraged/inverse investment vehicles, and can present additional risks, including the risk of issuer default. Accordingly, the proposed sales practices rules, if adopted, could cause: (1) Sponsors of leveraged/inverse investment vehicles to offer leveraged/inverse strategies as ETNs rather than funds or listed commodity pools; and (2) retail investors to seek out leveraged/inverse strategies through ETNs or other products that would not be subject to the requirements of the proposed sales practices rules.[584]

- Commenters questioned whether the proposed sales practices rules regulate ''sales practices'' and therefore the Commission's authority to promulgate the proposed rules.[585]

Some commenters expressed support for the proposed sales practices rules on the basis that additional investor protections are warranted in light of the unique characteristics and risks of leveraged/inverse investment vehicles.[586] In addition, several commenters stated that many retail investors do not understand the risks associated with investing in leveraged/inverse investment vehicles.[587]

Several commenters recommended alternatives to the proposed sales practices rules that they believed would address investor protection concerns associated with leveraged/inverse funds. Commenters suggested that we should place additional disclosure-based requirements on intermediaries offering leveraged/inverse investment vehicles to retail investors, rather than due diligence and account approval requirements.[588] Some commenters suggested we require broker-dealers to: (1) Provide their self-directed customers with short, plain-English disclosures of the potential risks of trading leveraged/inverse investment vehicles, both at the point of sale and periodically thereafter; and (2) require such customers to provide an acknowledgement of receipt of these disclosures.[589] Another commenter suggested that we require broker-dealers and investment advisers to adopt and implement policies and procedures designed to protect investors in leveraged/inverse investment vehicles.[590] This commenter stated that such policies and procedures could include, among other things, procedures for reviewing purchases of leveraged/inverse investment vehicles and monitoring accounts that hold positions in leveraged/inverse investment vehicles for extended time periods.

Commenters also suggested that we allow leveraged/inverse funds with a stated target multiple that is equal to or below the VaR-based limit on leveraged risk in rule 18f–4 (*e.g.,* a fund that seeks 100% inverse exposure to the relevant index) to comply with all the requirements of rule 18f–4, including the VaR-based risk limitation, rather than requiring broker-dealers or investment advisers to comply with the proposed sales practices rules with respect to transactions in these funds. According to these commenters, leveraged/inverse funds that do not exceed the VaR-based risk limit (and thus would not require an exception to the VaR limit) should not be subject to the proposed sales practices rules.[591]

2. Treatment of Leveraged/Inverse Funds Under Rule 18f–4

After considering the comments discussed above, we have determined not to adopt the proposed sales practices rules or the proposed exception from the leverage risk limit that was predicated on broker-dealers' and investment advisers' compliance with the sales practices rules. Leveraged/inverse funds, like funds generally, will be required to comply with the VaR-based limit on fund leverage risk in rule 18f–4, as adopted, with the exception of certain existing funds discussed in section II.F.3 below.

We recognize, as commenters suggested, that our proposal to address the investor protection concerns underlying section 18 by placing requirements on the activities of broker-dealers and investment advisers that offer leveraged/inverse funds, rather than on the leveraged/inverse funds themselves, presents unique challenges. These challenges include, as commenters stated, that broker-dealers and investment advisers would be required to carry out new due diligence requirements designed to address concerns under section 18, and that section 18 does not apply to the broker-dealers and investment advisers that would be subject to those new requirements.[592] We also recognize that many leveraged/inverse funds can comply with final rule 18f–4, particularly given the adjustments to the relative VaR test. We believe the approach we are adopting addresses many of the concerns raised by commenters regarding the proposed sales practices rules. We believe the final approach will preserve meaningful choice for investors by permitting a substantial number of leveraged/inverse funds to continue to operate under rule 18f–4, subject to the rule's requirements.

Leveraged/inverse funds generally will be subject to the requirements of rule 18f–4 on the same basis as other funds that are subject to that rule, including the VaR-based leverage risk limit.[593] Leveraged/inverse funds, because they provide a leveraged return of an index, will be subject to the rule's relative VaR and, under the rule, a leveraged/inverse fund must use the index it tracks as its designated reference portfolio.[594] For a leveraged/inverse fund that seeks, directly or indirectly, to provide investment returns that correspond to 200% of the performance or inverse performance of an index, we recognize that there may

[584] *See, e.g.,* Direxion Comment Letter; Comment Letter of Mark J. Flannery, Ph.D. (Mar. 31, 2020) (''Flannery Comment Letter'').

[585] *See, e.g.,* Direxion Comment Letter; ProShares Comment Letter; Comment Letter of Virtu Financial (Apr. 24, 2020).

[586] *See, e.g.,* Herber Comment Letter; Comment Letter of Tom Antony (Apr. 9, 2020); Comment Letter of Thomas Garman (Mar. 6, 2020); Comment Letter of Patrick Oberman (Feb. 20, 2020); NASAA Comment Letter. One commenter supported the sales practices rules as proposed, but suggested that the Commission not amend rule 6c–11 to include leveraged/inverse funds within that rule's scope (as proposed), without first implementing additional identification and categorization requirements for exchange-traded products generally. *See* BlackRock Comment Letter (also discussed at *infra* footnote 618 and accompanying text).

[587] *See supra* footnote 572.

[588] *See, e.g.,* Direxion Comment Letter; Schwab Comment Letter.

[589] *See, e.g.,* Schwab Comment Letter; TD Ameritrade Comment Letter; *see also* NASAA Comment Letter.

[590] *See* Comment Letter of Cambridge Investment Research, Inc. (May 1, 2020) (''Cambridge Investment Research Comment Letter'').

[591] *See, e.g.,* Direxion Comment Letter; ProShares Comment Letter. *See also* Comment Letter of Innovator Capital Management (May 8, 2020) (''Innovator Comment Letter'').

[592] Some commenters also expressed the concern that a leveraged/inverse fund sponsor would not be able to ensure that a broker-dealer or investment adviser complied with the sales practices rules. *See, e.g.,* Direxion Comment Letter. The alternative requirements in proposed rule 18f–4 would have applied to leveraged/inverse funds that were within the scope of the proposed sales practices rules. Broker-dealers and investment advisers would have been responsible for their own compliance with the sales practices rules.

[593] The Commission considered and requested comment on this alternative in section III.E.5 of the Proposing Release.

[594] As discussed above, if a fund's investment objective is to track the performance of an unleveraged index—as we understand to be the case for leveraged/inverse funds—the fund will be required under the final rule to use that index as the fund's designated reference portfolio. *See supra* section II.D.2.b.

be minor deviations between the VaR of the fund and 200% of the VaR of its designated index. These are attributable to financing costs embedded in the fund's derivatives and valuation differences between the fund's portfolio and the index it tracks.[595] These minor differences would be expected to cause a fund's VaR to exceed 200% of the VaR of its designated index by a *de minimis* amount from time to time where the fund is seeking to provide investment exposure equal to 200% of the return, or inverse of the return, of an index. We would not view these *de minimis* deviations by a leveraged/inverse fund as exceedances of the relative VaR test under these circumstances because they do not reflect an increase in the fund's leveraged or inverse market exposure. Therefore, we would not view these deviations, alone, as giving rise to the remediation requirements in rule 18f–4 for funds that are not in compliance with the VaR test, or the requirements for funds to file Form N–RN to report information about VaR test breaches to the Commission.

In addition, where a fund's investment strategy is to provide the inverse performance, or a multiple of the inverse performance, of an index, we anticipate the fund would calculate the VaR of the index based upon the index's inverse performance for purposes of the relative VaR test. This is because, for inverse funds, the potential for losses that VaR seeks to measure is driven by the potential for increases in the index.

3. Standards of Conduct for Broker-Dealers and Registered Investment Advisers

Although the final rules we are adopting will not include the proposed sales practices rules, we agree with commenters that, in the context of recommended transactions, certain of the investor protection concerns the Commission articulated in the Proposing Release regarding leveraged/inverse investment vehicles are addressed by the best interest standard of conduct for broker-dealers under Regulation Best Interest. Further, in the context of advisory relationships, the fiduciary obligations of investment advisers, as the Commission discussed in the Fiduciary Interpretation, address many of the same concerns. The best interest standard of conduct for broker-dealers and the fiduciary obligations of investment advisers apply to transactions in all exchange-traded products where the transaction is recommended by a broker-dealer or pursuant to the advice of an investment adviser. These include transactions in leveraged/inverse funds and listed commodity pools that the proposed sales practices rules covered, as well as transactions in products such as ETNs that the proposed rules did not address.

The Commission's adoption of Regulation Best Interest enhanced the standard of conduct for broker-dealers beyond the then-existing suitability obligations by requiring broker-dealers to act in the best interest of a retail customer when recommending a securities transaction or investment strategy involving securities to a retail customer.[596] To meet this best interest standard, a broker-dealer must, among other things, satisfy its care obligation. The care obligation requires the broker dealer to exercise reasonable diligence, care, and skill to understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers. This requirement is especially important where broker-dealers recommend products that are particularly complex or risky, including leveraged/inverse funds and other products that follow a similar leveraged or inverse strategy. Broker-dealers recommending such products should understand that leveraged/inverse products that are reset daily may not be suitable for, and as a consequence also not in the best interest of, retail customers who plan to hold them for longer than one trading session, particularly in volatile markets. A broker-dealer cannot establish a reasonable basis to recommend leveraged/inverse products to retail customers without understanding the terms, features, and risks of these products.[597] The care obligation also requires a broker-dealer to have a reasonable basis to believe that a recommendation provided to a retail customer is in the customer's best interest. Leveraged/inverse products may not be in the best interest of a retail customer absent an identified, short-term, customer-specific trading objective.

Similarly, as the Commission stated in the Fiduciary Interpretation, a reasonable belief that investment advice is in the best interest of a client requires that an adviser conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information. An investment adviser also must have a reasonable belief that the advice it provides is in the best interest of the client based on the client's investment objectives.[598] Complex products, such as leveraged/inverse products that are designed primarily as short-term trading tools for sophisticated investors, may not be in the best interest of a retail client absent an identified, short-term, client-specific trading objective.[599] Moreover, to the extent that such products are in the best interest of a retail client initially, they would require daily monitoring by the adviser.

To satisfy their respective obligations in making recommendations or giving investment advice to retail investors, broker-dealers and investment advisers need to ascertain certain information about their customer or client, which can include the same kinds of information the Commission proposed that firms would collect under the sales practices rules' due diligence requirement.[600] Broker-dealers must develop an investment profile for a retail customer based on the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the retail customer may disclose to the broker-dealer.[601] Similarly, investment advisers are required to develop a reasonable understanding of a retail client's objectives, which should, at a minimum, include a reasonable inquiry into the client's financial situation, level of financial sophistication, investment experience, and financial goals.[602]

[595] *See, e.g.,* ProShares Comment Letter.

[596] Regulation Best Interest Adopting Release, *supra* footnote 12.

[597] *Id.* at nn.593–597 and accompanying text.

[598] *See* Fiduciary Interpretation, *supra* footnote 580.

[599] *Id.* at n.39 and accompanying text.

[600] The proposed sales practices rules would have required broker-dealers and investment advisers to seek to obtain information about the retail investor, including, at a minimum, his or her investment objectives (*e.g.,* safety of principal, income, growth, trading profits, speculation) and time horizon; employment status (name of employer, self-employed or retired); estimated annual income from all sources; estimated net worth (exclusive of family residence); estimated liquid net worth (cash, liquid securities, other); percentage of the customer's estimated liquid net worth that he or she intends to invest in leveraged/inverse investment vehicles; and investment experience and knowledge (*e.g.,* number of years, size, frequency and type of transactions) regarding leveraged/inverse investment vehicles, options, stocks and bonds, commodities, and other financial instruments. *See* Proposing Release, *supra* footnote 1, at n.333 and accompanying text.

[601] *See* Regulation Best Interest Adopting Release, *supra* footnote 12, at paragraph (a)(2).

[602] *See* Fiduciary Interpretation, *supra* footnote 580, at section II.B.1.

4. Staff Review of Regulatory Requirements Relating to Complex Financial Products

We recognize that while Regulation Best Interest applies to all exchange-traded products, including products that the proposed sales practices rules did not cover, it applies only where a broker-dealer recommends a transaction or an investment strategy involving securities to a retail customer. Similarly, rule 18f–4 does not address the universe of potential investor protection issues related to transactions in complex products, as it applies only to registered investment companies and business development companies, and its requirements for leveraged/inverse funds specifically address the section 18 concerns that these funds raise. As such, neither Regulation Best Interest nor rule 18f–4 applies where a retail investor with a self-directed account invests in ETNs or other complex financial products that use leveraged/inverse strategies with a nearly identical risk/return profile to leveraged/inverse funds or in other complex investment products.

Accordingly, we have directed the staff to review the effectiveness of the existing regulatory requirements in protecting investors—particularly those with self-directed accounts—who invest in leveraged/inverse products and other complex investment products.[603] Based on this review, the staff will make recommendations to the Commission for potential new rulemakings, guidance, or other policy actions, if appropriate. As part of this review, the staff will consider whether the Commission's promulgation of any additional requirements for these products may be effective in helping to promote retail investor understanding of these products' unique characteristics and risks. The staff may consider requirements that include, among other things, additional obligations for broker-dealers and investment advisers relating to leveraged/inverse investment vehicles and other complex products, as well as the alternatives to the proposed sales practices rules that commenters recommended, including: (1) Point-of-sale disclosure; and (2) policies and procedures tailored to the risks of leveraged/inverse investment vehicles and other complex products.[604]

5. Treatment of Existing Leveraged/Inverse Funds That Seek To Provide Leveraged or Inverse Market Exposure Exceeding 200% of the Return of the Relevant Index

Under the relative VaR test with a 200% limit, as adopted, leveraged/inverse funds that seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index (''over-200% leveraged/inverse funds'') generally could not satisfy the limit on fund leverage risk in rule 18f–4. As such, over-200% leveraged/inverse funds in operation today would have to significantly change their investment strategies if they were required to comply with rule 18f–4's relative VaR test. While we believe that it is important to continue to consider these funds in light of investor protection concerns, and the staff review that we discuss above will assess these funds in addition to other complex investment products, we believe that these concerns would most appropriately be addressed holistically as a result of any Commission action that may result from the staff review.

Accordingly, rule 18f–4 includes a provision permitting over-200% leveraged/inverse funds to continue operating at their current leverage levels, provided they comply with all the provisions of rule 18f–4 other than the VaR-based limit on fund leverage risk and meet certain additional requirements, as discussed below. This provision recognizes the unique circumstances facing these funds, which have existed for years under Commission exemptive orders prior to our reconsideration of our regulatory approach regarding fund derivative use under section 18 and our adoption of a new approach for such regulation under rule 18f–4. Given this history and in light of the staff review discussed above, we have determined to allow these existing funds to continue but subject to further constraints and a limitation to funds currently in operation because of the section 18 concerns that these highly leveraged funds present.[605] Because the final rule limits this treatment to those over-200% leveraged/inverse funds that are currently in operation, absent a different regulatory approach following the staff review that might permit additional over-200% leveraged/inverse funds, the number of these funds may decrease over time, to the extent that fund sponsors remove existing funds from the market or reduce their leverage multiples.[606]

The final rule's approach to these funds is limited to a leveraged/inverse fund that cannot comply with rule 18f–4's limit on fund leverage risk and that, as of October 28, 2020, is: (1) In operation; (2) has outstanding shares issued in one or more public offerings to investors; and (3) discloses in its prospectus a leverage multiple or inverse multiple that exceeds 200% of the performance or the inverse of the performance of the underlying index.[607] A leveraged/inverse fund that can comply with rule 18f–4's limit on leverage risk because, for example, it rebalances its portfolios less frequently than daily or subsequently reduces its disclosed leverage or inverse multiple to 200% or less, will not qualify for the exception from the leverage risk limit and will be required to comply with all the provisions of rule 18f–4.

Rule 18f–4 provides that an over-200% leveraged/inverse fund relying on this exception may not change the underlying market index or increase the level of leveraged or inverse market exposure the fund seeks, directly or indirectly, to provide.[608] The Commission's exemptive orders for leveraged/inverse ETFs contemplate those funds seeking investment results corresponding to a multiple of the return (or inverse of the return) of an underlying index that does not exceed 300%, and thus no funds with an over-300% leverage multiple or inverse multiple currently exist. We are therefore not adopting the proposed requirement that leveraged/inverse funds must not seek or obtain, directly or indirectly, investment results exceeding 300% of the return (or inverse of the return) of the underlying index.[609]

We also are requiring existing over-200% leveraged/inverse funds to disclose in their prospectuses that they are not subject to the condition of rule 18f–4 limiting fund leverage risk.[610] Under the final rule requirement, the

[603] *See* Joint Statement Regarding Complex Financial Products and Retail Investors (Oct. 28, 2020), *available at https://www.sec.gov/news/public-statement/clayton-blass-hinman-redfearn-complex-financial-products-2020-10-28.*

[604] *See supra* footnotes 588–590 and accompanying text (discussing alternative approaches proposed by commenters).

[605] *See* rule 18f–4(c)(5). In addition, under rule 18f–4(a), ''fund'' is defined, in part, to mean a registered open-end or closed-end company or a business development company, including any separate series thereof.

[606] *See infra* section III.C.5. (discussion in the Economic Analysis section about, among other things, the potential market effects of the Commission's approach with respect to over-200% leveraged/inverse funds).

We understand that there are approximately 70 over-200% leveraged/inverse funds currently in operation. These funds represent approximately 0.07% of the total assets held by funds and business development companies subject to rule 18f–4. *See infra* section III.B.

[607] *See* rule 18f–4(c)(5)(i).

[608] *See* rule 18f–4(c)(5)(ii).

[609] *See* Proposing Release, *supra* footnote 1, at nn.349–350 and accompanying text.

[610] *See* rule 18f–4(c)(5)(iii).

prospectus disclosure that over-200% leveraged/inverse funds will provide is identical to the prospectus disclosure that all leveraged/inverse funds would have been required to provide under the proposal.[611] The proposed prospectus disclosure requirement was designed to provide investors and the market with clarity that leveraged/inverse funds (due to the proposed sales practices rules) were not subject to rule 18f–4's limit on fund leverage risk.[612] We are not requiring all leveraged/inverse funds to provide this disclosure, as the Commission proposed, because leveraged/inverse funds other than the existing over-200% leveraged/inverse funds will be required to comply with the final rule's limit on fund leverage risk. We continue to believe that such a disclosure for over-200% leveraged/inverse funds is appropriate, particularly because we have determined not to adopt the proposed sales practices rules at this time.

6. Amendments to Rule 6c–11 Under the Investment Company Act and Proposed Rescission of Exemptive Relief for Leveraged/Inverse ETFs

We are amending rule 6c–11 to include leveraged/inverse ETFs within the scope of that rule, provided that they comply with the applicable provisions of rule 18f–4. Rule 6c–11 permits ETFs that satisfy certain conditions to operate without obtaining an exemptive order from the Commission.[613] As discussed in the Proposing Release, rule 6c–11 includes a provision excluding leveraged/inverse ETFs from the scope of ETFs that may rely on that rule.[614] Leveraged/inverse ETFs, therefore, currently rely on their Commission exemptive orders. In adopting rule 6c–11, the Commission stated that the particular section 18 concerns raised by leveraged/inverse ETFs' use of derivatives distinguish those funds from the other ETFs permitted to rely on that rule, and that those section 18 concerns would be more appropriately addressed in a rulemaking addressing the use of derivatives by funds more broadly.[615] The Commission further stated that leveraged/inverse ETFs are similar in structure and operation to the other types of ETFs that are within the scope of rule 6c–11.[616]

The Commission proposed to amend rule 6c–11 to remove the provision excluding leveraged/inverse ETFs from the scope of ETFs that may rely on that rule. Two commenters expressed support for the proposal.[617] One commenter, however, stated that the Commission should not do so without first implementing a system for the categorization and identification of exchange–traded products (''ETPs'').[618] The Commission has previously addressed the implementation of an ETP naming system in the ETFs Adopting Release, and, as stated in that release, we encourage ETP market participants to continue engaging with their investors, with each other, and with the Commission on these issues.[619]

Because leveraged/inverse ETFs are similar in structure and operation to the other types of ETFs that are within the scope of rule 6c–11, we believe it is appropriate to permit leveraged/inverse funds to rely on rule 6c–11 when they satisfy the applicable conditions in rule 18f–4 as adopted. In addition, to provide greater clarity to investors and the market regarding the conditions we are placing on leveraged/inverse ETFs under rules 18f–4 and 6c–11, we are amending rule 6c–11 to require a leveraged/inverse ETF to comply with the applicable provisions of rule 18f–4 to operate as an ETF under rule 6c–11.[620]

Because the amendments to rule 6c–11 will permit a leveraged/inverse ETF to rely on that rule rather than its exemptive order, we are rescinding the exemptive orders the Commission has previously issued to leveraged/inverse ETFs, as proposed.[621] We believe that amending rule 6c–11 and rescinding these exemptive orders will help promote a more level playing field and greater competition by allowing any sponsor to form and launch a leveraged/inverse ETF whose target multiple is equal to or less than 200% of its reference portfolio, subject to the conditions in rules 6c–11 and 18f–4. We are rescinding the exemptive orders provided to leveraged/inverse ETFs on the compliance date for rule 18f–4, in eighteen months.[622] We believe that providing an eighteen-month period for existing leveraged/inverse ETFs also will provide time for them to prepare to comply with rule 6c–11 rather than their exemptive orders, and will provide the staff with time to conduct its review of leveraged/inverse and other complex products, as discussed above, and to provide a recommendation to the Commission.[623]

G. Amendments To Fund Reporting Requirements

We are adopting, with certain modifications from the proposal, amendments to the reporting requirements for funds that will rely on new rule 18f–4—in particular, amendments to Forms N–PORT, N–LIQUID (which we will re-title as ''Form N–RN,'' to reflect that funds will use this form to file risk notices with the Commission and not solely reports related to rule 22e–4), and Form N–CEN.[624] These amendments are designed to enhance the Commission's ability to oversee funds' use of and compliance with the new rule effectively, and to provide the Commission and the public additional information regarding funds' use of derivatives.[625]

[611] *See* proposed rule 18f–4(c)(4)(ii).

[612] The Commission received one comment questioning our proposal to require all leveraged/inverse funds, as defined in the Proposing Release, to disclose in their prospectuses that they are not subject to the leverage risk limit. *See* Direxion Comment Letter. Because we are not adopting the sales practices rules, we believe that the adoption of this disclosure requirement remains appropriate.

[613] *See* ETFs Adopting Release, *supra* footnote 76.

[614] *See* rule 6c–11(c)(4).

[615] *See* ETFs Adopting Release, *supra* footnote 76, at nn.72–75 and accompanying text.

[616] *See id.* at text following n.86. In addition, one sponsor of leveraged/inverse ETFs has stated that its ETFs would prefer to rely on rule 6c–11 over their exemptive orders and that leveraged/inverse ETFs would be able to comply with rule 6c–11 because they are structured and operated in the same manner as other ETFs that fall within the scope of that rule. *See id.* at n.83 and accompanying text.

[617] *See, e.g.,* Direxion Comment Letter; ProShares Comment Letter.

[618] *See* BlackRock Comment Letter.

[619] ETFs Adopting Release, *supra* footnote 76, at n.406 and accompanying and following paragraphs.

[620] In addition, in 2019 the Commission issued an order granting an exemption from certain provisions of the Exchange Act and the rules thereunder to broker-dealers and certain other persons, as applicable, that engage in certain transactions with ETFs relying on rule 6c–11, subject to certain conditions. *See* Order Granting a Conditional Exemption from Exchange Act Section 11(d)(1) and Exchange Act Rules 10b–10; 15c1–5; 15c1–6; and 14e–5 for Certain Exchange Traded Funds, Exchange Act Release No. 87110 (Sept. 25, 2019) [84 FR 57089 (Oct. 24, 2019)] (''ETF Exchange Act Order''). These exemptions will apply to transactions in the securities of leveraged/inverse ETFs that rely on rule 6c–11, provided the conditions of the ETF Exchange Act Order are satisfied.

[621] We did not receive any comments directly supporting or opposing our proposal to rescind the Commission exemptive orders to leveraged/inverse ETFs.

[622] *See infra* section II.L.

[623] *See* ETFs Adopting Release, *supra* footnote 76, at text following n.451.

[624] 17 CFR 274.150; 17 CFR 274.223; and 17 CFR 249.330 and 17 CFR 274.101.

[625] The funds that will rely on rule 18f–4 (other than BDCs) generally are subject to the reporting requirements of Form N–PORT. All registered management investment companies, other than registered money market funds and small business investment companies, are required to electronically file with the Commission, on a quarterly basis, monthly portfolio investment information on Form N–PORT, as of the end of each month. *See* Investment Company Reporting Modernization, Investment Company Act Release No. 32314 (Oct. 13, 2016) [81 FR 81870 (Nov. 18, 2016)] (''Reporting Modernization Adopting

Continued

Most commenters generally supported, or stated they did not object to, requiring funds to report to the Commission the information that the proposal would require about their derivatives use.[626] One commenter broadly opposed the new reporting requirements, in general, because they ''could introduce a substantial additional reporting burden for funds, particularly in the context of volatile market conditions.'' [627] No other commenter opposed the proposed reporting requirements in the aggregate. We continue to believe that the new reporting requirements will allow the Commission to identify and monitor industry trends, as well as risks associated with funds' investments in derivatives (including by requiring current, non-public reporting to the Commission when certain significant events related to a fund's leverage risk occur). The amendments will aid the Commission in evaluating the activities of investment companies in order to better carry out its regulatory functions. Accordingly, we are adopting, consistent with the proposal, the requirements to report the specified information to the Commission on Forms N–PORT, N–RN, and N–CEN, with certain modifications discussed below.

Commenters had mixed views regarding the public availability of certain information that funds would provide in response to the proposed reporting requirements. As discussed in more detail below, after considering these comments we are making certain of these data elements non-public, while making other information publicly available as proposed.

1. Amendments to Form N–PORT

We are adopting amendments to Form N–PORT to add new items to Part B (''Information About the Fund''), and revise some of the form's General Instructions.[628] As proposed, these amendments would have required all funds to report information about their derivatives exposure, as well as VaR information (as applicable) on Form N–PORT. However, the amendments we are adopting incorporate several changes from the proposal:

- While the proposal would have required all funds to report their aggregate derivatives exposure, under the final rules only a fund that relies on the limited derivatives exception in rule 18f–4 will be required to report this information.[629] A limited derivatives user will also be required to break out certain aspects of its derivatives exposure (*e.g.,* exposure from currency and interest rate derivatives that hedge related risks), and report the number of business days (in excess of the five–business-day remediation period provided in rule 18f–4) that derivatives exposure exceeded 10% of its net assets, to assist the Commission in monitoring compliance with the limited derivatives user exception.[630]
- We are tailoring the VaR-related information we are requiring funds to report to include the VaR-related information that we believe most effectively portrays a fund's use of derivatives.[631]
- Finally, we are modifying the proposed requirement to make all information reported in response to the new N–PORT items publicly available. In a change from the proposal, information about a limited derivatives user's derivatives exposure, as well as a fund's median daily VaR, median VaR ratio and VaR backtesting exceptions, will be confidentially reported to the Commission and not publicly disclosed.[632] Information about the fund's designated reference portfolio will be made publicly available, as proposed.

We discuss all of these changes in more detail below.

a. Derivatives Exposure

We are amending Form N–PORT to include a new reporting item for certain funds' derivatives exposure.[633] While the proposal would have required all funds to report their derivatives exposure, the final amendments we are adopting will require only a fund that relies on the limited derivatives user exception in rule 18f–4 to report derivatives exposure information.[634] A fund that relies on this exception will have to report: (1) Its derivatives exposure; (2) its exposure from currency derivatives that hedge currency risks; and (3) its exposure from interest rate derivatives that hedge interest rate risks. Such a fund also will have to report the number of business days, if any, in excess of the five-business-day remediation period that final rule 18f–4 provides, that the fund's derivatives exposure exceeded 10 percent of its net assets during the reporting period. These reporting requirements are designed to provide information to the Commission to further its ability to monitor compliance with the limited derivatives user exception.

No commenters specifically supported the Commission's proposal to require a fund to report its derivatives exposure data on Form N–PORT.[635] Likewise, no commenters specifically opposed this reporting requirement.[636] However, some commenters stated that public disclosure of a fund's aggregate derivatives exposure would not serve investor protection purposes because such information could be misleading and would be unnecessary, as individual portfolio holdings data already provide similar but more useful

Release''), and Investment Company Act Release No. 32936 (Dec. 8, 2017) [82 FR 58731 (Dec. 14, 2017)] (modifying approach to the requirement to submit reports on Form N–PORT).

Certain information that funds will report on Form N–PORT will be publicly available. For these data elements, only information that funds report for the third month of each fund's fiscal quarter on Form N–PORT will be publicly available (60 days after the end of the fiscal quarter). *See* Amendments to the Timing Requirements for Filing Reports on Form N–PORT, Investment Company Act Release No. 33384 (Feb. 27, 2019) [84 FR 7980 (Mar. 6, 2019)].

Currently, only open-end funds that are not regulated as money market funds under rule 2a–7 under the Investment Company Act are required to file current reports on Form N–LIQUID, under section 30(b) of the Investment Company Act and rule 30b1–10 under the Act. *See* Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)], at section III.L.2 (''Liquidity Adopting Release''). We are amending Form N–LIQUID (newly-retitled Form N–RN) and rule 30b1–10, and adopting rule 18f–4(c)(7) to add new VaR-related items to the form, and to extend the requirement to file current reports with respect to these new items to any fund (including registered open-end funds, registered closed-end funds, and BDCs) that relies on rule 18f–4 and that is subject to the rule's limit on leverage risk.

The funds that will rely on rule 18f–4 (other than BDCs) generally are subject to the reporting requirements of Form N–CEN. Specifically, all registered investment companies (excluding face amount certificate companies) are required to file annual reports on Form N–CEN. *See* Reporting Modernization Adopting Release.

[626] *See, e.g.,* J.P. Morgan Comment Letter; AQR Comment Letter I; Fidelity Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter.

[627] ISDA Comment Letter.

[628] *See* General Instructions E (Definitions) and F (Public Availability) to Form N–PORT.

[629] Item B.9 of Form N–PORT.

[630] *Id.*

[631] *See* Item B.10 of Form N–PORT; *see also infra* footnote 673 and accompanying paragraph.

[632] *See* General Instruction F (Public Availability) to Form N–PORT.

[633] Item B.9 of Form N–PORT; *see also* amendments to General Instruction E to Form N–PORT (adding a new definition for ''derivatives exposure,'' as defined in rule 18f–4(a)). A fund's derivatives exposure, which is expressed as a percentage of the fund's net assets, is computed in U.S. dollars.

[634] *See* proposed Item B.9 of Form N–PORT.

[635] Some commenters generally agreed with, or did not object to, reporting the proposed derivatives information to the Commission, but did not specifically support the derivatives exposure reporting item. *See* ICI Comment Letter; J.P. Morgan Comment Letter; Putnam Comment Letter.

[636] Although one commenter broadly objected to all new reporting requirements, it did not discuss or object to any specific requirements. *See* ISDA Comment Letter.

information.[637] We agree that the proposed derivatives exposure reporting requirement would not have permitted investors or other market participants to determine the purposes for which a fund uses derivatives, including whether derivatives are being used for hedging purposes. We also recognize that funds currently publicly disclose information regarding their derivatives positions on Form N–PORT and elsewhere.[638] In light of these considerations, we are not adopting the requirement for all funds to report derivatives exposure on Form N–PORT. However, because the limited derivatives user exception in final rule 18f–4 will require funds relying on the exception to limit their derivatives exposure to 10% or less of the value of their net assets, we are adopting a derivatives exposure reporting requirement for these funds to facilitate the Commission's ability to monitor compliance with the exception.[639]

The specific exposure information we are requiring funds to report reflects this regulatory purpose. While the proposal would have required a fund to provide its exposure from derivatives instruments and exposure from short sales separately, as distinct reporting items, we are not requiring limited derivatives users to break out these separate components of exposure.[640] We can perform our oversight function without requiring funds to separately report their exposure from derivatives instruments and shorts sales.[641] Conversely, because the final rule will permit a fund that relies on the limited derivatives user exception to exclude certain currency and interest rate hedging transactions from the 10% derivatives exposure threshold associated with the exception, we are adopting corresponding reporting requirements that will require funds to separately report the levels of exposure they have obtained from these currency and interest rate hedging transactions. This information will help support our ability to monitor funds' reliance on the exception. For each of the reporting items we are adopting, a fund will be required to provide its exposure as a percentage of the fund's net asset value as of the end of the reporting period.[642]

One commenter recommended allowing a fund to report derivatives exposure based on either a net notional basis (*e.g.,* allowing netting of long and short positions) or mark-to-market basis, stating that either of these methods provides a more accurate measure of the fund's derivatives exposure.[643] These suggestions, however, would result in funds reporting derivatives exposure figures that deviate from the manner in which funds are required to calculate derivatives exposure under rule 18f–4. As a result, this would limit the Commission's ability to monitor funds' use of derivatives for oversight purposes. Accordingly, we are not making the requested change, and the final amendments to Form N–PORT will require a fund that is a limited derivatives user to report its derivatives exposure on a gross notional basis, as proposed.[644]

In a change from the proposal, we are also adopting a requirement for funds that are limited derivatives users to report certain information regarding times during which these funds' derivatives exposure exceeds 10% of their net assets.[645] Final rule 18f–4 includes remediation provisions that address circumstances in which funds that are relying on the limited derivatives user exception have derivatives exposure that exceeds 10% of their net assets.[646] These provisions incorporate a five-business-day period for the fund to reduce its exposure before it must provide a written report to the fund's board of directors on the fund's plan to reduce its exposure. If a fund relying on that exception has derivatives exposure exceeding 10% of the fund's net assets, and this exceedance persists beyond the five-business-day period that rule 18f–4 provides for remediation, the fund will have to report the number of business days (beyond the five-business-day period) that its derivatives exposure exceeded 10% of net assets during the reporting period. This information also is designed to assist the Commission in monitoring compliance with the limited derivatives user exception.

In another change, derivatives exposure information reported in response to Item B.9 of Form N–PORT will not be made publicly available, as had been proposed.[647] The majority of commenters that addressed this aspect of the proposal urged the Commission to make this information non-public.[648] Other commenters supported (or stated they did not oppose) public disclosure of derivatives exposure, but did not provide detailed justification for this support.[649]

Commenters that opposed public disclosure of a fund's gross notional derivatives exposure expressed concern that this information could confuse or mislead investors who may not understand the relevance of or context for the data.[650] One commenter stated that ''derivatives exposure'' would include notional amounts of transactions that investors may not traditionally consider to be ''derivatives.''[651] Several commenters stated that public disclosure of this information could cause some investors or third-party analysts to incorrectly gauge the riskiness of (and amount of leverage used by) funds, particularly since Form N–PORT is not designed to include qualitative information that could provide context for the data.[652] Commenters also asserted that publicly disclosing this information would not be necessary to provide additional transparency to investors and other market participants because funds already publicly disclose information about their derivatives positions.[653] In particular, several commenters observed that: (1) Funds currently report their full portfolio schedules on Form N–PORT in a structured data format; (2) a fund's financial statements contain a variety of derivatives-related information (including notional amount information organized by category of derivative instrument); and (3) some funds provide disclosure about their use of derivatives in shareholder reports.[654] Some commenters also stated that public disclosure of derivatives exposure amounts, even if disclosed on a delayed basis, could reveal proprietary

[637] *See, e.g.,* ICI Comment Letter; Putnam Comment Letter.

[638] *See infra* footnote 654 and accompanying text.

[639] *See* Proposing Release, *supra* footnote 1, n.364 and accompanying text. As proposed, a fund also will have to indicate whether it is a limited derivatives user on Form N–CEN. *See infra* section II.G.3.

[640] *See* proposed Items B.9.a.i (exposure from derivative instruments that involve future payment obligations) and B.9.a.ii (exposure from short sales).

[641] *See supra* footnote 633.

[642] Item B.9; *see also* General Instruction A to Form N–PORT.

[643] Fidelity Comment Letter.

[644] Item B.9.a.; *see also* rule 18f–4(a) (defining ''derivatives exposure'').

[645] *See* Item B.9.d of Form N–PORT.

[646] *See* rule 18f–4(c)(4); *supra* section III.E.4.

[647] Proposing Release *supra* footnote 1, at n.363 and accompanying text.

[648] *See, e.g.,* Dechert Comment Letter I; Invesco Comment Letter; ICI Comment Letter; AQR Comment Letter I; Capital Group Comment Letter.

[649] J.P. Morgan Comment Letter; SIFMA AMG Comment Letter; T. Rowe Comment Letter.

[650] *See, e.g.,* Capital Group Comment Letter; Eaton Vance Comment Letter; MFA Comment Letter; PIMCO Comment Letter.

[651] Dechert Comment Letter I.

[652] *See, e.g.,* Invesco Comment Letter; ICI Comment Letter; Putnam Comment Letter.

[653] *See, e.g.,* ICI Comment Letter; AQR Comment Letter I; Capital Group Comment Letter; Invesco Comment Letter.

[654] Dechert Comment Letter I; Invesco Comment Letter; T. Rowe Comment Letter.

information to fund competitors.[655] Two commenters stated that the delayed public availability of exposure information that funds report, while protective of funds, may limit its utility to investors.[656]

We are not requiring derivatives exposure information to be publicly available. Section 45(a) requires information in reports filed with the Commission pursuant to the Investment Company Act to be made public unless we find that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors.[657] Because we are not, as proposed, requiring all funds to report derivatives exposure information, but are instead imposing the requirement only on funds that are limited derivatives users, making this information public is unlikely to provide the market-wide insight into the levels of funds' derivatives exposure to investors and other market participants we had initially anticipated.[658] Moreover, making the derivatives exposure data that funds that are limited derivatives users must report publicly available could cause investors to believe that these reporting funds (which do not use derivatives extensively or largely use them for limited hedging purposes), are riskier than funds that use derivatives to a greater extent but are not required to report their exposure information. In light of commenters' concerns, and given the regulatory purpose of the reporting requirement we are adopting, we find that public disclosure of this information is neither necessary nor appropriate in the public interest or for the protection of investors.

b. VaR Information

Form N–PORT will include a new reporting item related to the VaR tests we are adopting, with certain modifications from the proposal discussed below.[659] As proposed, the new disclosure item will apply to funds that are subject to the VaR-based limit on fund leverage risk during the relevant reporting period.

With the exception of one commenter that broadly opposed all new proposed reporting requirements on the grounds that they increase burdens on funds, no commenter opposed providing the proposed VaR information to the Commission on Form N–PORT.[660] Multiple commenters, however, opposed making certain information reported in response to the proposed VaR disclosure items publicly available.[661]

Median VaR and Designated Reference Portfolio Information

Funds will report their median daily VaR for the monthly reporting period, as proposed. Also as proposed, a fund subject to the relative VaR test during the reporting period will report, as applicable, the name of the fund's designated index and its index identifier. This item reflects a conforming change from the proposal, in light of modifications to the proposed relative VaR test, to require a statement that the fund's designated reference portfolio is the fund's securities portfolio, if applicable. Funds also will report their median daily VaR ratio for the reporting period, as the proposal would have required.[662] The requirement for a fund to report median daily VaR (and, for a fund that is subject to the relative VaR test, the fund's median VaR ratio) is designed to help the Commission assess compliance with the rule.[663] These data points will also facilitate the Commission's monitoring efforts. For example, these data points can be used to identify changes in a fund's VaR over time, and trends involving a single fund or group of funds regarding their VaRs. The requirement that a fund report information about its designated reference portfolio is designed to help analyze whether funds are using designated reference portfolios that meet the rule's requirements, and to assess any trends in the designated reference portfolios that funds select.

Although several commenters supported (or generally did not oppose) public reporting about a fund's designated index on Form N–PORT,[664] commenters largely objected to making information reported in response to the proposed VaR disclosure items publicly available.[665] Many commenters expressed concern that, while the Commission may expect and understand divergence across VaR models, VaR is a complex measure that many investors do not have the expertise or experience to understand.[666] One commenter stated that because investors trying to compare funds may misunderstand VaR information, funds could be incentivized to report data designed to appear less risky.[667] Although the proposed VaR information would have been made publicly available on a delayed basis, several commenters stated that publicly disclosing VaR information could reveal proprietary information about a fund's risk management tools.[668] Some generally questioned the investor protection benefits of making VaR data public.[669]

After considering these comments, we are making two modifications to the proposal. First, we are not requiring a fund's median VaR information (its median VaR, and its median VaR ratio for funds subject to the relative VaR test) to be publicly available, as had been proposed.[670] While we recognize that this information could help some market participants assess the effect of derivatives use on funds that have similar strategies but different VaRs, many investors may not have the expertise or experience to understand VaR and could misinterpret VaR figures, especially when comparing funds. Moreover, sophisticated investors and other market participants who may be less likely to misinterpret VaR figures can analyze a fund's portfolio holdings, which are publicly available in a structured data format on Form N–PORT, to roughly estimate a fund's VaR.[671] Taking all of these considerations into account, we find that public disclosure of this information is neither necessary nor appropriate in the public interest or for the protection of investors.[672] We are, however, requiring information about a fund's designated reference portfolio to be made publicly available, as proposed. Commenters did not object to making

[655] Dechert Comment Letter I; ICI Comment Letter; MFA Comment Letter.

[656] Dechert Comment Letter I; MFA/AIMA Comment Letter.

[657] Section 45(a) of the Investment Company Act.

[658] Proposing Release *supra* footnote 1, footnote 363 and accompanying text.

[659] Item B.10 of Form N–PORT.

[660] *See* ISDA Comment Letter.

[661] *See, e.g.,* ISDA Comment Letter; Dechert Comment Letter I; ICI Comment Letter; AQR Comment Letter I; BlackRock Comment Letter.

[662] In a conforming change to reflect modifications we are making to proposed rule 18f–4, this reporting item describes a fund's median VaR ratio as a percentage of the VaR of the fund's designated reference portfolio instead of as a percentage of the VaR of the fund's designated reference index (as proposed).

[663] *See* Proposing Release, *supra* footnote 1, at section II.H.1.b.

[664] Putnam Comment Letter; SIFMA AMG Comment Letter; Invesco Comment Letter.

[665] *See supra* footnote 661.

[666] *See, e.g.,* Dechert Comment Letter I; Invesco Comment Letter; ICI Comment Letter; AQR Comment Letter I; J.P. Morgan Comment Letter.

[667] Eaton Vance Comment Letter.

[668] Dechert Comment Letter I; MFA/AIMA Comment Letter.

[669] Dechert Comment Letter I; J.P. Morgan Comment Letter.

[670] See General Instruction F of Form N–PORT (stating that the SEC does not intend to make public the information reported with respect to a fund's median daily VaR (Item B.10.a) and Median VaR Ratio (Item B.10.b.iii)).

[671] *Cf.* Dechert Comment Letter I; Invesco Comment Letter; T. Rowe Comment Letter.

[672] *See supra* footnote 657.

this information publicly available, and to the extent that investors and other market participants wish to compare a fund's performance relative to the performance of its designated index, the information regarding a fund's designated reference portfolio will facilitate this analysis.

Second, while the proposal would have required funds to report their highest daily VaR (and for funds that use the relative VaR test, their highest daily VaR ratio) and these measures' corresponding dates, the Form N–PORT amendments that we are adopting do not include this requirement.[673] After considering comments, we believe that a fund's median VaR data more effectively portrays a fund's use of derivatives than the highest VaR figures. The median VaR data will be based on multiple inputs, whereas the high VaR figures would represent the fund's VaR on a single day during the period, which could have been an outlier that is not reflective of fund's typical VaR levels. Although information about a fund's highest VaR or VaR ratio also could facilitate monitoring by the Commission for compliance with the final rule, we believe that the requirement for funds to report VaR breaches on Form N–RN will provide sufficient information for this purpose. In addition, the elimination of these proposed reporting items will offset the burdens associated with new Form N–PORT reporting items that we believe provide higher information value, such as a fund's median daily VaR and median daily VaR ratio.

Backtesting Results

As proposed, a fund will have to report the number of exceptions it identified during the reporting period arising from backtesting the fund's VaR calculation model.[674] This requirement is designed to help analyze whether a fund's VaR model is effectively taking into account and incorporating all significant, identifiable market risk factors associated with a fund's investments, and will assist the Commission in monitoring funds' compliance with the VaR tests.

While the Commission proposed that this backtesting information would be publicly available, many commenters opposed making this information public due to concerns that investors would misunderstand or ascribe inappropriate significance to the backtesting exceptions.[675] These commenters suggested that investors might think a fund that reports backtesting exceptions is not complying with its leverage limits, or presents more compliance and leverage risk than it actually does.[676] The Proposing Release stated that funds would be expected to experience backtesting exceptions approximately 2.5 times a year and that more (or fewer) exceptions could suggest issues with the VaR model. Commenters expressed concern that while backtesting exceptions would not necessarily warrant investor concern, an investor may not have the experience or relevant background to understand this.[677] Some commenters suggested that public disclosure of the backtesting exceptions might confuse investors about the risks associated with a fund's use of derivatives unless a detailed contextual explanation regarding the fund's choice and application of its VaR limit were also provided, which Form N–PORT is not designed to provide.[678]

In a change from the proposal, and after consideration of these comments, we are not requiring the number of a fund's backtesting exceptions to be made publicly available.[679] This reporting requirement is designed to allow the Commission to assess the adequacy of a fund's VaR model. Taking into account the concerns commenters raised and the purpose of this reporting requirement, we believe that public disclosure of this information is neither necessary nor appropriate in the public interest or for the protection of investors

2. Amendments to Current Reporting Requirements

We are adopting new current reporting requirements for certain funds that are relying on rule 18f–4. Specifically, we are re-titling Form N–LIQUID as Form N–RN and amending this form to include new reporting events for funds that are subject to the VaR-based limit on fund leverage risk.[680] These funds will be required to determine their compliance with the applicable VaR test on at least a daily basis.[681] We are requiring these funds to file Form N–RN to report information about VaR test breaches under certain circumstances. We are adopting these requirements substantially as proposed, with conforming amendments to reflect changes to the modified VaR requirements that we adopting.

If the portfolio VaR of a fund subject to the relative VaR test exceeds, as applicable, 200% or 250% of the VaR of its designated reference portfolio for five business days, we are requiring that such a fund report: (1) The dates on which the fund portfolio's VaR exceeded 200% or 250% of the VaR of its designated reference portfolio; (2) the VaR of the fund's portfolio for each of these days; (3) the VaR of its designated reference portfolio for each of these days; (4) as applicable, either the name of the designated index, or a statement that the fund's designated reference portfolio is its securities portfolio; and (5) as applicable, the index identifier for the fund's designated index.[682] A fund will have to report this information within one business day following the fifth business day after the fund has determined that its portfolio VaR exceeds, as applicable, 200% or 250% of its designated reference portfolio VaR.[683] Such a fund also will then have to file a second report on Form N–RN when it is back in compliance with the relative VaR test.[684]

Similarly, if the portfolio VaR of a fund subject to the absolute VaR test were to exceed, as applicable, 20% or 25% of the value of the fund's net assets for five business days, we are requiring that such a fund report: (1) The dates on which the fund portfolio's VaR exceeded 20% or 25% of the value of its net assets; (2) the VaR of the fund's portfolio for each of these days; and (3)

[673] Proposed Items B.10.a, b, and d.iii–iv of Form N–PORT.

[674] Item B.10.c of Form N–PORT; *see also* Proposing Release, *supra* footnote 1, at n.370.

[675] *See, e.g.,* Dechert Comment Letter I; ICI Comment Letter; BlackRock Comment Letter; Eaton Vance Comment Letter; MFA Comment Letter.

[676] *See, e.g.,* Dechert Comment Letter I; MFA Comment Letter.

[677] *See* Proposing Release, *supra* footnote 1, at n.150 and accompanying text; *see also* BlackRock Comment Letter; Capital Group Comment Letter; ICI Comment Letter.

[678] Capital Group Comment Letter; BlackRock Comment Letter; Eaton Vance Comment Letter.

[679] *See* General Instruction F to Form N–PORT.

[680] *See* Parts E–G of Form N–RN.

[681] Rule 18f–4(c)(2).

[682] *See* Part E of Form N–RN. This requirement reflects conforming changes to parallel the VaR limits that we are adopting as part of final rule 18f–4. *See supra* sections II.D.2.c. and II.D.3. This requirement also reflects a conforming change to reflect the final time-frame for VaR test remediation (five business days as opposed to three business days, as proposed) that we are adopting. *See supra* footnote 460 and accompanying text.

[683] For example, if the fund were to determine, on the evening of Monday, June 1, that its portfolio VaR exceeded 200% of the fund's designated reference portfolio VaR, and this exceedance were to persist through Tuesday (June 2), Wednesday (June 3), Thursday (June 4), Friday (June 5), and Monday (June 8), the fund would file Form N–RN on Tuesday, June 9 (because five business days following the determination on June 1 is June 8, and 1 business day following June 8 is June 9). If the exceedance were to still persist on June 9 (the date that the fund would file Form N–RN), the fund's report on Form N–RN would provide the required information elements for June 1, 2, 3, 4, 5, 8 and 9.

[684] *See* Part G of Form N–RN. The report will include the dates on which the fund was not in compliance with the VaR test, and the current VaR of the fund's portfolio on the date the fund files the report.

the value of the fund's net assets for each of these days.[685] Such a fund will have to report this information within the same time frame as would be required under the parallel reporting requirements for funds that are subject to the relative VaR test, and also will have to file a report on Form N–RN when it is back in compliance with the absolute VaR test.[686]

Currently, only registered open-end funds (excluding money market funds) are required to file reports on Form N–LIQUID (to be re-titled as Form N–RN).[687] As proposed, we are requiring all funds that are subject to rule 18f–4's limit on fund leverage risk to file current reports on Form N–RN regarding VaR test breaches.[688] The scope of funds that will be subject to the new VaR test breach current reporting requirements of Form N–RN will thus include registered open-end funds, as well as registered closed-end funds and BDCs. In addition to extending the scope of funds required to respond to Form N–RN, we are amending the general instructions to the form to reflect the expanded scope and application, as proposed.[689]

Many commenters expressed general support for the proposed Form N–RN reporting requirements as an appropriate adjunct to the rule's remediation provisions, facilitating regulatory monitoring by the Commission.[690] Conversely, one commenter broadly opposed any new reporting requirements, including on Form N–RN.[691] This commenter stated that the proposed requirements in the aggregate could introduce a substantial additional reporting burden for funds, particularly in the context of volatile market conditions, and that given the board reporting requirements under the proposed remediation provision, imposing additional reporting requirements is unnecessary. Another commenter recommended that the Commission either eliminate the proposed Form N–RN reporting requirement and instead include the proposed Form N–RN reporting items on Form N–PORT, or extend the remediation period within which a fund must come back into compliance with its VaR to ten business days.[692] While acknowledging the Commission's need for transparency and information, particularly during times of market stress, this commenter expressed concern that some funds could engage in asset sales to avoid triggering the Form N–RN filing requirement.[693]

We continue to believe that the amendments to current reporting requirements will be important for the Commission to assess funds' compliance with the VaR tests and to monitor the effects of market stress on funds' leverage risk.[694] We are requiring funds to provide this information in a current report because we believe that the Commission should be notified promptly when a fund is out of compliance with the VaR-based limit on fund leverage risk, which could indicate that a fund is experiencing heightened risks as a result of the fund's use of derivatives transactions. VaR test breaches could indicate that a fund is using derivatives transactions to leverage the fund's portfolio, magnifying its potential for losses and significant payments of fund assets to derivatives counterparties. Such breaches also could indicate market events that are drivers of potential derivatives risks or other risks across the fund industry. Either of these scenarios—increased fund-specific risks, or market events that affect funds' risks broadly—may, depending on the facts and circumstances, require attention by the Commission. Relying on reporting to the fund's board alone and without a report to the Commission, as one commenter suggested, would not further these objectives.

The new current reporting requirement is designed to provide the Commission with current information regarding potential increased risks and stress events (as opposed to delayed reporting on Form N–PORT). The one-business-day time frame for this Form N–RN reporting—after a fund has been out of compliance with the VaR test for five business days—is designed to provide an appropriately early notification to the Commission of potential heightened risks, while at the same time providing sufficient time for a fund to compile and file its report on Form N–RN. This time frame is also consistent with the current required timing for reporting other events on current Form N–LIQUID.[695] A fund that breached its VaR test and has filed an initial report on Form N–RN is not required to file additional reports while it is working to come back into compliance because the requirement that a fund file a report when it comes back into compliance allows the Commission to monitor the length of time that a fund is out of compliance. However, we expect that Commission staff will engage with the fund about its plans to come back into compliance, among other monitoring activities, as discussed above.[696] Although one commenter suggested that a requirement to file a current report could ''create[ ] [a] sense of urgency and may cause forced selling not in the best interest of the fund,'' because a fund that is promptly coming back into compliance with the applicable VaR test must do so in a manner that is in the best interests of the fund and its shareholders, a fund engaging in ''fire sales'' to avoid filing a report on Form N–RN would violate the final rule.[697]

As proposed, funds' reports on Form N–RN regarding VaR test breaches (like their reports on this form regarding

[685] *See* Part F of Form N–RN. This requirement reflects conforming changes to parallel proposed requirements to reflect the VaR limits that we are adopting as part of final rule 18f–4. *See* proposed Part F of Form N–RN; *see also supra* footnote 402 and accompanying text. This requirement also reflects a conforming change to the proposed requirement to reflect the final time-frame for VaR test remediation that we are adopting (five business days as opposed to three business days, as proposed). *See supra footnote* 460 and accompanying text.

[686] A fund may provide explanatory information about any information reported in response to the form's items. *See* Part H of Form N–RN.

[687] *See* General Instruction A.(1) to Form N–LIQUID; *see also* rule 30b1–10 [17 CFR 270.30b1–10].

[688] *See* Form N–RN; *see also* rule 30b1–10 under the Investment Company Act (amended to extend current reporting requirements to registered closed-end funds), and rule 18f–4(c)(7) (requiring all funds that rely on rule 18f–4 and that are subject to its limit on fund leverage risk, which experience an event specified in the parts of Form N–RN titled ''Relative VaR Test Breaches,'' ''Absolute VaR Test Breaches,'' or ''Compliance with VaR Test,'' to file with the Commission a report on Form N–RN within the period and according to the instructions specified in that form).

Because BDCs are regulated, not registered, under the Investment Company Act, they are not subject to rule 30b1–10. A BDC is only required to file on Form N–RN if it elects to rely on rule 18f–4 to enter into derivative transactions, and the BDC experiences an event that rule 18f–4(c)(7) specifies requires a filing on Form N–RN.

[689] *See, e.g.,* General Instruction A.(1) to Form N–RN (amended to specify that the defined term ''registrant'' also includes registered closed-end funds and BDCs); General Instruction A.(2) to Form N–RN (amended to extend the scope of application to the new VaR-test-breach-related Items E–G); General Instruction A.(3) to Form N–RN (added to specify that only open-end funds required to comply with rule 22e–4 under the Investment Company Act must report events described in Parts B–D, as applicable, while all funds that rely on rule 18f–4 subject to compliance with rule 18f–4(c)(2)'s limit on fund leverage risk must report events described in Parts E–G, as applicable); and General Instruction F to Form N–RN (amended to specify that the terms used in Parts E–G have the same meaning as in rule 18f–4).

[690] *See, e.g.,* J.P. Morgan Comment Letter; ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter; Nuveen Comment Letter.

[691] ISDA Comment Letter.

[692] Dechert Comment Letter III.

[693] *Id.; see also supra* footnote 484.

[694] *See* Proposing Release *supra* footnote 1, at section II.H.2.

[695] *See* General Instruction A of current Form N–LIQUID (to be re–titled as Form N–RN).

[696] *See supra* section II.D.6.b.

[697] *See* Dechert Comment Letter III; *see also* rule 18f–4(2)(c)(ii); *supra* section II.D.6.b.

liquidity-related items) will be non-public, because we believe that public disclosure of this information is neither necessary nor appropriate in the public interest or for the protection of investors.[698] Information about VaR breaches that funds report on Form N–RN will provide important information to the Commission for regulatory purposes. Public disclosure is not required for these regulatory purposes, and we believe that adverse effects might arise from real-time public disclosure of a fund's VaR test breaches. For example, publicly disclosing this information could confuse investors and lead them and other market participants to make incorrect assumptions about whether a fund has suffered losses (or will imminently suffer losses) or about a fund's relative riskiness. This could have potential adverse effects for funds if investors redeem or sell fund shares as a result, and funds' remaining investors could be adversely affected as well. The only commenter to address this aspect of the proposal agreed that VaR information disclosed on Form N–RN should not be made public.[699] No commenters opposed the Commission's proposal to make VaR information reported on Form N–RN non-public.

3. Amendments to Form N–CEN

Form N–CEN currently includes an item that requires a fund to indicate—in a manner similar to ''checking a box''—whether the fund has relied on certain Investment Company Act rules during the reporting period.[700] As proposed, we are amending this item to require a fund to identify whether it relied on rule 18f–4 during the reporting period.[701] We are also adopting amendments, largely as proposed, requiring a fund to identify whether it relied on any of the exceptions from various requirements under the rule, specifically:

- Whether the fund is a limited derivatives user excepted from the rule's program requirement and VaR-based limit on fund leverage risk;[702] or
- Whether the fund is a leveraged/inverse fund that will be excepted from the limit on fund leverage risk.[703]

In addition, as proposed, a fund will have to identify whether it has entered into reverse repurchase agreements or similar financing transactions pursuant to the rule. In a change from the proposal, a fund must identify whether it entered into such transactions either under: (1) The provision of rule 18f–4 that requires compliance with section 18's asset coverage requirements; or (2) the provision that allows funds to treat these transactions as derivatives transactions for all purposes under the final rule.[704] As proposed, a fund also will have to identify whether it has entered into unfunded commitment agreements under rule 18f–4.[705] Finally, we are including a new reporting item designed to conform to other changes being adopted in final rule 18f–4 that will require a fund to identify whether it is relying on the provision of rule 18f–4 that addresses investments in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle.[706] This information will assist the Commission with its oversight functions by allowing Commission staff to identify which funds were excepted from certain of the rule's provisions or relied on the rule's provisions regarding reverse repurchase agreements, unfunded commitment agreements, or funds' investment in when-issued, forward-settling, and non-standard settlement cycle securities. All new information reported on Form N–CEN pursuant to this rulemaking will be publicly available, as proposed.

With the exception of one commenter that broadly opposed any new form reporting requirements, including reporting on Form N–CEN, the Commission received no comments opposing the proposed reporting requirements on Form N–CEN.[707] One commenter suggested that the Commission amend Form N–CEN to include a new reporting item requiring a fund to affirmatively identify whether it has adopted and implemented a derivatives risk management program and is subject to a VaR-based limit on leverage risk under rule 18f–4.[708] We believe that the requirement we are adopting for a fund to indicate on Form N–CEN that it is relying on rule 18f–4 effectuates this recommendation. One commenter supported making the new Form N–CEN disclosures publicly-available, and no commenters opposed public availability of the new disclosures.[709]

H. Reverse Repurchase Agreements

As proposed, rule 18f–4 will permit funds to enter into reverse repurchase agreements or similar financing transactions so long as they meet the relevant asset coverage requirements of section 18.[710] However, in a change from the proposal, the final rule also will allow funds the option to treat reverse repurchase agreements or similar financing transactions as derivatives transactions, rather than including such transactions in the fund's asset coverage calculations.[711] This change is designed to provide a fund flexibility to choose the approach that is best suited to its investment strategy or operational needs, while still addressing section 18's asset sufficiency and leverage concerns.[712]

As discussed in the Proposing Release, funds may engage in certain transactions that may involve senior securities primarily as a means of obtaining financing.[713] A common method of obtaining financing is through the use of reverse repurchase agreements,[714] which are economically

[698] *See* General Instruction A.(1) to Form N–RN; *see also* section 45(a) of the Investment Company Act.

[699] AQR Comment Letter I.

[700] *See* Item C.7 of Form N–CEN.

[701] *See* Item C.7.n of Form N–CEN.

[702] *See* Item C.7.n.i of Form N–CEN.

[703] *See* Item C.7.n.ii of Form N–CEN. This requirement reflects conforming changes to remove references to the proposed sales practices rules, which we are not adopting, and instead reference the provision in the final rule addressing leveraged/inverse funds. *See* rule 18f–4(c)(5).

[704] *See* Items C.7.n.iii–iv of Form N–CEN. These requirements reflect conforming changes to the proposed item to create two separate reporting items, so a fund that enters into reverse repurchase agreements or similar financing transactions under final rule 18f–4 must identify the specific provision on which it is relying, *i.e.,* rule 18f–4(d)(1)(i) or rule 18f–4(d)(1)(ii).

[705] *See* Item C.7.n.v of Form N–CEN.

[706] *See* Item C.7.n.vi of Form N–CEN. This reporting item corresponds with new rule 18f–4(f), which addresses investments in when-issued and forward-settling securities.

In a change from the proposal, we are modifying Part A of Form N–CEN (General Information) to include fields for a registrant's name, and series name, if applicable. This change is designed to facilitate the filing and review process.

[707] ISDA Comment Letter.

[708] Invesco Comment Letter.

[709] J.P. Morgan Comment Letter.

[710] Rule 18f–4(d)(1)(i). Among other things, section 18 prescribes the required amount of asset coverage for a fund's senior securities, and provides certain consequences for a fund that fails to maintain this amount. *See, e.g.,* section 18(a) (restrictions on dividend issuance).

[711] Rule 18f–4(d)(1)(ii).

[712] Rule 18f–4(d) does not provide any exemptions from the requirements of section 61 for BDCs because that section does not limit a BDC's ability to engage in reverse repurchase or similar transactions in parity with other senior security transactions permitted under that section, and we do not believe that BDCs use reverse repurchase agreements or similar financing transactions to such an extent that they would seek or require the additional flexibility to treat these transactions as derivatives transactions under the final rule.

[713] For example, open-end funds are permitted to borrow money from a bank, provided they maintain a 300% asset coverage ratio. *See* section 18(f)(1) of the Investment Company Act.

[714] In a reverse repurchase agreement, a fund transfers a security to another party in return for a percentage of the value of the security. At an agreed-upon future date, the fund repurchases the transferred security by paying an amount equal to the proceeds of the initial sale transaction plus interest. *See* Release 10666, *supra* footnote 14, at ''Reverse Repurchase Agreements'' discussion (stating that a reverse repurchase agreement may

Continued

equivalent to secured borrowings.[715] Accordingly, the Commission proposed to allow a fund to enter into reverse repurchase agreements and similar financing transactions if it treats them as economically equivalent to bank borrowings or other indebtedness subject to the full asset coverage requirements of section 18, and combines the aggregate amount of indebtedness associated with reverse repurchase agreements and other similar financing transactions with bank borrowings and other senior securities representing indebtedness when calculating compliance with section 18's asset coverage ratios.[716]

Commenters generally agreed that reverse repurchase agreements are economically a form of secured borrowing.[717] Nevertheless, some commenters urged that we provide additional flexibility for funds to engage in these transactions because subjecting them to the Act's asset coverage requirements as proposed would limit a fund's use of reverse repurchase agreements and similar financing transactions relative to current levels permitted under Release 10666.[718] Several commenters stated that reverse repurchase agreements are often simpler and less expensive to enter into than other borrowings, and have bankruptcy benefits.[719] One commenter was concerned that it would be operationally challenging to include reverse repurchases when calculating compliance with the 300% asset coverage test because the transactions are so quickly entered and exited.[720] Some commenters also suggested that the proposed approach would unnecessarily hamper the investment strategies of certain funds, with two commenters focusing on closed-end funds in particular.[721]

Commenters suggested alternatives to the Commission's proposed treatment of reverse repurchase agreements. They generally agreed that the current regulation of reverse repurchase agreements under an asset segregation framework has been effective.[722] A number of commenters recommended retaining the current regulatory framework under which funds segregate liquid assets in connection with reverse repurchase agreements rather than complying with section 18's asset coverage requirements.[723] Commenters also suggested allowing funds the option to use either the current asset segregation approach, or the proposed approach to requiring compliance with section 18's asset coverage requirements for reverse repurchase agreements.[724] Several commenters recommended that we adopt a modified asset segregation approach that limits segregated assets to assets classified as highly or moderately liquid under rule 22e–4.[725] Another commenter suggested that if we do not retain the existing asset segregation framework, we should allow funds to treat reverse repurchase agreements as derivatives transactions under the final rule.[726] One commenter also observed that a fund could create exactly the same economics of a reverse repurchase agreement with a total return swap, which is treated as a derivatives transaction under the rule.[727]

Reverse repurchase agreements and other similar financing transactions have the effect of allowing a fund to obtain additional cash that can be used for investment purposes or to finance fund assets. As such, they achieve effectively identical results to a bank borrowing or other borrowing.[728] Accordingly, we believe it is appropriate to allow funds to engage in these transactions to the same degree as borrowings under the Act, and to treat them equally. For example, this would have the effect of permitting an open-end fund to obtain financing by borrowing from a bank, engaging in a reverse repurchase agreement, or any combination thereof, so long as all sources of financing are included when calculating the fund's asset coverage ratio.[729] The final rule therefore will allow funds to use reverse repurchase agreements up to the Act's limits on borrowings without incurring the costs and burdens of instituting a derivatives risk management program under the final rule.[730]

We are also persuaded that reverse repurchase agreements and similar financing transactions, like derivatives transactions, may provide an efficient and cost-effective form of financing or leverage. When a fund engages in these transactions to borrow beyond what the Act allows under section 18, however, we believe that the same concerns that prompted our adoption of the derivatives risk management program requirement and other conditions of rule 18f–4 may arise. We also appreciate that other types of transactions that would qualify as derivatives transactions under the proposed rule, such as total return swaps, can achieve economically similar results to reverse

not have an agreed-upon repurchase date, and in that case the agreement would be treated as if it were reestablished each day).

[715] *See, e.g.,* Office of Financial Research, *Reference Guide to U.S. Repo and Securities Lending Markets* (Sept. 9, 2015), available at *https://www.financialresearch.gov/working-papers/files/OFRwp-2015-17_Reference-Guide-to-U.S.-Repo-and-Securities-Lending-Markets.pdf.*

[716] Proposed rule 18f–4(d).

[717] *See, e.g.,* Nuveen Comment Letter; Guggenheim Comment Letter.

[718] *See, e.g.,* NYC Bar Comment Letter; ICI Comment Letter; BlackRock Comment Letter; Guggenheim Comment Letter; PIMCO Comment Letter.

Under the approach established in Release 10666, a fund could enter into reverse repurchase agreements so long as it segregated assets equal to the fund's repurchase obligations, or effectively up to a 200% asset coverage ratio. Under the proposal, reverse repurchase agreements would be combined with other borrowings, subject to a total asset coverage limit of 300% in the case of open-end funds. This would have the effect of reducing the maximum amount that a fund could borrow using reverse repurchase agreements relative to the approach under Release 10666.

[719] *See, e.g.,* Dechert Comment Letter I; Guggenheim Comment Letter; ICI Comment Letter.

[720] *See, e.g.,* Guggenheim Comment Letter.

[721] *See, e.g.,* ICI Comment Letter; Blackrock Comment Letter; PIMCO Comment Letter.

[722] *See, e.g.,* ICI Comment Letter; NYC Bar Comment Letter.

[723] *See, e.g.,* NYC Bar Comment Letter, Guggenheim Comment Letter; Dechert Comment Letter I; BlackRock Comment Letter; SIFMA AMG Comment Letter.

[724] *See, e.g.,* Guggenheim Comment Letter; Dechert Comment Letter I; SIFMA AMG Comment Letter; PIMCO Comment Letter.

[725] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter; Guggenheim Comment Letter; PIMCO Comment Letter; SIFMA AMG Comment Letter.

[726] NYC Bar Comment Letter. The Commission requested comment regarding whether to treat reverse repurchase agreements and similar financing transactions as derivatives transactions in the Proposing Release.

[727] Nuveen Comment Letter.

[728] Another example of a similar financing transaction for purposes of this provision would be a fund's purchase of a security on margin.

[729] Section 18 states that certain borrowings that are made for temporary purposes (less than 60 days) and that do not exceed 5% of the total assets of the issuer at the time when the loan is made (temporary loans) are not senior securities for purposes of certain paragraphs in section 18. As the Commission noted in Release 10666, reverse repurchase agreements and similar financing transactions could be designed to appear to fall within the temporary loans exception, and then could be ''rolled-over,'' perhaps indefinitely, with such short-term transactions being entered into, closed out, and later re–entered. If substantially similar financing arrangements were being ''rolled over'' in any manner for a total period of 60 days or more, we would treat the later transactions as renewals of the earlier ones, and all such transactions would fall outside the exclusion for temporary loans.

[730] Under this asset coverage option, reverse repurchase agreements and similar financing transactions will not be included in calculating a fund's derivatives exposure under the limited derivatives user provisions of the final rule. However, if a fund does not qualify as a limited derivatives user due to its other investment activity, any portfolio leveraging effect of reverse repurchase agreements or similar financing transactions will be included and restricted through the VaR-based limit on fund leverage risk. This is because the VaR tests estimate a fund's risk of loss taking into account all of its investments, including the proceeds of reverse repurchase agreements and investments the fund purchased with those proceeds.

repurchase agreements. That is, a total return swap produces an exposure and economic return substantially equal to the exposure and economic return a fund could achieve by borrowing money from the counterparty—including through a reverse repurchase agreement—in order to purchase the swap's reference assets. While reverse repurchase agreements may not be traditionally seen as ''derivatives,'' they were one of the specific types of transactions that were addressed in Release 10666, in light of the leverage and asset sufficiency concerns they may raise. We believe that as part of our re-evaluation of our regulatory scheme with respect to derivatives and similar transactions, we should address the concerns raised by fund use of reverse repurchase agreements in a consistent manner as those posed by derivatives transactions under the rule when a fund engages in these transitions beyond the Act's asset coverage requirements for borrowings.

Accordingly, the final rule will allow a fund that does not wish to avail itself of the asset coverage treatment of reverse repurchase agreements, to instead choose to treat them as a derivatives transaction for all purposes under the final rule.[731] In other words, a fund can either choose to limit its reverse repurchase and other similar financing transaction activity to the applicable asset coverage limit of the Act for senior securities representing indebtedness, or it may instead treat them as derivative transactions.[732] A fund's election will apply to all of its reverse repurchase agreements or similar financing transactions so that all such transactions are subject to a consistent treatment under the final rule.[733] For example a fund may not elect to treat reverse repurchase agreements as derivatives transactions under the final rule, while at the same time electing to treat similar financing transactions, such as Tender Offer Bond (''TOB'') financings, like bank borrowings under the final rule's asset coverage option. Such mixing and matching of transaction types would not be consistent with the final rule.

We recognize that such transactions could have the effect of introducing leverage into a fund's portfolio if the fund were to use the proceeds of the financing transaction to purchase additional investments. In addition, such transactions impose a requirement to return assets at the termination of the agreement, which can raise section 18 asset sufficiency concerns to the extent the fund needs to sell less-liquid securities at a loss to obtain the necessary assets.

However, we believe that the derivatives risk management program requirement we are adopting in rule 18f–4 is designed to address these concerns. The leverage risks introduced by the use of reverse repurchase agreements will be identified through the funds' VaR calculations and managed through the program. Similarly, any asset sufficiency concerns should be addressed as a liquidity risk or other derivatives risk under the program. Accordingly, the final rule would allow funds to treat reverse repurchase agreements as derivatives transactions if they choose to do so and comply with the other requirements of the final rule.

Allowing a fund to treat reverse repurchase agreements as derivatives transactions will provide additional flexibility for funds to enter into these agreements. This is because, under the final rule, a fund is permitted to have a portfolio VaR up to 200% of the VaR of the fund's designated reference portfolio or up to 20% for funds relying on the absolute VaR test (with higher limits for closed-end funds). Under our historical approach to asset segregation for these transactions, a fund could incur obligations under these transactions equal to 100% of the fund's net assets, after which all of the fund's assets would have been segregated. The approach we are taking under the final rule would provide reasonably comparable flexibility where a fund relies on the relative VaR test because the fund could treat reverse repurchase agreements as derivatives transactions and would be able to use them to increase the fund's VaR up to approximately 200% of the VaR of the fund's designated reference portfolio by reinvesting the reverse repurchase agreement borrowings in the fund's strategy.

The final rule will also require a fund to memorialize on its books and records which option it is using to manage its reverse repurchase agreements and similar financing transactions, and maintain that record for five years.[734] These records will provide supporting detail for a fund's corresponding Form N–CEN ''check-the-box'' representation regarding the rule provision upon which it relied in entering into reverse repurchase agreements and similar financing transactions.[735] We believe it is appropriate to require such a record to ensure that our examiners can identify and verify which option the fund is using for these transactions.

The required records also could preserve more-granular detail than the corresponding Form N–CEN representation, depending on the circumstances. For example, if a fund were to switch between the two options multiple times throughout one year, these actions would be memorialized in the fund's books and records, but would not appear on Form N–CEN, which registered funds file annually. We believe that if a fund were to switch between the two options on a dynamic or frequent basis, this may indicate that the fund has not effectively evaluated the appropriate approach. In addition, such frequent switching may indicate gaming or create other evasion concerns. However, a fund could reasonably decide to switch between options if circumstances change or it otherwise reevaluates how it should best treat such transactions. In such a case, this recordkeeping provision requires the fund to maintain a record of its original choice and its switch to the other option for the appropriate period.

As noted above, some commenters suggested that we retain an asset segregation approach for reverse repurchase agreements and similar financing transactions, similar to the approach that the Commission proposed for these and certain other transactions in 2015. We are not persuaded that we should adopt such a separate and distinct approach for reverse repurchase agreements. As part of this rulemaking process, we are engaging in a holistic re-evaluation of our approach to regulating derivatives and similar transactions. As discussed previously, while asset segregation, depending on the assets segregated, can address the asset sufficiency and leverage concerns of the Act, we generally believe that when a fund exceeds the leverage limits contemplated by the Act, such concerns are more appropriately managed through a derivatives risk management program and other rule 18f–4 requirements. We do not believe that establishing an asset segregation regime for a limited subset of transactions, such as reverse repurchase agreements, is necessary. Moreover, providing separate and distinct regimes for bank borrowings and other transactions subject to the Act's asset coverage requirements, derivatives transactions under the final rule, and an asset

[731] Rule 18f–4(a) (definition of derivatives transaction).

[732] A fund could choose to treat its reverse repurchase agreements as borrowings under the option we are adopting, and also engage in a limited amount of derivatives use under the limited derivatives user exception.

[733] Rule 18f–4(d)(1)(i) and (ii).

[734] Rule 18f–4(d)(2).

[735] *See supra* footnote 704.

segregation requirement for reverse repurchase agreements and similar financing transactions would increase the likelihood that funds engaging in economically similar transactions would be subject to disparate regulatory requirements. Accordingly, in light of the approach we are adopting here, we do not believe that providing a separate asset segregation regime for reverse repurchase agreements and similar financing transactions is appropriate.

Some commenters requested that we provide different limits for reverse repurchase agreements or similar financing transactions for closed-end funds in light of the lower asset coverage ratio the Act allows for the issuance of preferred stock.[736] While the Act provides a lower asset coverage ratio for such purposes, we believe that permitting closed-end funds the option to treat such transactions as derivatives transactions should address this issue. Under the final rule, closed-end funds can choose to engage in reverse repurchase agreements and similar financing transactions to the same extent as derivative transactions, which would allow them to use reverse repurchase agreement to the same degree or higher than would be permitted under the 200% asset coverage requirement for preferred stock in the Act.

Several commenters sought clarification on whether certain types of transactions (such as TOB financings) are ''similar financing transactions'' to reverse repurchase agreements and thus would be subject to the proposed asset coverage limit.[737] We believe that TOB financings are economically similar to reverse repurchase agreements, and therefore are ''similar financing transactions'' under the final rule, where a fund engages in a TOB financing (as opposed to purchasing an ''inverse floater'' issued by a TOB trust in the secondary market). In a TOB financing, similar to a reverse repurchase agreement, a fund transfers a bond to a TOB trust that, in turn, issues floating rate securities to money market funds and other investors, often called ''floaters,'' and transfers to the fund the residual interest in the trust (an ''inverse floater'') and the proceeds of the sale of the floating rate securities. The fund typically uses the cash proceeds from the sale of the floating rate securities to purchase additional portfolio securities. As one commenter on the 2015 proposal observed, a fund employing a TOB trust has in effect used the underlying bond as collateral to secure a borrowing analogous to a fund's use of a security to secure a reverse repurchase agreement.[738]

Some commenters urged that the final rule should distinguish between ''recourse'' and ''non-recourse'' TOB financings.[739] Under a ''recourse'' TOB financing, the fund holding the inverse floater is obligated to increase its investment in the TOB trust to either provide an additional cushion to the holder of the floaters or allow the liquidity provider to redeem some or all of the outstanding floaters, or make payments to a financial institution providing liquidity to the holders of the floaters. In a non-recourse TOB financing, the fund would not have a legal obligation to provide additional assets to the TOB trust or payments to liquidity providers.[740] We do not believe that this distinction supports different treatment under section 18 or the final rule. We also note that GAAP does not support such a distinction.[741] In both a recourse and non-recourse TOB financing, the fund effectively is engaging in a leveraging transaction and receiving the proceeds from the sale of the floaters, which the fund can use to make further investments. Although the inverse floater, itself, may represent an equity interest in the TOB trust, we believe TOB financings involve a borrowing by the fund regardless of whether the holders of the floaters would look to the fund or some other party if the income produced by the bond deposited in the TOB trust or proceeds realized upon the bond's sale is insufficient to repay them.

Securities lending arrangements are structurally similar to reverse repurchase agreements in that, in both cases, a fund transfers a portfolio security to a counterparty in exchange for cash (or other assets).[742] Nevertheless, the Commission stated in the Proposing Release that it would not view a fund's obligation to return securities lending collateral as a ''similar financing transaction'' if the fund reinvests cash collateral in cash or cash equivalents (such as money market funds), and the fund does not sell or otherwise use non-cash collateral to leverage its portfolio.[743] The Commission also stated that a fund that engages in securities lending under these circumstances is limited in its ability to use securities lending transactions to increase leverage in its portfolio.[744]

The commenters who addressed this issue agreed that securities lending transactions should not be treated as reverse repurchase agreements or similar transactions under the final rule under these circumstances.[745] However, some of these commenters requested that we expand the types of assets in which funds can invest the securities lending proceeds beyond cash and cash equivalents.[746] Commenters also requested that we clarify what

[736] *See, e.g.,* Nuveen Comment Letter; PIMCO Comment Letter. These commenters noted that unlike open-end funds, which are subject to a 300% asset coverage requirement for debt, which is the only form of leverage that such funds are permitted to use, registered closed-end funds and BDCs can also obtain equity-based leverage by selling preferred stock, which are subject to lower asset coverage requirements. These commenters asserted that closed-end funds should be allowed to treat reverse repurchase agreements and TOB Residuals for purposes of section 18 as a form of senior security representing stock subject to a 200% asset coverage requirement. Under section 18, whether a senior security involves equity or debt for purposes of that section does not depend on whether the fund entering into the transaction is an open-end or closed-end fund. We believe the final rule should take the same approach.

[737] *See, e.g.,* SIFMA AMG Comment Letter; Putnam Comment Letter.

[738] *See* Proposing Release, *supra* footnote 1, at n.406 (citing the Comment Letter of the Securities Industry and Financial Markets Association (Mar. 28, 2016)).

[739] *See, e.g.,* SIFMA AMG Comment Letter.

[740] SIFMA AMG Comment Letter; Nuveen Comment Letter.

[741] *See, e.g., FASB* Accounting Standards Codification Transfers and Servicing (Topic 860) (''ASC 860 Transfers and Servicing''). ASC 860 Transfers and Servicing, which applies to transfers and servicing of financial assets, provides guidance on the accounting for a transfer of financial assets as a sale to third parties and the use of financial assets as collateral in secured borrowings. Transactions related to TOB financings, including the initial transfer of the bond into the TOB trust and subsequent issuance of synthetic floaters, generally should be evaluated pursuant to ASC 860 to determine whether the transaction is a secured borrowing or a sale.

[742] In the 2015 Proposing Release, the Commission sought comment on whether rule 18f–4 should address funds' compliance with section 18 in connection with securities lending, to which commenters responded that the staff's current guidance on securities lending forms the basis for funds' securities lending practices and effectively addresses the senior securities implications of securities lending, and thus securities lending practices need not be addressed in the final rule. *See, e.g.,* Comment Letter of the Investment Company Institute (Mar. 28, 2016); Comment Letter of Guggenheim (Mar. 28, 2016); Comment Letter of the Securities Industry and Financial Markets Association (Mar. 28, 2016); Comment Letter of the Risk Management Association (Mar. 28, 2016); *see also* Staff Guidance on Securities Lending by U.S. Open-End and Closed-End Investment Companies (Feb. 27, 2014), available at *https://www.sec.gov/divisions/investment/securities-lending-open-closed-end-investment-companies.htm* (providing guidance on certain no-action letters that funds consider when engaging in securities lending and summarizing areas those letters address, including limitations on the amount that may be lent and collateralization for such loans).

[743] *See* Proposing Release *supra* footnote 1, at nn.403–405 and accompanying text.

[744] *Id.*

[745] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter; Dechert Comment Letter I; SIFMA AMG Comment Letter.

[746] *See, e.g.,* ICI Comment Letter; BlackRock Comment Letter.

instruments would qualify as cash or cash equivalents.[747]

We do not agree with commenters' suggestions that we expand the types of collateral in which a fund may reinvest its proceeds beyond cash and cash equivalents without treating the arrangements as reverse repurchase agreements or similar financing transactions under the final rule. If a fund were to engage in securities lending and to invest the cash collateral in securities other than cash or cash equivalents, this may result in leveraging of the fund's portfolio. Accordingly, we believe this activity would be a ''similar financing transaction'' under the final rule. The Commission has previously stated that ''[c]urrent U.S. generally accepted accounting principles define cash equivalents as short-term, highly liquid investments that are readily convertible to known amounts of cash and that are so near their maturity that they present insignificant risk of changes in value because of changes in interest rates.'' [748] The Commission has also stated that items commonly considered to be cash equivalents include certain Treasury bills, agency securities, bank deposits, commercial paper, and shares of money market funds.[749]

I. Unfunded Commitment Agreements

As proposed, rule 18f–4 will permit a fund to enter into unfunded commitment agreements to make certain loans or investments if the fund reasonably believes, at the time it enters into such agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements.[750] This approach recognizes that while entering into unfunded commitment agreements may raise the risk that a fund may be unable to meet its obligations under these transactions, unfunded commitments do not generally involve the leverage and other risks associated with derivatives transactions.

When a fund enters into an unfunded commitment agreement, the fund commits, conditionally or unconditionally, to make a loan to a company or to invest equity in a company in the future.[751] They include capital commitments to a private fund requiring investors to fund capital contributions or to purchase shares upon delivery of a drawdown notice. As proposed, the final rule will define an unfunded commitment agreement to mean a contract that is not a derivatives transaction, under which a fund commits, conditionally or unconditionally, to make a loan to a company or to invest equity in a company in the future, including by making a capital commitment to a private fund that can be drawn at the discretion of the fund's general partner.[752] The exclusion of derivatives transactions from this definition is predicated on our understanding that unfunded commitment agreements have certain characteristics that distinguish them from derivatives transactions.[753]

We continue to believe that unfunded commitment agreements are distinguishable from the derivatives transactions covered by rule 18f–4. Based on characteristics that we understand are typical of unfunded commitment agreements, we do not believe that funds enter into these agreements to leverage a fund's portfolio, or that they generally raise the Investment Company Act's concerns regarding the risks of undue speculation.[754] Two commenters agreed that unfunded commitments are distinguishable from derivative transactions.[755] Commenters also agreed that unfunded commitments do not give rise to the type of leverage risk that section 18 was meant to regulate.[756] Two commenters expressly supported the proposed definition of ''unfunded commitment agreement.'' [757] One commenter stated that the proposed definition may not clearly demarcate the difference between unfunded commitment agreements and derivatives transactions in all cases, but offered no suggestions regarding how to revise the definition to address this concern.[758] We are adopting the definition of ''unfunded commitment agreement'' as proposed.

We believe that unfunded commitment agreements can raise the asset sufficiency concerns underlying the Investment Company Act, depending on the facts and circumstances. No commenters opposed this view, and one commenter agreed, stating that ''[e]xcessive unfunded commitments, even made or acquired as the result of careful planning, may engender asset sufficiency concerns, particularly in the context of a market distortion.'' [759] We are therefore adopting, as proposed, an approach that will permit a fund to enter into unfunded commitment agreements if it reasonably believes, at the time it enters into such an agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements, in each case as they come due.[760]

A fund should consider its unique facts and circumstances in forming such a reasonable belief. As proposed, the final rule prescribes certain specific factors that a fund must take into account.[761] Specifically:

- A fund must take into account its reasonable expectations with respect to other obligations, including any obligation with respect to senior securities or redemptions. This factor reflects that other obligations can place competing demands on cash a fund otherwise might intend to use to fund an unfunded commitment agreement.
- A fund may not take into account cash that may become available from the sale or disposition of any investment at a price that deviates significantly from

[747] *See, e.g.,* Putnam Comment Letter; SIFMA AMG Comment Letter.

[748] *See* 2015 Proposing Release, *supra* footnote 1, at n.367 and accompanying text.

[749] *See id.,* at n.368 and accompanying text.

[750] Rule 18f–4(e)(1).

[751] Proposing Release *supra* footnote 1, at section II.J. The types of funds that enter into unfunded commitment agreements typically include BDCs and registered closed-end funds. Certain types of open-end funds, such as floating rate funds and bank loan funds, also enter into unfunded commitment agreements, although to a lesser extent. We estimate that approximately 989 of 11,616 (8.5%) open-end funds, 205 of 678 (30%) closed-end funds, and 100% of BDCs entered into unfunded commitments in 2019. *See infra* footnote 1033.

[752] Rule 18f–4(a).

As discussed in the Proposing Release, commenters on the 2015 Proposal identified characteristics of unfunded commitment agreements that they believed distinguished them from derivatives transactions: (1) A fund often does not expect to lend or invest up to the full amount committed; (2) a fund's obligation to lend is commonly subject to conditions, such as a borrower's obligation to meet certain financial metrics and performance benchmarks, which are not typically present under the types of agreements that the Commission described in Release 10666; and (3) unfunded commitment agreements do not give rise to the risks that Release 10666 identified and do not have a leveraging effect on the fund's portfolio because they do not present an opportunity for the fund to realize gains or losses between the date of the fund's commitment and its subsequent investment when the other party to the agreement calls the commitment. *See* Proposing Release *supra* footnote 1, at nn.410–412 and accompanying text.

[753] *See id.* at n.413 and accompanying text.

[754] *Id.*

[755] ABA Comment Letter; Aditum Comment Letter.

[756] ABA Comment Letter; NYC Bar Comment Letter; Aditum Comment Letter.

[757] Aditum Comment Letter; ICI Comment Letter.

[758] Keen Comment Letter.

[759] Aditum Comment Letter.

[760] *See* rule 18f–4(e)(1). Because this condition is designed to provide an approach tailored to unfunded commitment agreements, the final rule also provides that these transactions will not be considered for purposes of computing asset coverage under section 18(h).

[761] Rule 18f–4(e)(1). The final rule requires the fund to make and maintain records documenting the basis for this belief, as proposed. *See* rule 18f–4(e)(2).

the market value of those investments. This provision is designed to address the risk that a fund could suffer losses by selling assets to raise cash to fund an unfunded commitment agreement, ultimately having an adverse impact on the fund's investors.

- A fund may not consider cash that may become available from issuing additional equity. We believe that a fund's ability to raise capital in the future depends on a variety of factors that are too speculative to support a fund's reasonable belief that it could fund an unfunded commitment agreement with the proceeds from future sales of securities issued by the fund, as discussed below.

The final rule will not preclude a fund from considering the issuance of debt (*e.g.,* borrowings from financial institutions, or the issuance of debt securities) to support a reasonable belief that it could cover an unfunded commitment, as proposed.[762] We understand that funds often satisfy their obligations under unfunded commitments through borrowings, which are limited by section 18's asset coverage requirements. These asset coverage requirements, in turn, affect the extent to which a fund may form a reasonable belief regarding its ability to borrow, and likewise, to enter into unfunded commitment agreements.

To have a reasonable belief, a fund could consider, for example, its strategy, its assets' liquidity, its borrowing capacity under existing committed lines of credit, and the contractual provisions of its unfunded commitment agreements. A fund with unfunded loan commitments, for instance, could evaluate the likelihood that different potential borrowers would meet contractual ''milestones'' that the borrowers would have to satisfy as a condition to the obligation to fund a loan, as well as the amount of the anticipated borrowing. The fund's historical experience with comparable obligations should inform this analysis. Whether a fund has a reasonable belief also could be informed by a fund's assessment of the likelihood that subsequent market or other events could impair the fund's ability to have sufficient cash and cash equivalents to meet its unfunded commitment obligations. One commenter confirmed that the proposed approach conforms with current industry practice for BDCs and other regulated funds.[763]

The commenters that addressed this aspect of the proposal broadly supported requiring a ''reasonable belief'' determination in connection with unfunded commitment agreements as set forth in the proposed rule.[764] Two commenters recommended that the final rule treat unfunded commitments in the same manner as the proposed rule.[765] One stated that the ''reasonable belief'' factors ''are appropriate and will provide additional clarity for how a fund should handle determining whether or not it should enter into unfunded commitment agreements going forward.'' [766] Conversely, two commenters recommended changing certain aspects of the proposed factors, with one seeking greater flexibility, and the other advocating for more restrictive criteria.

The commenter advocating for additional flexibility suggested that, instead of being required to consider the proposed specified factors, funds be permitted to determine their own factors to consider when making a ''reasonable belief'' determination with respect to asset sufficiency.[767] This commenter stated that a more flexible approach would allow a fund to consider its unique facts and circumstances, and the Commission's exam staff could review a fund's records to assess what factors a fund considered when entering into unfunded commitment transactions. We believe the approach we are adopting provides this flexibility. While a fund must take into account the specified factors and prohibitions, it may consider any other factors it deems relevant for purposes of forming a reasonable belief as to its asset sufficiency. This commenter also suggested that in making an asset sufficiency determination, a fund should be permitted to consider its ability to raise cash by issuing equity securities, in addition to debt. We continue to believe, as the Commission discussed in the proposal, that a fund's future ability to raise cash by issuing equity would depend on a variety of factors, including future market conditions, that are too speculative to support a reasonable belief that a fund could cover its unfunded commitments with the proceeds from future sales of the fund's securities.[768] Thus, the final rule precludes a fund that is making an asset sufficiency determination from taking into account cash that may become available from issuing additional equity, as proposed.

Conversely, another commenter urged the Commission to enhance or expand the specified factors to provide additional protections to investors.[769] This commenter recommended that a fund making an asset sufficiency determination be precluded from considering the availability of any additional capital (including debt) because its ability to satisfy its unfunded commitments is likely to be most impaired during a market distortion, when it should least expect additional fund subscriptions or the availability of borrowed funds. We are not adopting this suggested approach. Borrowings may be an important way for funds to obtain cash to fund an unfunded commitment agreement. Closed-end funds that hold less liquid assets, for example, may rely on lending facilities rather than selling assets or holding cash. Moreover, although the final rule does not preclude a fund from considering its ability to borrow to satisfy unfunded commitments, a fund's reasonable belief would be based on all of the facts and circumstances, including whether the fund would reasonably expect to be able to access financing in a particular case.

This commenter also suggested requiring a fund to reassess whether its ''reasonable belief'' remains reasonable at various points during the period of the unfunded commitment agreement.[770] We are not adopting this approach. Under the final rule, a fund must reassess its asset sufficiency before entering into any additional unfunded commitment agreements, when such information would be most relevant to such a determination. Requiring a fund to reassess its asset sufficiency after entering into a contract would be of limited use because regardless of the outcome, the fund would still be bound by the terms of the contract. Finally, this commenter urged that given the potential impact of a market distortion on a fund's ability to meet its unfunded commitments and the negative impact

[762] Proposing Release, *supra* footnote 1, at section II.J.

[763] ABA Comment Letter (''BDCs and other regulated funds that enter into unfunded commitments generally represent to the staff during the review of their registration statements that they believe their assets will provide adequate cover to satisfy unfunded commitments when due. In other words, funds have experience complying with the reasonable belief requirement under the Proposed Rules.'').

[764] ABA Comment Letter; ICI Comment Letter, NYC Bar Comment Letter, Aditum Comment Letter.

[765] ICI Comment Letter; ABA Comment Letter.

[766] ABA Comment Letter.

[767] NYC Bar Comment Letter.

[768] Proposing Release, *supra* footnote 1, at section II.J. Because an exchange-traded closed-fund can only sell shares if its share price is above NAV, its ability to issue equity is more limited (and thus, we believe more speculative) than its ability to issues debt or access a line of credit. *See* section 23(b) of the Investment Company Act (generally prohibiting a registered closed end fund or BDC from issuing its shares at a price below the fund's current net asset value (''NAV'') without shareholder approval).

[769] *See* Aditum Comment Letter.

[770] Aditum Comment Letter.

that a failure to meet these commitments would have on its investors, a fund's ability to enter into unfunded commitments should be subject to a ''well-defined limitation.'' We are not adopting this approach, as the extent to which unfunded commitment agreements could raise asset sufficiency concerns depends on funds' facts and circumstances. We do not believe that an across-the-board limitation is appropriate in light of this, or is necessary given the protections our adopted approach will provide.

J. Recordkeeping Provisions

We are adopting, consistent with the proposal, certain recordkeeping requirements.[771] We did not receive comments on the proposed recordkeeping provisions. We are making certain conforming changes to the proposed recordkeeping provisions in light of changes to other aspects of the final rule, which we discuss below. The final recordkeeping requirements are designed to provide our staff, and a fund's compliance personnel, the ability to evaluate the fund's compliance with the rule's requirements.

First, as proposed, the rule will require the fund to maintain certain records documenting the fund's derivatives risk management program. Specifically, for a fund subject to the rule's program requirements, the rule requires the fund to maintain a written record of its policies and procedures that are designed to manage the fund's derivatives risks. The rule also requires a fund to maintain a written record of the results of any stress testing of its portfolio, the results of any VaR test backtesting it conducts, any internal reporting or escalation of material risks under the program, and any periodic reviews of the program.

Second, as proposed, the rule will require funds to keep records of any materials provided to the fund's board of directors in connection with approving the designation of the derivatives risk manager. The rule also will require a fund to keep records of any written reports provided to the board of directors relating to the program, and any written reports provided to the board that the rule requires regarding the fund's non-compliance with the applicable VaR test, as proposed. We also are making a new conforming change in light of a change to the rule's remediation provision for a fund that is out of compliance with its applicable VaR test. The final rule includes a new reporting requirement providing that the derivatives risk manager, within thirty calendar days of the exceedance, must provide a written report to the fund's board of directors explaining how the fund came back into compliance and the results of the derivatives risk manager's analysis of the circumstances that caused the fund to be out of compliance for more than five business days and any updates to the program elements.[772] As part of this new reporting provision, if the fund remains out of compliance with the applicable VaR test at that time, the derivatives risk manager's written report must update the report previously provided to the fund's board of directors and explain how and by when he or she reasonably expects that the fund will come back into compliance. These reports will be covered by the final recordkeeping requirements.

Third, as proposed, for a fund that is required to comply with the VaR-based limit on fund leverage risk, the fund will have to maintain records documenting the fund's determination of: The VaR of its portfolio; the VaR of the fund's designated reference portfolio, as applicable; the fund's VaR ratio (the value of the VaR of the fund's portfolio divided by the VaR of the designated reference portfolio), as applicable; and any updates to any VaR calculation models used by the fund, as well as the basis for any material changes made to those models.

Fourth, generally as proposed, the rule will require a fund that is a limited derivatives user to maintain a written record of its policies and procedures that are reasonably designed to manage its derivatives risk. We are updating the cross reference cite in the recordkeeping provision to reflect the new paragraph number for the limited derivatives users' policies and procedures requirement. We also are making a new conforming change in light of the rule's limited derivatives user provision requiring written reports to the board of directors for fund exceedances of the limited derivatives user exception's 10% derivatives exposure threshold. These reports will be covered by the final recordkeeping requirements.

Fifth, as proposed, the rule will require a fund that enters into unfunded commitment agreements to maintain a record documenting the basis for the fund's basis for its reasonable belief regarding the sufficiency of its cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements.[773] A fund must make such a record each time it enters into such an agreement.

Sixth, the final recordkeeping requirement includes a new conforming change in light of the final rule providing two separate treatment options for a fund that enters into a reverse repurchase agreement or similar financing transaction. Under this new recordkeeping requirement, the fund must maintain a written record documenting whether the fund is treating these transactions, as set forth in the rule, under (1) an asset coverage requirements approach or (2) a derivatives transactions treatment approach.[774]

Finally, the rule will require funds to maintain the required records for a period of five years.[775] In particular, a fund must retain a copy of its written policies and procedures under the rule that are currently in effect, or were in effect at any time within the past five years, in an easily accessible place.[776] In addition, a fund will have to maintain all other records and materials that the rule would require the fund to keep for at least five years (the first two years in an easily accessible place).[777]

K. Conforming Amendments

1. Form N–PORT and Rule 22e–4

In change from the proposal, and in response to comments, we are amending rule 22e–4 and a related reporting requirement on Form N–PORT to remove references to assets ''segregated to cover'' derivatives transactions.[778] These are references to assets segregated in accordance with Release 10666 and related staff guidance, which are being rescinded in connection with the final rule. The final rule does not include an asset segregation requirement, and these references therefore are moot and superseded. Although the Commission did not propose to amend rule 22e–4 or the related reporting requirement in Form N–PORT, the Proposing Release

[771] *See* rule 18f–4(c)(6); *see also* proposed rule 18f–4(c)(6).

[772] Rule 18f–4(c)(2)(iii)(C).

[773] Rule 18f–4(e)(2).

[774] Rule 18f–4(d)(2).

[775] Rule 18f–4(c)(6)(ii); rule 18f–4(d)(2); rule 18f–4(e)(2).

[776] Rule 18f–4(c)(6)(ii)(A). The retention requirement will apply to both funds that are required to implement a derivatives risk management program and funds that are limited derivatives users under rule 18f–4(c)(4).

[777] Rule 18f–4(c)(6)(ii)(B); rule 18f–4(d)(2); rule 18f–4(e)(2).

[778] We are removing these references from, and making conforming changes to, paragraph (b)(1)(ii)(C) of rule 22e–4 and the related note to this paragraph; paragraph (b)(iii)(B) of rule 22e–4; and Item B.8 of Form N–PORT. We also are amending these provisions to refer to ''collateral,'' in addition to ''margin,'' and adding an instruction to Item B.8 of Form N–PORT regarding the calculation required by that item. These amendments are designed to make these provisions clearer and do not reflect any changes in the underlying requirements.

included requests for comment regarding whether references to ''segregated'' assets in rule 22e–4 should be removed, and whether the Commission should make any other conforming amendments to its rules or forms. Commenters who responded to these requests for comment urged the Commission to remove these references from rule 22e–4, and some commenters also suggested removing the parallel references in a related reporting requirement in Form N–PORT.[779]

One commenter also stated that the current Form N–PORT description of ''derivatives transactions'' is not consistent with the Proposed Rule's definition, ''which includes transactions not customarily considered 'derivatives' (*e.g.,* TBAs).'' [780] The commenter recommended that the Commission undertake a review of affected public disclosures to evaluate whether an existing and commonly used definition of derivatives transactions should be used for purposes of the revised Form N–PORT reporting to avoid investor confusion and administrative cost associated with differing definitions.

We recognize that the final rule's ''derivatives transaction'' definition includes some instruments not generally described as ''derivatives,'' and also excludes other instruments commonly understood as derivatives where they do not involve a future payment obligation. Accordingly, we are amending Form N–PORT's general instructions to make clear that the term ''derivatives transactions'' has the same meaning as in rule 18f–4 solely with respect to N–PORT items that relate specifically to the rule.[781]

2. Form N–2 (Senior Securities Table)

As proposed, we are amending Form N–2 to provide that funds relying on rule 18f–4 will not be required to include their derivatives transactions and unfunded commitment agreements in the senior securities table on Form N–2.[782] This amendment conforms Form N–2's senior securities table to the provisions of the final rule that provide that a fund's derivatives transactions and unfunded commitment agreements entered into in compliance with the rule will not be considered for purposes of computing asset coverage under section 18(h). We believe that applying section 18's asset coverage requirements to these transactions is unnecessary in light of rule 18f–4's specific requirements tailored to address these transactions. We are adopting these provisions as proposed.

One commenter suggested the Commission clarify how a fund should ''not consider'' derivatives transactions for purposes of calculating asset coverage under section 18(h), in light of the proposed provision providing that derivatives transactions entered into under the proposed rule will not be considered for purposes of computing asset coverage under section 18(h).[783] The commenter asked, for example, if a fund should include the assets and liabilities associated with a written option in the calculation, or the gains and losses associated with the option's premium. We believe a fund would ''not consider'' a derivatives transaction for purposes of calculating asset coverage, and accordingly for disclosure in the senior securities table, by not including the derivatives transaction or any component of the derivatives transaction in the calculation. We do not believe that this provision in the final rule requires the fund to track gains and losses associated with the fund's investment of options' premium, margin, or collateral received in connection with the fund's derivatives transactions.

L. Compliance Date

The Commission is providing a transition period to give funds sufficient time to comply with the provisions of rule 18f–4 and the related reporting requirements.[784] Specifically, we are adopting a compliance date for rule 18f–4 and the related amendments in this release that is eighteen months following the effective date. We believe that an eighteen-month compliance period provides sufficient time for all funds to come into compliance with the rule and the related reporting requirements. Accordingly, we are also rescinding Release 10666, effective August 19, 2022.[785] In addition, staff in the Division of Investment Management has reviewed its no-action letters and other guidance addressing derivatives transactions and other transactions covered by proposed rule 18f–4 to determine which letters and other staff guidance, or portions thereof, should be withdrawn in connection with the final rule. This review included, but was not limited to, the staff no-action letters and other guidance identified in the Proposing Release. Some of these letters and other staff guidance, or portions thereof, will be moot, superseded, or otherwise inconsistent with the final rule and, therefore, will be withdrawn by the staff, effective upon the rescission of Release 10666.[786]

Commenters urged the Commission to provide more time beyond the one-year transition period we discussed in the Proposing Release, generally suggesting an eighteen-month or two-year period to provide time for funds to prepare to comply with the rule's requirements.[787] In particular, commenters stated that a one-year transition period would not provide sufficient time to implement the derivatives risk management program and the VaR limit, and to designate a qualified derivatives risk manager.[788] Delaying the rescission of Release 10666 and the staff's rescission of its no-action letters and other guidance for eighteen months is designed to provide additional time for funds to prepare to transition their current approaches and come into compliance with the final rule and the related reporting requirements.

A fund may rely on rule 18f–4 after its effective date but before the compliance date, provided that the fund satisfies the rule's conditions.[789] To promote regulatory consistency, however, any fund that elects to rely on rule 18f–4 prior to the date when Release 10666 is rescinded may rely only on rule 18f–4, and not also consider Release 10666, staff no-action letters, or other staff guidance in determining how it will comply with section 18 with respect to its use of derivatives and the other transactions that rule 18f–4 addresses. In addition, rule 18f–4 provides that, if a fund

[779] Putnam Comment Letter; Invesco Comment Letter; Vanguard Comment Letter; ICI Comment Letter.

[780] Fidelity Comment Letter.

[781] General Instruction E of Form N–PORT.

[782] *See* amendment to Instruction 2 of Item 4.3 of Form N–2; proposed amendment to Instruction 2 of Item 4.3 of Form N–2. This amendment will apply to registration statements on a prospective basis. Accordingly, the amendment does not require funds to modify information provided for periods before a fund begins to rely on the final rule.

[783] *See* Comment Letter of Ernst Young LLP (Mar. 24, 2020).

[784] The ''related reporting requirements'' include the amendments to fund reporting requirements discussed in section II.G, as well as the amendments to rule 30b1–10.

[785] *See supra* section I.C.

[786] We also intend, after appropriate notice and opportunity for hearing, to rescind orders we have granted to funds providing exemptive relief from section 18(f) relating to investments in certain futures contracts, related options and/or options on stock indices that is superseded by or otherwise inconsistent with rule 18f–4. Based on staff review of filings on Form N–CEN, no fund is relying on these exemptive orders.

[787] *See e.g.* Invesco Comment Letter; Fidelity Comment Letter; Dechert Comment Letter I; Capital Group Comment Letter.

[788] *See e.g.* Dechert Comment Letter I; Fidelity Comment Letter; Invesco Comment Letter.

[789] Similarly, leveraged/inverse funds will be able to rely on rule 6c–11 once rule 18f–4 is effective and the leveraged/inverse funds comply with its conditions. In addition, we are rescinding the exemptive orders provided to leveraged/inverse ETFs on the compliance date for rule 18f–4. *See supra* footnote 622 and accompanying text.

experiences a reportable event on Form N–RN, the fund must file with the Commission a report on Form N–RN within the period and according to the instructions specified in that form.[790] Until the Commission staff completes the process of updating current Form N–LIQUID on EDGAR to reflect the amendments we have adopted, including retitling the form as ''Form N–RN,'' a fund relying on rule 18f–4 may satisfy the requirement to file a report on Form N–RN by including information that Form N–RN requires in a report on Form N–LIQUID filed on EDGAR. A fund may contact Commission staff with any questions regarding this filing process.

Because the reporting requirements we are adopting will enhance the Commission's ability to oversee funds' use of and compliance with rule 18f–4 effectively, we are requiring a fund that relies on rule 18f–4 prior to the rule's compliance date also to comply with the amendments we are adopting to Form N–PORT and Form N–CEN, as applicable, once these updated forms are available for filing on EDGAR. We appreciate that funds will not be able to comply with these new reporting requirements until Commission staff completes the process of updating these amended forms for filing on EDGAR. Therefore, until this updating process is complete, a fund may elect to rely on rule 18f–4 prior to the rule's compliance date without also complying with these reporting requirements. Commission staff will issue a notice to the public when the updated forms are available for filing on EDGAR.

M. Other Matters

Pursuant to the Congressional Review Act,[791] the Office of Information and Regulatory Affairs has designated this rule a ''major rule,'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

III. Economic Analysis

We are mindful of the costs imposed by, and the benefits obtained from, our rules. Section 2(c) of the Investment Company Act provides that when the Commission is engaging in rulemaking under the Act and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider whether the action will promote efficiency, competition, and capital formation, in addition to the protection of investors. The following analysis considers, in detail, the potential economic effects that may result from the final rules, including the benefits and costs to investors and other market participants as well as the broader implications of the final rules for efficiency, competition, and capital formation.

A. Introduction

Funds today use a variety of derivatives, both to obtain investment exposure as part of their investment strategies and to manage risks. A fund may use derivatives to gain, maintain, or reduce exposure to a market, sector, or security more quickly, or to obtain exposure to a reference asset for which it may be difficult or impractical for the fund to make a direct investment. A fund may use derivatives to hedge interest rate, currency, credit, and other risks, as well as to hedge portfolio exposures.[792] As funds' strategies have become increasingly diverse over the past several decades, funds' use of derivatives has grown in both volume and complexity. At the same time, a fund's derivatives use may entail risks relating to, for example, leverage, markets, operations, liquidity, and counterparties, as well as legal risks.[793]

Section 18 of the Investment Company Act is designed to limit the leverage a fund can obtain through the issuance of senior securities.[794] As discussed above, a fund's derivatives use may raise the investor protections concerns underlying section 18. In addition, funds' asset segregation practices have developed such that funds' derivatives use—and thus funds' potential leverage through derivatives transactions—does not appear to be subject to a practical limit as the Commission contemplated in Release 10666.

Rule 18f–4 is designed to provide an updated, comprehensive approach to the regulation of funds' use of derivatives and certain other transactions. The final rule will permit a fund, subject to certain conditions, to enter into derivatives or other transactions, notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Investment Company Act. We believe that the final rule's requirements, including the derivatives risk management program requirement and VaR-based limit on fund leverage risk, will benefit investors by mitigating derivatives-related risks, including those that may lead to unanticipated and potentially significant losses for investors.

Certain funds use derivatives in a limited manner, which we believe presents a lower degree of risk or potential impact and generally a lower degree of leverage than permitted under section 18. The final rule will provide an exception from the derivatives risk management program requirement and VaR-based limit on fund leverage risk and the related board oversight and reporting provisions (collectively, the ''VaR and program requirements,'' as noted above) for these limited derivatives users. Instead, the final rule will require a fund relying on this exception to adopt policies and procedures that are reasonably designed to manage its derivatives risks. Funds with limited derivatives exposure will therefore not be required to incur costs and bear compliance burdens that may be disproportionate to the resulting benefits, while still being required to manage the risks their limited use of derivatives may present.[795]

Leveraged/inverse funds generally will be subject to the requirements of rule 18f–4 on the same basis as other funds subject to that rule, including the VaR-based leverage risk limit.[796] The rule will, however, provide an exception from the VaR-based limit on fund leverage risk for leveraged/inverse funds currently in operation that seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index. The conditions to this exception are designed to allow these funds to continue to operate in their current form, but prohibit them from changing their index or increasing the amount of their leveraged or inverse market exposure.

Rule 18f–4 also contains requirements for funds' use of certain senior securities that are not derivatives. Specifically, the final rule permits a fund to either choose to limit its reverse repurchase and other similar financing transaction

[790] Rule 18f–4(c)(7).

[791] 5 U.S.C. 801 *et seq.*

[792] *See supra* section I.A.

[793] *See, e.g., supra* footnotes 15–16 and accompanying text.

[794] *See supra* section I.B.1.

[795] *See supra* sections I.C and II.E.

[796] The enhanced standard of conduct for broker-dealers under Regulation Best Interest and the fiduciary obligations of registered investment advisers also will apply in the context of recommended transactions and transactions occurring in an advisory relationship with respect to these funds and the listed commodity pools that would have been subject to the proposed sales practices rules.

activity to the applicable asset coverage limit of the Act for senior securities representing indebtedness, as proposed, or a fund may instead treat them as derivatives transactions. This approach reflects that reverse repurchase agreements and similar financing transactions can be used to introduce leverage into a fund's portfolio just like other forms of borrowings, or derivatives.[797]

In addition, the final rule will permit a fund to enter into unfunded commitment agreements if it reasonably believes, at the time it enters into such an agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements.[798] This requirement is designed to address the concern that a fund may experience losses as a result of having insufficient assets to meet its obligations with respect to these transactions, and we believe that the requirement will benefit investors by mitigating such losses or other adverse effects if a fund is unable to satisfy an unfunded commitment agreement.[799]

The final rule also includes a provision that will allow funds, as well as money market funds, to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to certain conditions.[800] This provision reflects our view that these short-term transactions generally do not raise the concerns about fund leverage risk underlying section 18.

This rule also includes certain recordkeeping requirements and reporting requirements for funds that use derivatives.[801] We expect that the recordkeeping requirements will benefit investors by facilitating fund compliance with the final rule and our staff's review of funds' compliance. In addition, we expect that the amendments we are adopting to Forms N–PORT, N–CEN, and N–LIQUID (which is being re-titled as Form N–RN) will further benefit investors primarily by enhancing the Commission's understanding of the impact of funds' use of derivatives on fund portfolios, and by facilitating the Commission's ability to oversee funds' use of derivatives and compliance with the final rules.[802]

B. Economic Baseline

1. Fund Industry Overview

The fund industry has grown and evolved substantially in past decades in response to various factors, including investor demand, technological developments, and an increase in domestic and international investment opportunities, both retail and institutional.[803] As of July 2020, there were 10,092 mutual funds (excluding money market funds) with $19,528 billion in total net assets, 2,142 ETFs organized as an open-end fund or as a share-class of an open-end fund with $3,462 billion in total net assets, 666 registered closed-end funds with $307 billion in total net assets, and 13 variable annuity separate accounts registered as management investment companies on Form N–3 with $216 billion in total net assets. There also were 420 money market funds with $3,881 billion in total net assets.[804] Finally, as of July 2020, there were 99 BDCs with $58 billion in total net assets.[805]

2. Funds' Use of Derivatives and Reverse Repurchase Agreements

DERA staff analyzed funds' use of derivatives and reverse repurchase agreements based on Form N–PORT filings as of September 2020. The filings covered 9,700 mutual funds with $17,059 billion in total net assets, 1,973 ETFs with $3,252 billion in total net assets, 672 registered closed-end funds with $276 billion in net assets, and 13 variable annuity separate accounts registered as management investment companies with $179 billion in total net assets.[806]

Based on this analysis, 60% of funds reported no derivatives holdings, and a further 26% of funds reported using derivatives with gross notional amounts below 50% of net assets. These results are comparable to and consistent with the findings of a white paper prepared by DERA staff that studied a random sample of 10% of funds in 2015.[807] The 14% of funds that reported derivatives holdings at or above 50% of net assets reported combined net assets of $1,886 billion, which represented 8% of fund industry net assets. One percent of funds reported entering into reverse repurchase agreements.

BDCs do not file Form N–PORT. To help evaluate the extent to which BDCs use derivatives, our staff reviewed the most recent financial statements of 48 of the current 99 BDCs as of July 2020.[808] Based on this analysis, we observe that most BDCs do not use derivatives extensively. Of the sampled BDCs, 59.1% did not report any derivatives holdings, and a further 31.8% reported using derivatives with gross notional amounts below 10% of net assets. We do not believe that BDCs use reverse repurchase agreements to a significant extent.[809]

[797] Similar financing transactions may include securities lending arrangements and TOBs, depending on the particular facts and circumstances of the individual transaction. *See supra* section II.H.

[798] *See supra* section II.I.

[799] We believe that the treatment of unfunded commitment transactions is consistent with general market practices. Therefore, we believe that the requirements for these transactions will not have significant economic effects when measured against this baseline.

[800] *See supra* section II.A.

[801] *See supra* sections II.C and II.G.

[802] Because existing leveraged/inverse funds with a stated target multiple that is equal to or below the VaR-based limit on leveraged risk in rule 18f–4 will be subject to the VaR-based limit on fund leverage risk, these funds will be subject to the related reporting requirements on Forms N–PORT and N–RN. Conversely, existing leveraged/inverse funds that seek to provide leveraged or inverse market exposure exceeding 200% of the return of the relevant index will not be subject to the condition of rule 18f–4 limiting fund leverage risk and thus not subject to the related reporting requirements on Forms N–PORT and N–RN. However, such funds will have to disclose this exemption in their prospectuses. All leveraged/inverse funds will also be subject to the new requirements on Form N–CEN.

[803] *See* Proposing Release, *supra* footnote 1, at n.1.

[804] Estimates of the number of registered investment companies and their total net assets are based on a staff analysis of Form N–CEN filings as of July 8, 2020. For open-end funds that have mutual fund and ETF share classes, which only one fund sponsor currently operates, we count each type of share class as a separate fund and use data from Morningstar to determine the amount of total net assets reported on Form N–CEN attributable to the ETF share class. Money market funds generally are excluded from the scope of rule 18f–4, but may rely on the provision in the rule for investments in when-issued and similar securities. We therefore report their number and net assets separately from those of other mutual funds.

[805] Estimates of the number of BDCs and their net assets are based on a staff analysis of Form 10–K and Form 10–Q filings as of July 30, 2020. Our estimate includes BDCs that may be delinquent or have filed extensions for their filings, and it excludes 6 wholly-owned subsidiaries of other BDCs.

[806] The analysis is based on each registrant's latest Form N–PORT filing as of September 15, 2020. Money market funds are excluded from the analysis; they do not file monthly reports on Form N–PORT and generally are excluded from the scope of rule 18f–4. For open-end funds that have mutual fund and ETF share classes, we count each type of share class as a separate fund and use data from Morningstar to determine the amount of total net assets reported on Form N–PORT attributable to the ETF share class.

[807] *See* Daniel Deli, Paul Hanouna, Christof Stahel, Yue Tang & William Yost, *Use of Derivatives by Registered Investment Companies,* Division of Economic and Risk Analysis (2015), *available at https://www.sec.gov/dera/staff-papers/white-papers/derivatives12-2015.pdf.*

[808] *See supra* footnote 397 and accompanying text.

[809] *See also supra* footnote 712 (stating our belief that BDCs do not use reverse repurchase agreements and bank borrowings (or similar transactions) in combined amounts that exceed 50% of NAV).

3. Current Regulatory Framework for Derivatives

Funds generally have developed certain general asset segregation practices to ''cover'' their derivatives positions, considering at least in part the staff's no-action letters and guidance.[810] However, as discussed in the proposal, practices vary based on the type of derivatives transaction, and funds use different practices regarding the types of assets that they segregate to cover their derivatives positions. For purposes of establishing the baseline, we assume that funds generally segregate sufficient assets to at least cover any mark-to-market liabilities on the funds' derivatives transactions, with some funds segregating more assets for certain types of derivatives transactions (sufficient to cover the full notional amount of the transaction or an amount between the transaction's full notional amount and any mark-to-market liability).[811] The mark-to-market liability of a derivative can be much smaller than the full investment exposure associated with the position. As a result, funds' current asset segregation practices do not appear to place a practical limit on their use of derivatives: A fund that segregates only the mark-to-market liability could theoretically incur virtually unlimited investment leverage.[812] Moreover, funds' current asset segregation practices may not assure the availability of adequate assets to meet funds' derivatives obligations, on account of both the amount and types of assets that funds may segregate.

4. Funds' Derivatives Risk Management Practices and Use of VaR Models

There is currently no requirement for funds that use derivatives to have a formalized derivatives risk management program. However, we understand that advisers to many funds whose investment strategies entail the use of derivatives already assess and manage risks associated with their derivatives transactions to varying extents.[813] In addition, we understand that funds engaging in derivatives transactions have increasingly used stress testing as a risk management tool over the past decade.[814]

We also understand that VaR calculation tools are widely available, and many advisers that enter into derivatives transactions already use risk management or portfolio management platforms that include VaR tools.[815] Advisers to funds that use derivatives more extensively may be particularly likely currently to use risk management or portfolio management platforms that include VaR capability. Moreover, advisers that manage (or that have affiliates that manage) UCITS funds may already be familiar with using VaR models in connection with European guidelines.[816] One commenter submitted the results of a survey based on responses from 24 fund complexes with $13.8 trillion in assets.[817] The results of this survey indicate that 73% of respondents used some form of both VaR and stress testing as derivatives risk management tools. Other commenters also observed that VaR is commonly used.[818]

5. Leveraged/Inverse Funds

Leveraged/inverse investment funds generally target a daily return (or a return over another predetermined time period) that is a multiple, inverse, or inverse multiple of the return of an underlying index; however over longer holding periods, the realized leverage multiple of the returns of an investment in a leveraged/inverse investment vehicle relative to the returns of its underlying index can vary substantially from the vehicle's daily leverage multiple. To achieve the stated leverage multiple, most leveraged/inverse investment funds rebalance their exposure to the underlying index daily.[819]

Currently, there are 172 leveraged/inverse ETFs with $33.4 billion in total net assets and 120 leveraged/inverse mutual funds with $4.6 billion in total net assets. Of these funds, 70 leveraged/inverse ETFs with $15.7 billion in total net assets and none of the leveraged/inverse mutual funds currently seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index.[820]

Two ETF sponsors currently rely upon exemptive relief from the Commission that permits them to operate leveraged/inverse ETFs.[821] Since 2009, the Commission has not granted leveraged/inverse ETF exemptive relief to any additional sponsors. In addition, leveraged/inverse ETFs are currently excluded from the scope of rule 6c–11, which the Commission adopted in 2019 and allows ETFs satisfying certain conditions to operate without obtaining an exemptive order from the Commission.[822] While certain exchange-listed commodity- or currency-based trusts or funds that are not registered investment companies also have strategies that are similar to leveraged/inverse funds, and other investments like certain exchange-traded notes may provide a similar investment exposure, the final rules' provisions for leveraged/inverse funds address only registered investment companies with these strategies.

C. Benefits and Costs of the Final Rules and Amendments

The Commission is sensitive to the economic effects that may result from the final rules and form amendments, including benefits and costs. Where possible, we have attempted to quantify the likely economic effects; however, we are unable to quantify certain economic effects because we lack the information

[810] *See supra* section II.B.1.

[811] *See* Proposing Release, *supra* footnote 1, at n.54–55 and accompanying text.

[812] *See supra* section I.B.2; footnote 69 and accompanying text.

[813] *See, e.g.,* AQR Comment Letter I, at 4.

[814] *See supra* footnote 194.

[815] *See* Proposing Release, *supra* footnote 1, at n.180.

[816] *See e.g.,* ABA Comment Letter; Blackrock Comment Letter; Dechert Comment Letter I; Vanguard Comment Letter. Based on a staff analysis of Form ADV and Form N–CEN filings received through July 31, 2020, there were approximately 190 registered investment advisers that are registered with a EU financial regulatory authority and that are reported as the investment adviser, or sub-adviser, for a registered fund. This estimate may not capture instances where a U.S. registered investment adviser and a EU registered investment adviser are affiliated but separate legal entities.

[817] *See* Comment Letter of Investment Company Institute (Oct. 8, 2019) (''2019 ICI Comment Letter''). The commenter also indicated that the surveyed ICI member firms accounted for 67% of mutual fund and ETF assets as of June 2019 and that survey responses were submitted by firms ''whose assets under management spanned the spectrum from small to very large.'' However, these representations alone do not provide sufficient information about whether the surveyed firms were representative of all mutual funds and ETFs in terms of the exact distribution of specific characteristics, such as firm size or type of investment strategy.

[818] *See, e.g., supra* footnotes 287–291 and accompanying text.

[819] Leveraged/inverse funds that track the returns of an underlying index over time periods that are longer than one day rebalance their portfolios at the end of each such period. Leveraged/inverse funds use derivatives to achieve their targeted returns.

[820] Estimates of the number of leveraged/inverse mutual funds and leveraged/inverse ETFs and their total net assets are based on a staff analysis of Form N–CEN filings as of July 7, 2020 and are based on fund's responses to item C.3.c of the form. Information about the market exposure funds seek to provide is based on a staff review of funds' summary prospectuses and takes into account that several leveraged/inverse funds that sought to provide 300% leveraged or inverse market exposure recently reduced their target exposures to 200% due to the increased market volatility caused by COVID–19. *See also supra* footnote 24 and accompanying text.

[821] *See* Proposing Release, *supra* footnote 1, at nn.307 and 356. The exemptive orders of the two sponsors that operate leveraged/inverse ETFs permit these sponsors to launch additional funds under the terms and conditions of those orders.

[822] *See supra* footnotes 613–614 and accompanying text.

necessary to provide reasonable estimates. In some cases, it is difficult to predict how market participants will act under the conditions of the final rules. For example, we are unable to predict whether the derivatives risk management program requirement and VaR-based limit on fund leverage risk may make investors more or less likely to invest in funds that would be subject to these requirements or the degree to which these requirements may affect the use of derivatives by these funds. Nevertheless, as described more fully below, we are providing both a qualitative assessment and quantified estimate of the economic effects, including the initial and ongoing costs of the additional reporting requirements, where feasible.

Direct costs that funds will incur, as discussed below, may to some extent be absorbed by a fund's investment adviser or be passed on to a fund's investors in the form of increased fees and expenses.[823] The share of these costs borne by funds, their advisers, and investors depends on multiple factors, including the nature of competition between advisers, and investors' relative sensitivity to changes in fund fees, the joint effects of which are particularly challenging to predict due to the number of assumptions that the Commission would need to make.

1. Derivatives Risk Management Program and Board Oversight and Reporting

Rule 18f–4 will require funds that enter into derivatives transactions and are not limited derivatives users to adopt and implement a derivatives risk management program. The program will have to include risk guidelines, stress testing, backtesting, internal reporting and escalation, and program review elements. The final rule will require a fund's board of directors to approve the fund's designation of a derivatives risk manager, who will be responsible for administering the derivatives risk management program.[824] The fund's derivatives risk manager will have to report to the fund's board on the derivatives risk management program's implementation and effectiveness and the results of the fund's stress testing and backtesting.[825]

We understand that advisers to many funds whose investment strategies entail the use of derivatives already assess and manage risks associated with their derivatives transactions.[826] However, rule 18f–4's requirement that funds establish written derivatives risk management programs will create a standardized framework for funds' derivatives risk management by requiring each fund's program to include all of the rule's program elements. To the extent that the resulting risk management activities are more comprehensive than funds' current practices, this may result in more effective risk management across funds. While the adoption of a derivatives risk management program requirement may not eliminate all derivatives-related risks, including that investors could experience large, unexpected losses from funds' use of derivatives, we expect that investors may benefit from a decrease in leverage-related risks.

Some funds may reduce or otherwise alter their use of derivatives transactions to respond to risks identified after adopting and implementing their derivatives risk management programs. In particular, we expect that funds currently utilizing risk management practices that are not tailored to their use of derivatives may decide to make such changes to their portfolios.[827]

Rule 18f–4 will require a fund to reasonably segregate the functions of its derivatives risk management program from those of its portfolio management.[828] This segregation requirement is designed to enhance the program's effectiveness by promoting the objective and independent identification and assessment of derivatives risk.[829] Segregating the functions of a fund's derivatives risk management program from those of its portfolio management may also mitigate the risks posed by competing incentives between a fund's portfolio managers and its investors.[830]

Finally, to the extent that the periodic stress testing and backtesting requirements of the derivatives risk management program result in fund managers developing a more complete understanding of the risks associated with their use of derivatives, we expect that funds and their investors will benefit from improved risk management.[831] Such benefits will be in addition to benefits derived from the VaR-based limit on fund leverage risk discussed below.[832] VaR analysis, while yielding a simple yet general measure of a fund's portfolio risk, does not provide a complete picture of a fund's financial risk exposures.[833] Complementing VaR analysis with stress testing will provide a more complete understanding of the fund's potential losses under different sets of market conditions. For example, simulating potential stressed market conditions not reflected in historical correlations between fund returns and asset prices observed in normal markets may provide derivatives risk managers with important information pertaining to derivatives risks in stressed environments.[834] By incorporating the potential impact of future economic outcomes and market volatility in its stress test analysis, a fund may be able

[823] Several commenters stated that a fund may pass on some of the costs associated with the rule's requirements to its investors. *See* Dechert Comment Letter I; Dechert Comment Letter II; ICI Comment Letter; Vanguard Comment Letter.

[824] *See supra* section II.C.1. for a discussion of the final rule's requirements for board approval of the derivatives risk manager and the comments we received on the proposal.

[825] *See supra* section II.C.2. for a discussion of the final rule's board reporting requirements and the comments we received on the proposal.

[826] *See supra* section III.B.4. *See also* Blackrock Comment Letter; ICI Comment Letter; and J.P. Morgan Comment Letter.

[827] As a consequence of reducing risk, such funds may earn reduced returns.

[828] *See supra* section II.B.1.

[829] In addition, while some portfolio managers may find it burdensome to collaborate with a derivatives risk manager, to the extent that portfolio managers already consider the impact of trades on the fund's portfolio risk, we believe that having the involvement of a derivatives risk manager may typically make a portfolio manager's tasks more rather than less efficient.

[830] For example, portfolio managers of actively-managed funds that are underperforming competing funds may have an incentive to increase risk exposures through use of derivatives in an effort to increase returns. This behavior may result in a fund also increasing risk beyond investor expectations. *See also* SIFMA AMG Comment Letter; ABA Comment Letter. (For theoretical motivation of such behaviors *see, e.g.,* Keith C. Brown, W.V. Harlow, & Laura T. Starks, *Of Tournaments and Temptations: An Analysis of Managerial Incentives in the Mutual Fund Industry,* 51 J. FIN. 85 (1996), *available at https://www.onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.1996.tb05203.x;* Judith Chevalier & Glenn Ellison, *Risk-Taking by Mutual Funds as a Response to Incentives,* 105 J. POL. ECON. 1167 (1997), *available at https://www.jstor.org/stable/10.1086/516389?seq=1#metadata_info_tab_contents*).

[831] *See supra* sections II.B.2.c and II.B.2.d; *see also supra* section II.C.2 (discussing the requirements that a fund's derivatives risk manager provide to the fund's board: (1) A written report, at least annually, providing a representation that the program is reasonably designed to manage the fund's derivatives risks and to incorporate the required elements of the program; and (2) a written report, at the frequency determined by the board, analyzing exceedances of the fund's risk guidelines and the results of the fund's stress tests and backtesting).

[832] *See infra* section III.C.2.

[833] *See id.*

[834] *See supra* section II.B.2.c (rule 18f–4 will require the program to provide for stress testing to ''evaluate potential losses to the fund's portfolio in response to extreme but plausible market changes or changes in market risk factors that would have a significant adverse effect on the fund's portfolio, taking into account correlations of market risk factors as appropriate and resulting payments to derivatives counterparties'').

to analyze future potential swings in its portfolio that may impact the fund's long-term performance. Recent episodes of market volatility related to the COVID–19 global health pandemic have highlighted the importance of analyzing such future potential swings in a fund's portfolio. This forward-looking aspect of stress testing will supplement the final rule's VaR analysis requirement, which will rely on historical data.

In addition, the final rule will require that a fund backtest the results of its VaR analysis no less frequently than weekly, which will assist funds in examining the effectiveness of the fund's VaR model. The final rule will require that, for each weekly backtesting period, the fund compare its actual gains or losses on each business day during the weekly period, with the fund's VaR calculated for each business day during the same weekly period.[835] The weekly comparison will help identify days where the fund's portfolio losses exceed the VaR calculated for each day during the week, as well as systematic over- or under-estimation of VaR, which would suggest that the fund may not be accurately measuring all significant, identifiable market risk factors.[836]

Commenters stated that weekly backtesting would be associated with reduced burdens compared to the more frequent daily backtesting requirement we proposed.[837] We have not reduced our estimates from the Proposing Release of one-time and ongoing program-related costs as a result of the decreased backtesting frequency, however.[838] Therefore, the cost estimates we provide below may overstate the costs of the final rule's backtesting requirement.[839]

Rule 18f–4 will also require that a fund's board of directors approve the designation of the fund's derivatives risk manager.[840] We anticipate that this requirement, along with the derivatives risk manager's direct reporting line to the board, will result in effective communication between the board and the derivatives risk manager that will enhance oversight of the program to the benefit of the fund and its investors.

Rule 18f–4 will require that the derivatives risk manager provide the fund's board a written report at least once a year on the program's effectiveness as well as regular written reports at a frequency determined by the board that analyze exceedances of the fund's risk guidelines and the results of the fund's stress tests and backtests.[841] The board reporting requirements may facilitate the board's oversight of the fund and the operation of the derivatives risk management program, to the extent the fund does not have such regular reporting mechanisms already in place. In the event the derivatives risk manager encounters material risks that need to be escalated to the fund's board, the rule's provision that the derivatives risk manager must directly inform the board of these risks in a timely manner as appropriate may help prevent delays in resolving such risks.

Funds today employ a range of different practices, with varying levels of comprehensiveness and sophistication, for managing the risks associated with their use of derivatives.[842] We expect that compliance costs associated with the derivatives risk management program requirement will vary based on the fund's current risk management practices, as well as the fund's characteristics, including in particular the fund's investment strategy, and the nature and type of derivatives transactions used by the fund.

We understand that VaR models are widely used in the industry and that backtesting is commonly performed in conjunction with VaR analyses. As a result, we believe that many funds that will be required to establish derivatives risk management programs already have VaR models with backtesting in place. Moreover, the final rule's derivatives risk management program requirements, including stress testing and backtesting requirements are, generally, high-level and principles-based. As a result, as one commenter acknowledged, many funds' current risk management practices may already be in line with many of the rule's derivatives risk management program requirements or could be readily conformed without material change.[843] Thus, the costs of adjusting funds current' practices and procedures to comply with the parallel requirements of final rule 18f–4 may be minimal for such funds.

Certain costs of the rule's derivatives risk management program may be fixed, while other costs may vary with the size and complexity of the fund and its portfolio allocation. For instance, costs associated with purchasing certain third-party data used in the program's stress tests may not vary much across funds. On the other hand, certain third-party services may vary in terms of costs based on the portfolio positions to be analyzed. Further, the extent to which a cost corresponding to the program is fixed or variable may also depend on the third-party service provider.

Larger funds or funds that are part of a large fund complex may incur higher costs in absolute terms but find it less costly, per dollar managed, to establish and administer a derivatives risk management program relative to a smaller fund or a fund that is part of a smaller fund complex. For example, larger funds may have to allocate a smaller portion of existing resources for the program, and fund complexes may realize economies of scale in developing and implementing derivatives risk management programs for several funds. In addition, smaller funds or those that are part of a smaller fund complex may find it more costly to appoint a derivatives risk manager, because they (1) may not have existing officers of the fund's investment advisers who are capable of fulfilling the responsibilities of the derivatives risk manager; (2) may have existing officers of the fund's investment advisers who are capable of fulfilling the responsibilities of the derivatives risk manager but may be overburdened with other existing responsibilities within the fund; or (3) may choose to hire a new officer or promote a current employee to fulfill this role.

We estimate that the one-time costs to establish and implement a derivatives risk management program will range from $150,000 to $500,000 per fund, depending on the particular facts and circumstances, including whether a fund is part of a larger fund complex and therefore may benefit from economies of scale.[844] These estimated

[835] *See supra* section II.B.2.d.

[836] *See supra* footnote 212; *see also supra* section II.B.2.d for a discussion of comments the Commission received on the proposed backtesting requirement.

[837] *See supra* footnote 222 and associated text.

[838] *See* Proposing Release, *supra* footnote 1, at section III.C.1.

[839] We anticipate that any cost savings compared to the proposal as a result of the decreased backtesting frequency will be small, as the development and implementation of processes for backtesting likely have a significant fixed-cost component.

[840] *See supra* section II.C.1.

[841] *See id.*

[842] *See supra* section III.B.4.

[843] *See* Blackrock Comment Letter, at 8.

[844] We believe that the low end of this range is reflective of a fund that already has policies and procedures in place that could be readily adapted to meet the final rule's requirements. Such a fund would nevertheless incur costs associated with analyzing its current practices relative to the final rule's requirements and determining whether it is subject to the derivatives risk management program; some funds may also incur costs associated with analyzing whether and how they could modify their derivatives exposure in order to qualify as a limited derivatives user. We increased our estimate of the

Continued

costs are attributable to the following activities: (1) Assessing whether a fund is subject to the derivatives risk management program requirement; (2) analyzing the fund's current practices relative to the final rule's requirements; (3) developing risk guidelines and processes for stress testing, backtesting, internal reporting and escalation, and program review; (4) integrating and implementing the guidelines and processes described above; (5) preparing training materials and administering training sessions for staff in affected areas;[845] (6) recruiting and hiring a derivatives risks manager, to the extent the fund is unable to consider an existing officer of the investment adviser that is equipped with the appropriate and relevant experience necessary to be selected for the role of derivatives risk manager; and (7) approval by the board of the fund's derivatives risk manager.[846]

We estimate that the ongoing annual program-related costs that a fund will incur range from 65% to 75% of the one-time costs to establish and implement a derivatives risk management program. Thus, a fund will incur ongoing annual costs that range from $97,500 to $375,000.[847] These estimated costs are attributable to the following activities: (1) Assessing, monitoring, and managing the risks associated with the fund's derivatives transactions; (2) periodically reviewing and updating (A) the program including any models or measurement tools (including any VaR calculation models) to evaluate the program's effectiveness and to reflect changes in risk over time, and (B) the appropriateness of any designated reference portfolio; (3) providing written reports to the fund's board; (4) additional staff training; and (5) the derivatives risk manager's base salary and compensation, to the extent a fund is unable to consider an existing officer of the investment adviser that is equipped with the appropriate and relevant experience necessary to be selected for the role of derivatives risk manager. Under the final rule, a fund that is a limited derivatives user will not be required to establish a derivatives risk management program.[848] Based on an analysis of Form N–PORT filings, as well as financial statements filed with the Commission by BDCs, we estimate that about 21% of funds, or 2,766 funds total, will be required to implement a derivatives risk management program.[849] As many funds belong to a fund complex and are likely to experience economies of scale, we expect that the lower end of the estimated range of costs ($150,000 in one-time costs; $97,500 in annual costs) better reflects the total costs likely to be incurred by those funds.[850] In addition, we believe that many funds already have a derivatives risk management program in place that could be readily adapted (and also already have personnel on staff who could serve as derivatives risk manager) to meet the final rule's requirements without significant additional cost.[851] However, as we do not have data to determine how many funds already have a program in place that will substantially satisfy the final rule's requirements, and commenters did not provide any such data, we over-inclusively assume that all funds that will be required to establish a derivatives risk management program will incur a cost associated with this requirement. Based on these assumptions, we provide an upper-end estimate for total industry cost in the first year of $684,585,000.[852]

2. VaR-Based Limit on Fund Leverage Risk

The final rule will generally impose a VaR-based limit on fund leverage risk on funds relying on the rule to engage in derivatives transactions.[853] This outer limit is based on a relative VaR test that compares the fund's VaR to the VaR of a ''designated reference portfolio.'' If the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, the fund will be required to comply with an absolute VaR test.[854] In either case a fund will apply the test at least once each business day.

The relative VaR test will limit a fund's VaR to 200% of the VaR of the fund's designated reference portfolio, unless the fund is a closed-end fund that has then-outstanding shares of a preferred stock issued to investors. For such closed-end funds, the VaR must not exceed 250% of the VaR of the fund's designated reference portfolio.[855] The designated reference portfolio will have to be unleveraged—an unleveraged designated index or the fund's securities portfolio—and reflect the markets or asset classes in which the fund invests.[856] By comparing the VaR of a fund's portfolio to that of an unleveraged reference portfolio, the relative VaR test restricts the incremental risk associated with a fund's portfolio relative to a similar but unleveraged investment strategy. In this sense, the relative VaR test restricts the degree to which a fund can use derivatives to leverage its portfolio.

The final rule will permit a fund to rely on the absolute VaR test only if the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test. To

low end of this range compared to the proposal to account for these costs as well as to account for comments we received suggesting that the implementation of the program may be more burdensome than the Commission estimated at proposal and comments suggesting that requiring the fund's board of directors to approve the designation of the fund's derivatives risk manager would place increased burdens on the fund's board of directors. *See* Dechert Comment Letter I; IDC Comment Letter; *see also supra* sections II.C.1 and II.B. This increased estimate also takes into account our assumption that a number of funds and their boards may wish to employ outside legal services in connection with adopting and implementing the fund's derivatives risk management program as well as approving the derivatives risk manager. *See infra* sections IV.B.1, IV.B.2.

[845] *See also* ProShares Comment Letter (stating that ''employees will need to read and be trained on the policies and procedures.'')

[846] A fund that selects an existing officer of its investment adviser for the role of derivatives risk manager may incur costs associated with recruiting and hiring an additional officer to assume some or all of the tasks that previously were allocated to the officer who is selected as derivatives risk manager.

[847] This estimate is based on the following calculations: 0.65 × $150,000 = $97,500; 0.75 × $500,000 = $375,000.

[848] The estimates of the one-time and ongoing costs described in this section include the costs associated with determining whether a fund is subject to the rule's VaR and program requirements.

[849] We estimate that about 21% of funds hold some derivatives and will not qualify as a limited derivatives user under the final rule.

[850] A fund that uses derivatives in a complex manner, has existing risk management practices that are not commensurate with such use of derivatives, and may have to hire additional personnel to fulfill the role of derivatives risk manager will be particularly likely to experience costs at the upper end of this range.

[851] Prior to the proposal, one commenter indicated that implementing stress testing, which would be one of the required elements of the proposed derivatives risk management program, would be only slightly burdensome for 27% of respondents to a survey of ICI member firms and would be moderately burdensome for an additional 50% of respondents. *See* Proposing Release, *supra* footnote 1, at n.501.

[852] This estimate is based on the following calculation: 2,766 funds × ($150,000 + $97,500) = $684,585,000.

[853] *See supra* section II.D.

[854] The final rule provides an exception from the rule's VaR test for limited derivatives users. *See supra* section II.E.

[855] *See supra* section II.D.2 for a discussion of the comments we received and the data commenters provided on the relative VaR limit we proposed.

[856] *See supra* section II.D.2.b. The final rule's definition of ''designated index'' also includes other requirements, as discussed above. *See id.* For example, a designated index cannot be administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, unless the index is widely recognized and used.

comply with the absolute VaR test, the VaR of the fund's portfolio must not exceed 20% of the value of the fund's net assets, unless the fund is a closed-end fund that has then-outstanding preferred stock. For such closed-end funds, the VaR must not exceed 25% of the value of the fund's net assets.[857]

The 20% absolute VaR limit is based on DERA staff analysis that calculated the VaR of the S&P 500 since inception that the Commission used to propose a 15% absolute VaR limit, adjusted consistent with the final rule's increases to the proposed relative VaR limit.[858] Under the final rule, for example, a fund that uses the S&P 500 as its benchmark index would be permitted to have a VaR equal to 200% of the VaR of the S&P 500 if the fund also uses that index as its designated reference portfolio. The 20% absolute VaR test limit would therefore provide approximately comparable treatment for funds that rely on the absolute VaR test and funds that rely on the relative VaR test with a 200% limit and use the S&P 500 as their designated reference portfolio during periods where the S&P 500's VaR is approximately equal to the historical mean.[859]

One common critique of VaR is that it does not reflect the conditional distribution of losses beyond the specified confidence level.[860] In other words, the VaR tests will not capture the size and relative frequency of losses in the ''tail'' of the distribution of losses beyond the measured confidence level.[861] As a result, two funds with the same VaR level could differ significantly in the magnitude and relative frequency of extreme losses, even though the probability of a VaR breach would be the same for the two funds. The Proposing Release contained a set of example calculations, based on a simplified portfolio, that illustrate this point.[862]

As discussed in more detail above, the VaR tests are designed to address the concerns underlying section 18, but they are not a substitute for a fully-developed derivatives risk management program.[863] Recognizing VaR's limitations, the final rule will also require the fund to adopt and implement a derivatives risk management program that, among other things, will require the fund to establish risk guidelines and to stress test its portfolio in part because of concerns that VaR as a risk management tool may not adequately reflect tail risks.

Below is an analysis using benchmark and other data that is an effort to produce estimates of how many funds (out of the 2,696) that we estimate will be subject to the final rule's VaR-based limit on fund leverage risk would have operated in exceedance of such limit.[864] The analysis supporting these estimates relies on various assumptions that limit the applicability of the estimates to the population of funds subject to the final rule. More specifically, the analysis is limited in the following ways: (1) The estimated VaR is based on funds' historical portfolio and benchmark returns throughout the look-back period, rather than returns of the funds' current portfolio and composition of the benchmark index at the end of the look-back period, as will be required of funds under the final rule, (2) the calculations do not take into account the VaR of funds' securities portfolios, because we do not have historical data regarding the returns of those portfolios, and (3) the calculations generally assume that funds will use their primary prospectus benchmarks for purposes of the relative VaR test, even though the final rule permits them to use a different index or their own securities portfolio. Accordingly, the estimates approximate the effects of the final rule's VaR limits using the available information, and that approximation, as discussed below, may not reflect the actual manner in which the limits apply to funds under the final rule.

The analysis estimates VaR based on the historical returns of fund portfolios and benchmark indexes because it would be impractical for staff to estimate VaR based on the exact composition, as of the end of the look-back period, for every fund's portfolio and benchmark index. As a result, the VaR estimates we derive reflect changes to the composition of funds' portfolios and the benchmark indexes throughout the look-back period rather than just at the end of the look-back period.[865] Funds computing their own VaRs, in contrast, would analyze their current portfolios and benchmark indexes, if applicable, at the time of calculation, taking into consideration at least three years of historical market data. We also were not able to evaluate VaR levels of funds' securities portfolios because we do not have historical data regarding the returns of funds' securities portfolios, as defined in the final rule.

We analyzed the effects of the final rule's VaR limits for two three-year lookback periods: The first ending on December 31, 2018 and the second ending on June 30, 2020. The former period is the period we analyzed in the Proposing Release and reflects a relatively calm market environment.[866] The latter period is more recent and includes parts of the more volatile market environment following the onset of COVID–19.

For the three-year period ending on December 31, 2018, we did not estimate that any funds would fail the relative VaR test from the pool of funds that would have been subject to the VaR-based limit.[867] For the three-year period ending on June 30, 2020, which included a period of significantly heightened market volatility, our analysis yields an estimate of 383 funds that may fail the relative VaR test from the pool of funds that will be subject to the VaR-based limit.[868] None of the 383 funds are closed-end funds that have outstanding shares of preferred stock

[857] *See supra* section II.D.2.

[858] *See supra* section II.D.3 for a discussion of the comments we received and the data commenters provided on the absolute VaR limit we proposed.

[859] DERA staff analyzed the historical returns of the S&P 500 index since inception. Computing VaR based on historical simulation using the parameters specified in the final rule, we find that the S&P 500's VaR had an average VaR of approximately 10.5%. The VaR of the index varied over time, with a minimum of approximately 4.1% attained for much of the first quarter of 1994 and a maximum of approximately 22.9% attained from late 1987 through the third quarter of 1990.

[860] *See supra* footnote 295 and accompanying text.

[861] The term ''relative frequency'' here refers to the frequency of loss outcomes in the tail of the distribution relative to other loss outcomes that are also in the tail of the distribution. This relative frequency of the loss outcomes together with the magnitude of the associated losses describe the conditional distribution of losses in the tail of the distribution.

[862] *See* Proposing Release, *supra* footnote 1, at section IV.C.2.

[863] *See supra* footnote 297 and accompanying text.

[864] This analysis is based on Morningstar data with three-year look-back periods ending in December 31, 2018 and June 30, 2020. DERA staff computed the VaR of each fund and that of the related index using historical simulation from three years of prior daily return data. Staff generally computed the relative VaR test based on a fund's primary prospectus benchmark. In cases where historical return data for the primary prospectus benchmark was not available or where the primary prospectus benchmark did not appear to capture the markets or asset classes in which a fund invests, DERA staff instead used a broad-based unleveraged index that captures a fund's markets or asset classes or a broad-based U.S. equity index.

[865] For example, our methodology would under-estimate VaR for volatility-targeting funds in a period of low volatility that was preceded by a period of higher volatility earlier in the look-back period. This is because these funds increase the size of their positions when market risks are lower in order to target a constant level or range of volatility. *See also supra* footnote 451 and accompanying text.

[866] *See* Proposing Release, *supra* footnote 1, at section III.C.2.

[867] In the Proposing Release we identified six funds that would have failed the relative VaR test at the lower 150% limit we proposed. *See id.*

[868] For the purposes of this analysis, we assumed that all leveraged/inverse funds with exposures up to 200% will be able to satisfy the relative VaR test.

and thus are subject to the higher 250% relative-VaR based limit.[869] Differences between the composition of the benchmarks and the funds' portfolios—together with heightened market volatility during the lookback period—likely contributed to some funds being estimated to fail the VaR tests. In addition, this estimate is limited by the information available to the Commission, which generally compared the funds' VaRs to the VaRs of the funds' primary prospectus benchmarks.[870] To the extent that these funds' derivatives risk managers would have determined that the fund's securities portfolio or an index other than the disclosed benchmark would have been more appropriate for purposes of computing the relative VaR test, some of these funds could have satisfied the relative VaR test. Conversely, if the indexes selected by the funds, or their securities portfolios, had lower volatility than the index selected here, funds that are estimated to have passed the relative VaR test may not ultimately satisfy that test under the final rule.

In addition, some of these funds could have applied the absolute VaR test if the funds' derivatives risk managers reasonably determined that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test. Most of the funds with VaRs exceeding 200% of the relevant index VaR (351 of 383) had portfolio VaRs below the final rule's 20% absolute VaR limit. Conversely, we recognize that some funds that are estimated to pass the relative VaR test could have applied the absolute VaR test and may not have satisfied that test.[871]

One commenter provided the results from a survey that asked respondents to evaluate whether they would anticipate relying on the proposed absolute or relative VaR test and whether they would satisfy their applicable test, assuming various alternative specifications of limits for these tests.[872] The commenter reported that 0.9% of funds that indicated that they use derivatives and do not qualify as a limited derivatives user (under the proposed definition) would not have been able to satisfy their applicable VaR test at the end of 2019 using a 200% limit for the relative VaR test and a 20% limit for the absolute VaR test. Using the staff estimate of the number of funds that will be subject to the VaR-based test under the final rule, this result implies that 24 funds would have failed their applicable VaR test.[873] The commenter also asked respondents to evaluate their VaR levels during a stressed market period, and reported that 1.8% of funds would have failed their applicable VaR test (using assumed 200% and 20% levels for the relative VaR test and absolute VaR test, respectively).[874] Using the staff estimate of the number of funds that we estimate will be subject to the VaR-based test under the final rule, this result implies that 49 funds would have failed their applicable VaR test.[875] We believe that these survey-based results of the proposed VaR-based tests using a 200% limit for the relative VaR test and a 20% limit for the absolute VaR test help inform an assessment of the final rule's likely effects and complement the staff's own analysis of the VaR-based tests under the final rule.

Two commenters stated that the VaR-based limit on fund leverage risk would not benefit investors, because only a relatively small number of funds will have to adjust their portfolios in order to comply with the VaR based limit on leverage risk.[876] However, we believe that the VaR-based limit on fund leverage risk will benefit investors by establishing an outer bound on fund leverage risk, which will prevent funds from using strategies that expose investors to a degree of fund leverage risk that is inconsistent with the investor protection concerns of section 18.

Funds that will have to adjust their portfolios to comply with the VaR-based limit on fund leverage risk will incur associated trading costs. If a fund has to adjust its portfolio so significantly that it could no longer pursue its investment strategy, such a fund may also lose investors or, if it chooses to cease operating, incur costs associated with unwinding the fund.

In addition, funds could be required to adjust their portfolios to comply in the future and, if so, will incur associated trading costs. For example, as market conditions change, a fund's VaR could exceed the VaR-based limit, especially if a fund relies on the absolute VaR test. The final rule's VaR tests also will eliminate the flexibility that funds currently have to leverage their portfolios to a greater extent than the VaR tests permit. Although funds currently may not be exercising this flexibility, they may nevertheless value the ability to increase leverage beyond the rule's VaR-based limit. While, on the one hand, the VaR-based tests impose costs on funds by restricting the strategies they can employ, the limit on fund leverage risk will benefit fund investors, to the extent that it prevents these investors from experiencing losses from a fund's increased risk exposure that is prohibited by the VaR-based limit on fund leverage risk.

By establishing a bright-line limit on the amount of leverage risk that a fund can take on using derivatives, the final rule may make some funds and their advisers more comfortable with using derivatives. As a result, some funds that currently use derivatives to an extent that will result in the fund's VaR being below the limit may react by increasing the extent of their derivatives usage.

The requirement could also indirectly result in changing the amount of investments in funds. On the one hand, the final rule could attract additional investment, if investors become more comfortable with funds' general level of riskiness as a result of funds' compliance with an outside limit on fund leverage risk. On the other hand, to the extent that investors currently expect funds to limit their risk to levels below those which the limits will produce, or to the extent that the rule's bright-line limit on the amount of leverage risk leads some funds to increase their derivatives usage, the limits may result in investors re-evaluating how much risk they are willing to take and reducing their investments in funds. Due to a lack of data regarding current investor expectations about fund risk, however,

[869] We identified one closed-end fund that has outstanding shares of preferred stock that is subject to the VaR-based limit with a relative VaR level that exceeds 200% but not 250%. Thus, this fund would not be able to satisfy the relative VaR test absent the higher limit for closed-end funds that have outstanding shares of preferred stock.

[870] *See supra* footnote 858.

[871] DERA staff also examined funds' absolute VaR levels in isolation as a result of the volatile market environment following the onset of COVID–19. Specifically, we observe that 396 funds that we estimated would satisfy the relative VaR test had absolute VaR levels above 20% for the three-year lookback period ending on June 30, 2020. However, we believe this observation is of limited value in estimating the impact of the absolute VaR test. First, because the relative VaR test is the default test under the final rule, we do not believe that this observation is indicative of the number of funds that will not be able to satisfy the rule's VaR-based limit on fund leverage risk because they rely on the absolute VaR test. Second, because we lack the information necessary to identify the subset of funds that are likely to rely on the absolute VaR test under the rule, it is not clear that this observation is representative of the likelihood that such funds would exceed the absolute VaR limit.

[872] *See* ICI Comment Letter.

[873] This number is based on the following calculation: 2,696 funds × 0.9% = 24 funds.

[874] The commenter indicated that the survey did not specify a specific stressed period but that the majority of respondents included the global financial crisis. *See* ICI Comment Letter.

[875] This number is based on the following calculation: 2,696 funds × 1.8% = 49 funds.

[876] *See* ProShares Comment Letter and Direxion Comment Letter.

we are unable to predict which of the two effects will more likely dominate the other.

As the requirements will prevent funds that are subject to the outer limit on fund leverage risk from offering investment strategies that exceed the outer limit, those investors who prefer to invest in such funds because they value the increased potential for gains that is generally associated with riskier investment strategies may see their investment opportunities restricted by the final rules.[877] As a result, such investors may instead invest in alternative products that can provide leveraged market exposure but will not be subject to the VaR-based limit on fund leverage risk of rule 18f–4 and incur any transactions costs associated with changing their investments.[878] Examples of such alternative products include existing leveraged/inverse funds with exposures exceeding 200%, as well as products that are not registered investment companies, such as alternative investment vehicles (including the listed commodity pools that would have been subject to the proposed sales practices rules), exchange-traded notes (''ETNs''), and structured products.[879] Some of these alternatives may present additional risks. For example, some investors could choose to invest in ETNs, which are subject to issuer default. Alternatively, such investors, particularly institutional ones, may instead borrow themselves or trade on margin to achieve leverage.

Funds that will be subject to the VaR-based limit on fund leverage risk will incur the cost of determining their compliance with the applicable VaR test at least once each business day. Part of these costs will be associated with obtaining the necessary data required for the VaR calculation, to the extent that a fund does not already have this data available. Funds implementing the relative VaR test and using a designated index as the reference portfolio will likely incur larger data costs compared to funds implementing the absolute VaR test, as the absolute VaR test will require funds to obtain data only for the VaR calculation for the fund's portfolio, whereas the relative VaR test in this case also will require funds to obtain data for the VaR calculation for their designated index. In addition, some index providers may charge licensing fees to funds for including indexes in their regulatory documents or for access to information about the index's constituent securities and weightings.[880] Funds may avoid these index-related costs by using their securities portfolio. That approach may, however, involve some operational burdens in that it would require a fund to be able to identify and exclude the fund's derivatives transactions, as defined in the rule, in order to calculate the VaR of the fund's securities and other investments.

Funds that do not already have systems to perform the VaR calculations in place will also incur the costs associated with setting up these systems or updating existing systems.[881] Both the data costs and the systems costs will likely be larger for funds that use multiple types of derivatives, use derivatives more extensively, or otherwise have more complicated derivatives portfolios, compared to funds with less complicated derivatives portfolios.

Larger funds or funds that are part of a large fund complex may incur higher costs in absolute terms but find it less costly, per dollar managed, to perform VaR tests relative to a smaller fund or a fund that is part of a smaller fund complex. For example, larger funds may have to allocate a smaller portion of existing resources for the VaR test and fund complexes may realize economies of scale in implementing systems to compute VaR. In particular, the costs associated with implementing or updating systems to calculate VaR will likely only be incurred once at the level of a fund complex, as such systems can be used to perform VaR tests for all funds in the complex that are subject to the VaR test requirement. Similarly, larger fund complexes may incur lower costs associated with purchasing data on a per-fund basis, to the extent that the VaR calculations for multiple funds in the complex partially or completely require the same data. For these reasons, smaller funds or funds that are not part of a large fund complex may be particularly likely to find it more economical to rely on a third-party vendor to calculate VaR compared to incurring the associated systems and data costs directly.

Under the final rule, a fund that holds derivatives that is not a limited derivatives user will generally be subject to the VaR-based limit on fund leverage risk.[882] Based on an analysis of Form N–PORT filings and financial statements filed with the Commission by BDCs, we estimate that about 21% of funds, or 2,696 funds total, will be required to implement VaR tests. We estimate that the incremental annual cost associated with the VaR test will range from $5,000 to $100,000 per fund, depending on the particular facts and circumstances, including whether the fund currently computes VaR; whether the fund is implementing the relative or absolute VaR test; and whether a fund that is part of a larger complex may be able to realize economies of scale or compliance efficiencies with UCITS requirements.[883] Funds that currently already compute VaR, and especially funds that are managed by an adviser (or are managed by an affiliate of an adviser) that manages UCITS funds, will be particularly likely to experience costs at the very low end of this range.[884] Assuming that the midpoint of this range reflects the cost to the average fund subject to the VaR requirement, we

[877] *See also* ProShares Comment Letter (mentioning a ''reduction of investment opportunities for investors'' as a result of the VaR-based test.)

[878] *See also* ProShares Comment Letter (mentioning ''costs incurred if [investors] switched to alternative investment vehicles [from funds that cannot satisfy the VaR-based test].'')

[879] As part of the staff review discussed above, the staff will review the effectiveness of the existing regulatory requirements in protecting investors who invest in leveraged/inverse products and other complex investment products. *See supra* section II.F.4.

[880] We understand that industry practices around licensing indexes for regulatory purposes vary widely, with some providers not charging any fees and others charging fees in excess of $10,000 per year.

[881] In advance of the proposal, one commenter indicated that implementing a UCITS VaR test will be only slightly burdensome for 45% of respondents to a survey of ICI member firms and would be moderately burdensome for an additional 34% of respondents. The commenter also indicated that respondents commonly reported that the burden will increase, in some cases very substantially, if a VaR test has different parameters or is more prescriptive than UCITS VaR. *See* 2019 ICI Comment Letter. As the requirements of the VaR test in the final rule are generally consistent with existing market practice, including that of UCITs funds, the results of this survey therefore support our view that many funds will likely experience efficiencies in implementing the VaR test.

[882] The final rule will permit leveraged/inverse funds in operation today that seek investment results in excess of the 200% leverage risk limit, and that cannot comply with the relative VaR test, to continue operating at their current leverage levels, provided they meet certain requirements. *See supra* section II.F.5.

[883] One commenter criticized our estimates for the incremental annual cost associated with the VaR test, and pointed out that our estimates are lower than the estimated range of $60,000 to $180,000 per fund that the Commission provided in the 2015 Proposing Release. *See* ProShares Comment Letter. The commenter did not, however, provide data to inform more precise cost estimates. Conversely, other commenters said that many advisers that use derivatives already use risk management platforms that include VaR tools, indicating that many funds may experience lower marginal costs than we estimated in 2015. *See supra* footnotes 729–732 and accompanying text. We are therefore not revising the cost estimates we provided in the Proposing Release.

[884] We estimate that there are 190 registered investment advisers that are registered with a EU financial regulatory authority and that are reported as the investment adviser, or sub-adviser, for a registered fund. *See supra* footnote 816.

estimate a total additional annual industry cost of $141,540,000.[885]

In addition, a fund that currently operates in a manner that could result in the fund's portfolio VaR being just under the final rule's limit on fund leverage risk may need to alter its portfolio during periods of increased market volatility in order to avoid falling out of compliance with this limit. We expect such a scenario to be more likely for a fund that will rely on the absolute VaR test, because the relative VaR test will allow a fund to operate with a higher portfolio VaR when the VaR of its designated reference portfolio increases.

A fund that determines to eliminate some of its leverage risk associated with derivatives in order to comply with the VaR-based limit on leverage risk might do so through unwinding or hedging its derivatives transactions or through some other means. These portfolio adjustments may be costly, particularly in conditions of market stress and reduced liquidity, such as the recent experience during COVID–19. The final rule will, however, give a fund the flexibility to mitigate these potential costs by not requiring the fund to exit positions or change its portfolio if it is out of compliance with its VaR test. If a fund determines that it is not in compliance with the applicable VaR test, the final rule provides that a fund must come back into compliance promptly after such determination, in a manner that is in the best interests of the fund and its shareholders.[886] If the fund is not in compliance within five business days, the rule requires the derivatives risk manager to report to the fund's board of directors certain specified information about the fund coming back into compliance, as well as requiring him or her to analyze the circumstances that caused the fund to be out of compliance and update as appropriate program elements to address those circumstances. If the fund remains out of compliance with the applicable VaR test for thirty calendar days since the exceedance, the derivatives risk manager's written report must update the initial report to the board explaining how and by when he or she reasonably expects the fund will come back into compliance, and the derivatives risk manager must update the board of directors on the fund's progress in coming back into compliance at regularly scheduled intervals at a frequency determined by the board.[887] These provisions of the final rule collectively provide some flexibility for a fund that is out of compliance with the VaR test to make any portfolio adjustments. The final rule expressly requires a fund's prompt coming back into compliance with its applicable VaR test to be in a manner that is in the best interests of the fund and its shareholders. This provision recognizes the investor protection concerns arising from the harm and costs to funds and their shareholders if funds were forced to exit derivatives transactions immediately or at the end of the five-day period. Under this more flexible approach, funds will have the ability to avoid some of the costs that otherwise could result from a fund being forced to exit its derivatives transactions within a short timeframe.

3. Limited Derivatives Users

Rule 18f–4 includes an exception from the VaR-based limit on fund leverage risk and program requirements for limited derivatives users.[888] The exception will be available for a fund that limits its derivatives exposure to 10% of its net assets, excluding for this purpose derivative transactions that are used to hedge certain currency and/or interest rate risks. The final rule also provides certain adjustments for interest rate derivatives and options, in computing derivatives exposure, and permits funds to exclude positions closed out with the same counterparty. A fund relying on the exception is required to adopt and implement policies and procedures reasonably designed to manage the fund's derivatives risks.[889]

We expect that the risks and potential impact of these funds' derivatives use may not be as significant, compared to those of funds that do not qualify for the exception.[890] Therefore, we believe that a principles-based policies and procedures requirement would appropriately address these risks. We believe that investors in funds that use derivatives in a limited manner will benefit from the requirement, which we anticipate will reduce, but not eliminate, the frequency and severity of derivatives-related losses for such funds. In addition, to the extent that the final rule's framework is more comprehensive than funds' current practices, the requirement may result in more effective risk management across funds and increased fund industry stability.

We estimate that the one-time costs would range from $15,000 to $100,000 per fund, depending on the particular facts and circumstances, including whether a fund is part of a larger fund complex; the extent to which the fund uses derivatives within the parameters of the limited derivatives user exception, including whether the fund uses more complex derivatives; and the fund's current derivatives risk management practices.[891] These estimated costs are attributable to the following activities: (1) Assessing whether a fund is a limited derivatives user, which may include determining whether a fund's derivatives positions are used to hedge certain currency and/or interest rate risks or are closed out with the same counterparty; (2) analyzing the fund's current practices relative to the final rule's requirements; (3) developing policies and procedures reasonably designed to manage a fund's derivatives risks; (4) integrating and implementing the policies and procedures; and (5) preparing training materials and administering training sessions for staff in affected areas.

[885] This estimate is based on the following calculation: 2,696 funds × 0.5 × ($5,000 + $100,000) = $141,540,000. Some funds may find it more cost effective to restrict their use of derivatives in order to be able to rely on the final rule's exception for limited derivatives users compared to complying with the VaR-based limit on fund leverage risk. *See supra* section II.E; *infra* section III.C.3. As in the proposal, we do not have data that would allow us to quantify the costs and benefits that define the tradeoff for any particular fund of changing its use of derivatives in order to qualify for the limited derivatives user exception, and commenters did not provide any such data. Thus, we are still unable to quantify how many funds would make this choice.

[886] *See* rule 18f–4(c)(2)(ii).

[887] *See* rule 18f–4(c)(2)(iii); *see also supra* section II.G.2 (discussing the requirement to submit a confidential report to the Commission if the fund is out of compliance with the applicable VaR test for five business days).

[888] *See supra* section II.E for a discussion of the comments we received on the proposed limited derivatives user exception and for a discussion of the final rule's exclusions of certain hedging transactions and offsetting of closed-out derivatives positions.

[889] *See supra* section II.E.4 for a discussion of the final rule's two alternative paths for remediation if a fund's derivatives exposure exceeds the 10% derivatives exposure threshold for five business days.

[890] *See supra* footnote 488 and accompanying and immediately-following text.

[891] We believe that the low end of this range is reflective of a fund that already has policies and procedures in place that could be readily adapted to meet the final rule's requirements. Such a fund would nevertheless incur costs associated with analyzing its current practices relative to the final rule's requirements and determining whether it could qualify as a limited derivatives user. We increased our estimate of the low end of this range compared to the proposal to account for this cost as well as to account for the potential that funds may implement additional policies and procedures related to the changes we have incorporated into the final rule to address exceedances of the 10% derivatives exposure threshold. This increased estimate also takes into account our assumption that a number of funds that qualify as limited derivatives users may wish to employ outside legal services in connection with adopting and implementing policies and procedures reasonably designed to manage their derivatives risks. *See infra* section IV.B.6.

We estimate that the ongoing annual costs that a fund that is a limited derivatives user will incur range from 65% to 75% of the one-time costs associated with these requirements. Thus, we estimate that a fund will incur ongoing annual costs that range from $9,750 to $75,000.[892] These estimated costs are attributable to the following activities: (1) Assessing, monitoring, and managing the risks associated with the fund's derivatives transactions; (2) periodically reviewing and updating a fund's policies and procedures; (3) additional staff training; and (4) preparing a written report to the fund's board if a fund exceeds the 10% derivatives exposure threshold and does not reduce its exposure within five business days.

Based on an analysis of Form N–PORT filings, as well as financial statements filed with the Commission by BDCs, we estimate that about 19% of funds, or 2,437 funds total, will qualify as limited derivatives users.

Because many funds belong to a fund complex and are likely to experience economies of scale, we expect that the lower end of the estimated range of costs ($15,000 in one-time costs; $9,750 in annual costs) better reflects the total costs likely to be incurred by many funds. In addition, commenters suggested that many funds already have policies and procedures in place to manage certain risks associated with their derivatives transactions.[893] We believe that these policies and procedures could be readily adapted to meet the final rule's requirements without significant additional cost. However, we do not have data to determine how many funds already have such policies and procedures in place that will substantially satisfy the final rule's requirements, and commenters did not provide any such data. All funds that seek to qualify as limited derivatives users also will need to evaluate both the final rule and their current policies and procedures to identify any needed modifications. We therefore assume that all funds that seek to qualify as limited derivatives users will incur a cost associated with this requirement. Based on these assumptions, we estimate the total industry cost in the first year of $60,315,750, but we believe that this estimate is likely over-inclusive for the reasons stated above.[894]

Some funds may change how they use derivatives in order to qualify for the limited derivatives user exception and thereby avoid the potentially increased compliance cost associated with the final rule's VaR and program requirements. For example, a fund with derivatives exposure just below 10% of its net assets may forego taking on additional derivatives positions, while a fund with derivatives exposure just above 10% of its net assets might close out some existing derivatives positions. As a result, the final rule's exception for limited derivatives users may reduce the extent to which some funds use derivatives.[895]

4. Reverse Repurchase Agreements and Similar Financing Transactions

Reverse repurchase agreements and similar financing transactions represent secured loans, which can be used to introduce leverage into a fund's portfolio just like other forms of borrowings, or derivatives. Accordingly, the final rule permits a fund to either choose to limit its reverse repurchase and other similar financing transaction activity to the applicable asset coverage limit of the Act for senior securities representing indebtedness, or a fund may instead treat them as derivative transactions. A fund's election will apply to all of its reverse repurchase agreements and similar financing transactions so that all such transactions are subject to a consistent treatment under the final rule.[896]

Today, funds rely on the asset segregation approach that Release 10666 describes with respect to reverse repurchase agreements, which funds may view as separate from the limitations established on bank borrowings (and other senior securities that are evidence of indebtedness) by the asset coverage requirements of section 18.[897] As a result, the degree to which funds can engage in reverse repurchase agreements under the final rule may differ from the baseline.

A fund that engages in both reverse repurchase agreements and bank borrowings (or similar transactions), in excess of the asset coverage requirements of section 18, may be affected by the rule's requirements. If such a fund chose to treat its reverse repurchase and other similar financing transaction activity under the applicable asset coverage limit of the Act for senior securities representing indebtedness, the fund would be required to reduce the size of its activity to satisfy this limit. Conversely, such a fund could choose to treat its reverse repurchase and other similar financing transaction activity as derivatives for all purposes of the final rule. Whether and how this election would affect a fund would depend on the amount of other derivatives and the degree to which the fund engages in reverse repurchase agreements and similar financing transactions. This election could cause a fund that otherwise did not engage in any derivatives transactions to be required to adopt and implement policies and procedures reasonably designed to manage the fund's derivatives risks in order to qualify as a limited derivatives user (assuming that the fund's use of reverse repurchase agreements and similar financing transactions was limited to 10% of its net assets).[898] Similarly, a fund that otherwise could qualify as a limited derivatives user (because it otherwise engaged in only a limited amount of derivatives transactions) may no longer be able to rely on this exception to the final rule's VaR and program requirements.

To the extent that funds today separately analyze their asset coverage requirements with respect to reverse repurchase agreements under Release 10666 and bank borrowings and similar senior securities under section 18, the treatment of reverse repurchase agreements under the final rule could have the effect of limiting the overall scale of these transactions. In addition, if a fund does not qualify as a limited derivatives user due to its other investment activity or its treatment of reverse repurchase agreements and similar financing transactions as derivatives, any portfolio leveraging effect of reverse repurchase agreements, similar financing transactions, and

[892] This estimate is based on the following calculations: 0.65 × $15,000 = $9,750; 0.75 × $100,000 = $75,000.

[893] *See* Fidelity Comment Letter; IAA Comment Letter.

[894] This estimate is based on the following calculation: 2,437 funds × ($15,000 + $9,750) = $60,315,750. This cost estimate assumes that none of the funds that currently do not hold any derivatives will choose to establish and implement policies and procedures reasonably designed to manage the fund's derivatives risks in anticipation of a future limited use of derivatives. Notwithstanding this assumption, we acknowledge some funds that currently do not use derivatives may still choose to establish and implement such policies and procedures prophylactically in order to preserve the flexibility to engage in a limited use of derivatives on short notice.

[895] As we do not have data that allow us to quantify the costs and benefits that define the tradeoff for any particular fund of changing its use of derivatives in order to qualify for the limited derivatives user exception, and commenters did not provide any such data, we are unable to estimate how many funds will make this choice.

[896] Rule 18f–4(d)(1)(i) and (ii).

[897] *See supra* section II.H.

[898] As discussed further below in this section, we did not identify any funds that used reverse repurchase agreements and bank borrowings in combined amounts that exceed the asset coverage requirement that also did not otherwise hold any derivatives. Nevertheless, this fact pattern could affect some funds in the future.

borrowings will also be restricted indirectly through the VaR-based limit on fund leverage risk. As a result, a fund could be restricted through the VaR-based limit on fund leverage risk from investing the proceeds of borrowings through reverse repurchase agreements to the full extent otherwise permitted by the asset coverage requirements in section 18 if the fund does not qualify as a limited derivatives user.

DERA staff analyzed funds' use of reverse repurchase agreements and borrowings using Form N–PORT filings as well as financial statements filed with the Commission by BDCs. Based on the staff's analysis of Form N–PORT filings, we estimate that about 0.27% of funds, or 35 funds total, used these transactions in combined amounts that exceeded the asset coverage requirement.[899] All of these funds also otherwise engaged in derivatives transactions, but only one of them would no longer qualify as a limited derivatives user if it elected to treat its reverse repurchase transactions as derivatives for all purposes of the final rule.[900]

5. Treatment of Existing Leveraged/Inverse Funds That Seek To Provide Leveraged or Inverse Market Exposure Exceeding 200% of the Return of the Relevant Index

Rule 18f–4 permits existing leveraged/inverse funds that cannot satisfy the final rule's relative VaR test and that seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index as of October 28, 2020 to continue operating, provided they meet certain requirements. This exception is limited to funds currently in operation, and would therefore not apply to any new funds.

Because the final rule limits this provision to funds currently in operation, the number of funds with exposure above 200% may fall over time, to the extent that fund sponsors remove existing funds from the market. This may particularly affect funds that are less popular or become less popular with investors over time. For the same reason, the final rule may limit the growth (or lead to a decline) of assets managed by leveraged/inverse funds with a market exposure above these limits over time. At the same time, because leveraged/inverse funds that are already in operation today will be permitted to continue operating at their current exposure levels and because fund sponsors will likely be hesitant to remove funds relying on the exception from the market (because the exception applies only to funds currently in operation), the final rule is not likely to have a significant immediate effect on the number of these funds and the size of the assets they manage.

Any reduction in the variety (including future variety) of leveraged/inverse funds with exposures exceeding 200% will affect investors. While investors generally benefit from increased investment opportunities, the effects on any particular investor also depend on how well an investor is able to evaluate the characteristics and risks of leveraged/inverse funds, particularly those with exposures exceeding 200%. On the one hand, there is a body of academic literature that provides empirical evidence that some retail investors may not fully understand the risks inherent in their investment decisions and not fully understand the effects of compounding.[901] In addition, the Commission received some comments on the proposal suggesting that retail investors do not understand the unique risks of leveraged/inverse funds.[902] On the other hand, we also received a large number of comments from individual investors asserting they understand the risks involved in these funds.[903]

The final rule's treatment of leveraged/inverse funds with exposures above 200% could benefit some investors, to the extent that the rule has the effect of reducing the number of investors in these funds who are not capable of evaluating the risks they pose. These benefits would be limited, however, to the extent that they overlap with the effects of current requirements that apply to investment advisers or broker-dealers, including the best interest standard of conduct for broker-dealers under Regulation Best Interest and the fiduciary obligations of investment advisers.[904] Conversely, the final rule may impose a cost on those investors who are capable of evaluating the risks these funds pose, by limiting the investment opportunities available to those investors.[905]

The final rule also includes a requirement that a fund that seeks to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index disclose in its prospectus that it is not subject to the final rule's limit on fund leverage risk. We believe that this requirement may benefit investors and the market, by providing transparency regarding which funds are exempt from rule 18f–4's limit on fund leverage fund risk.

As discussed below in section IV.B.4, rule 18f–4 requires an over-200% leveraged/inverse fund currently in operation to disclose in its prospectus that it is not subject to the VaR-based limits on fund leverage risks. We estimate that the total industry cost associated with this disclosure requirement in the first year will be $71,400.[906]

[899] In our review of form N–PORT filings, we observed that several of the funds that used reverse repurchase agreements and similar financing transactions (bank borrowings and similar securities) in combined amounts that exceeded 50% of net assets already exceeded the 50% limit for either repurchase agreements, similar financing transactions (bank borrowings and similar securities, or both, when considered separately. In our review of financial statements filed by the Commission by BDCs, we observed that no BDCs exceeded the asset coverage requirement.

[900] For purposes of our analysis in other parts of the economic analysis (specifically, sections III.C.1–III.C.3), we assumed that this fund would not qualify for the limited derivatives user exception.

[901] *See, e.g.,* Annamaria Lusardi & Olivia S. Mitchell, *The Economic Importance of Financial Literacy: Theory and Evidence,* 52 J. Econ. Literature 5 (2014), available at *https://www.aeaweb.org/articles?id=10.1257/jel.52.1.5,* which reviews a body of recent survey-based work indicating that many retail investors have limited financial literacy. As the Commission pointed out in the Proposing Release, this literature studies investor inattention to financial products generally and does not specifically examine retail investors' understanding of leveraged/inverse funds. Two commenters stated that the arguments provided in the Proposing Release do not represent evidence that investors misunderstand the risks of leveraged/inverse funds. *See* Comment Letter of Chester Spatt, Ph.D. (Mar. 31, 2020); Flannery Comment Letter. One of those commenters specifically raised the limitations of this literature. *See* Flannery Comment Letter. We continue to believe that this literature may be informative of investors' understanding of leveraged/inverse funds, as it includes an examination of investors' understanding of interest compounding, which may directly apply in the context of the (generally) daily compounding feature of leveraged/inverse funds.

[902] *See supra* footnote 572 and accompanying text.

[903] *See supra* footnote 571 and accompanying text. *See also* Flannery Comment Letter, *supra* footnote 901 (finding a negative historical relationship between the returns of some leveraged/inverse funds and subsequent changes in outstanding shares and arguing that this relationship is consistent with some investors using leveraged/inverse funds for short-term trading strategies).

[904] *See supra* section II.F.2.

[905] *See, e.g.,* Flannery Comment Letter, *supra* footnote 901 (stating that an investor may rationally hold a leveraged/inverse fund for multi-day holding periods and that leveraged/inverse funds provide a cost-efficient means of achieving investors' objectives).

[906] The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* section IV.B.4. The estimate is based on the following calculations: First, we calculate the one-time cost to an over-200% leveraged/inverse fund for the disclosure, to be 1.5 hours × $312 (compliance manager) + 1.5 hours × $368 (compliance attorney) = $468 + $552 = $1,020 per year. The total industry

6. Amendments to Rule 6c–11 Under the Investment Company Act and Rescission of Exemptive Relief for Leveraged/Inverse ETFs

Existing leveraged/inverse ETFs rely on exemptive relief, which the Commission has not granted to a leveraged/inverse ETF sponsor since 2009. We are amending the provision in rule 6c–11 that excludes leveraged/inverse ETFs from its scope to allow a leveraged/inverse ETF to operate under rule 6c–11 if the fund complies with the applicable requirements of rule 18f–4. As a result, fund sponsors will be permitted to operate a leveraged/inverse ETF subject to the conditions in rules 6c–11 and 18f–4 without obtaining an exemptive order.

The amendments to rule 6c–11 will benefit any fund sponsors seeking to launch leveraged/inverse ETFs whose target multiple is equal to or less than 200% of its reference index that did not obtain the required exemptive relief due to the Commission's moratorium on granting such relief. A fund sponsor planning to seek exemptive relief from the Commission to form and operate a leveraged/inverse ETF that could operate under rules 6c–11 and 18f–4 will also no longer incur the cost associated with applying for an exemptive order.[907] To the extent that the amendments result in new leveraged/inverse ETFs with exposures not exceeding 200% coming to market, the industry-wide assets under management of such leveraged/inverse ETFs could increase and investors who are able to evaluate the risks they pose could benefit from an increase in investment choices. Conversely, the amendment may also have the effect of increasing the number of investors in these funds who may not be capable of evaluating the risks they pose.[908]

Because our amendments to rule 6c–11 will permit leveraged/inverse ETFs to rely on that rule, we also are rescinding the exemptive orders the Commission has previously granted to sponsors of leveraged/inverse ETFs. As a result, existing and future leveraged/inverse ETFs will operate under a consistent regulatory framework with respect to the relief necessary to operate as an ETF. We believe that the costs to leveraged/inverse ETFs of complying with the conditions of rule 6c–11 instead of those contained in their exemptive orders will be minimal (other than the costs of complying with rule 18f–4, which we discuss separately), as we anticipate that all existing leveraged/inverse ETFs will be able to continue operating as they do currently, while also being required to comply with rule 6c–11's requirements for additional website disclosures and basket asset policies and procedures.[909] While we do anticipate that these funds will incur costs from having to comply with the applicable provisions of rule 18f–4, as referenced in the amendments to rule 6c–11, we estimate these costs in the subsections of this section III.C that discuss the costs and benefits of rule 18f–4. Sponsors of leveraged/inverse ETFs with existing exemptive orders describing exposures exceeding 200% will no longer be able to launch additional leveraged/inverse ETFs with exposures exceeding this limit. The economic effects of this restriction are discussed above.[910] Additional economic considerations that the treatment of leveraged/inverse ETFs presents with regards to efficiency and competition are discussed below in section III.D.

7. Unfunded Commitment Agreements

Rule 18f–4 will permit a fund to enter into unfunded commitment agreements to make certain loans or investments if it reasonably believes, at the time it enters into such an agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements, in each case as they come due.[911] While a fund should consider its unique facts and circumstances, the final rule will prescribe certain specific factors that a fund must take into account in having such a reasonable belief.

We continue to believe that the final rule's requirements are consistent with current industry practice.[912] As a result, we do not believe that the rule's treatment of unfunded commitment agreements represents a change from the baseline, although we acknowledge that there may be some variation in the specific factors that funds consider today, as well as the potential for some variation between those factors and those prescribed in the final rule. Because we believe that the final rule's approach is consistent with general industry practices, we believe this requirement will not lead to significant economic effects.[913]

8. Recordkeeping

Rule 18f–4 includes certain recordkeeping requirements.[914] Specifically, the final rule will require a fund to maintain certain records documenting its derivatives risk management program's written policies and procedures, along with its portfolio's stress test results, VaR backtesting results, any internal reporting or escalation of material risks under the program, and periodic reviews of the program.[915] It will also require a fund to maintain records of any materials provided to the fund's board of directors in connection with approving the designation of the derivatives risk manager and any written reports relating to the derivatives risk management program.[916]

A fund that will be required to comply with the VaR-based limit on fund leverage risk will also have to maintain records documenting the determination of: Its portfolio's VaR; the VaR of its designated reference portfolio, as applicable; its VaR ratio (the value of the VaR of the Fund's portfolio divided by the VaR of the designated reference portfolio), as applicable; and any updates to any of its VaR calculation models and the basis for any material changes to its VaR models.[917] The rule also will require a fund to keep records of any written reports provided to the board that the rule requires regarding the fund's non-compliance with the applicable VaR

cost to over-200% leveraged/inverse funds, in the first year, is (70 over-200% leveraged/inverse funds) × $1,020 = $71,400.

[907] In the ETFs Adopting Release, we estimated that the direct cost of a typical fund's application for ETF relief (associated with, for example, legal fees) is approximately $100,000. As exemptive applications for leveraged/inverse ETFs are significantly more complex than those of the average fund, we estimate that the direct costs of an application for leveraged/inverse ETF relief amounts to approximately $250,000. *See* ETFs Adopting Release, *supra* footnote 76, at nn.537–539 and accompanying text.

[908] *See supra* section III.C.5 for a discussion of investors' understanding of leveraged/inverse funds and the comments we received on this topic in the context of leveraged/inverse funds with exposures exceeding 200%, for which the effects of these fund's unique characteristics are more pronounced due to the higher levels of exposure they seek to provide.

[909] In this section as well as in section III.D below, we have accounted for the costs and benefits to leveraged/inverse ETFs as a result of the removal of the current exclusion of these funds from rule 6c–11. We believe that the additional considerations the Commission analyzed in the ETFs Adopting Release for ETFs other than leveraged/inverse ETFs that were included in the scope of rule 6c–11 at adoption apply substantially similarly to leveraged/inverse ETFs. *See* ETFs Adopting Release, *supra* footnote 76.

[910] *See infra* section III.C.5.

[911] *See supra* section II.I.

[912] *See supra* footnote 763 and accompanying text.

[913] *See supra* footnote 763 and accompanying text.

[914] *See supra* section II.J.

[915] Rule 18f–4(c)(i)(A).

[916] Rule 18f–4(c)(6)(i)(B).

[917] Rule 18f–4(c)(6)(i)(C).

test.[918] A fund that will be a limited derivatives user under the final rule will have to maintain a written record of its policies and procedures that are reasonably designed to manage derivatives risks, as well any written reports to the fund's board regarding the fund's exceeding the exception's 10% derivatives exposure threshold.[919] In light of the final rule providing two separate treatment options for a fund that enters into a reverse repurchase agreement or similar financing transactions, a fund must also maintain a written record documenting whether the fund is treating these transactions, as set forth in the rule, under (1) an asset coverage requirements approach or (2) a derivatives transactions treatment approach.[920] Finally, a fund engaging in unfunded commitment agreements will be required to maintain records documenting the basis for its reasonable belief regarding the sufficiency of its cash and cash equivalents to meet its obligations with respect to each unfunded commitment agreement, with such a record made each time it enters such an agreement.[921] Rule 18f–4 will require funds to maintain required records for a period of five years (the first two years in an easily accessible place).[922]

We believe that these requirements will increase the effectiveness of the Commission's oversight of the fund industry, which will, in turn, benefit investors. Further, the requirement to keep records documenting the derivatives risk management program, including records documenting periodic review of the program and written reports provided to the board of directors relating to the program, will help our staff evaluate a fund's compliance with the derivatives risk management program requirements. We anticipate that these recordkeeping requirements will generally not impose a large additional burden on funds, as most funds would likely choose to keep such records, even absent the requirement to do so, in order to support their ongoing administration of the derivatives risk management program and their compliance with the associated requirements.

As discussed below in section IV.B.7, our estimated average one-time and ongoing annual costs associated with the recordkeeping requirements take into account the fact that some funds, such as those that can rely on the final rule's limited derivatives user exception, may incur less extensive recordkeeping costs relative to other funds that use derivatives, or the other transactions that rule 18f–4 addresses, more substantially. We estimate that the total industry cost for the final rule's recordkeeping requirement in the first year will equal $53,012,728.[923]

9. Amendments To Fund Reporting Requirements

a. Form N–PORT and Form N–CEN

We are amending Form N–PORT to include a new reporting item on limited derivatives users' derivatives exposure, which will be non-public because we are collecting this information for regulatory purposes.[924] This new item requires a limited derivatives user to report: (1) The fund's derivatives exposure; and (2) the fund's derivatives exposure attributable to currency or interest rate derivatives entered into and maintained by the fund for hedging purposes. Furthermore, if a fund relying on that exception has derivatives exposure exceeding 10% of the fund's net assets, and this exceedance persists beyond the five-business-day period that the final rule provides for remediation, the fund will have to report the number of business days beyond the five-business-day remediation period that its derivatives exposure exceeded 10% of net assets.[925] In addition, we are adopting a new Form N–PORT reporting item related to the VaR tests we are adopting, in which funds that are subject to the final rule's VaR-based limit on fund leverage risk will have to report certain information related to their VaR.[926]

We also are amending Form N–CEN to require a fund relying on the final rule to identify that it is relying on the rule in the first instance, as well as: (1) Whether it is a limited derivatives user excepted from the rule's program requirement and VaR tests; (2) whether it is a leveraged/inverse fund as defined in the rule; (3) whether it has entered into reverse repurchase agreements or similar financing transactions, either under the provision of rule 18f–4 that requires a fund to comply with the asset coverage requirements of section 18 or under the provision that requires a fund to treat such transactions as derivative transactions under the final rule; (4) whether it has entered into unfunded commitment agreements under rule 18f–4; and (5) whether it is relying on the provision of rule 18f–4 that addresses investment in when-issued and forward-settling securities. All new information reported in Form N–CEN pursuant to this rulemaking will be made publicly available. These additional reporting requirements will not apply to BDCs,

[918] Rule 18f–4(c)(6)(i)(B).

[919] Rule 18f–4(c)(6)(i)(D).

[920] Rule 18f–4(d)(2).

[921] *See* rule 18f–4(e)(2).

[922] *See* rule 18f–4(c)(6)(ii); rule 18f–4(d)(2); rule 18f–4(e)(2).

[923] The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* section IV.B.7.The total industry cost estimate is then based on the following calculations: First, 9 hours × $63 (general clerk) = $567, 9 hours × $96 (senior computer operator) = $864, and 9 hours × $368 (compliance attorney) = $3,312, for a total of $567 + $864 + $3,312 + ($1,800 for initial external cost burden) = $6,543, which is the one-time cost per non-limited derivatives user fund for establishing recordkeeping policies and procedures for derivatives risk management program and VaR requirements; Second, 16 hours × $63 (general clerk) = $1,008, 16 hours × $96 (senior computer operator) = $1,536, and 16 hours × $368 (compliance attorney) = $5,888, for a total of $1,008 + $1,536 + $5,888 = $8,432, which is the annual ongoing recordkeeping cost per non-limited derivatives user fund for derivatives risk management program and VaR requirements; Third, 1.5 hours × $63 (general clerk) = $95, 1.5 hours × $96 (senior computer operator) = $144, and 1.5 hours × $368 (compliance attorney) = $552, for a total of $95 + $144 + $552 + ($1,800 for initial external cost burden) = $2,591, which is the one-time cost per limited derivatives user fund for establishing recordkeeping policies and procedures; Fourth, 2 hours × $63 (general clerk) = $126, 2 hours × $96 (senior computer operator) = $192, and 2 hours × $368 (compliance attorney) = $736, for a total of $126 + $192 + $736 = $1,054, which is the annual ongoing recordkeeping cost per limited derivatives user fund or a fund engaging in unfunded commitment agreements; Fifth, 1.5 hours × $63 (general clerk) = $95, 1.5 hours × $96 (senior computer operator) = $144, and 1.5 hours × $368 (compliance attorney) = $552, for a total of $95 + $144 + $552 = $791, which is the one-time cost per fund engaging in unfunded commitment agreements *or* reverse repurchase agreements for establishing recordkeeping policies and procedures; Lastly, 1 hour × $63 (general clerk) = $63, 1 hour × $96 (senior computer operator) = $96, and 1 hour × $368 (compliance attorney) = $368, for a total of $63 + $96 + $368 = $527, which is the annual ongoing recordkeeping cost per fund engaging in reverse repurchase agreements; Total industry costs associated with recordkeeping requirements are estimated as: (2,766 funds which cannot rely on the limited derivatives user exception) × ($6,543 + $8,432) = $41,420,850; (2,437 funds which can rely on the limited derivatives user exception) × ($2,591 + $1,054) = $8,882,865; (1,339 funds engaging in unfunded commitment agreements) × ($791 + $1,054) = $2,470,455; (181 funds engaging in reverse repurchase agreements) × ($791 + $527) = $238,558 for a total of $53,012,728.

[924] *See supra* section II.G.1.a.

[925] *Id.*

[926] Specifically, this information will include the fund's median daily VaR for the reporting period. Funds subject to the relative VaR test during the reporting period also will have to report: (1) The name of the fund's designated index or a statement that the fund used its securities portfolio as its designated reference portfolio; (2) the index identifier; and (3) the fund's median daily VaR Ratio for the reporting period. Finally, all funds that are subject to the limit on fund leverage risk also will have to report the number of exceptions that the fund identified as a result of the backtesting of its VaR calculation model. Information about a fund's designated index will be made publicly available, but not a fund's median daily VaR, median daily VaR ratio, and backtesting information. *See supra* section II.G.1.b.

which do not file reports on Form N–CEN or Form N–PORT.[927]

To the extent that the information that we will require funds to report on Forms N–PORT and N–CEN is not currently available, the requirements that funds make such information available periodically on these forms will improve the ability of the Commission to oversee reporting funds. It also will allow the Commission and its staff to oversee and monitor reporting funds' compliance with the final rule and help identify trends in reporting funds' use of derivatives. The expanded reporting also will increase the ability of the Commission staff to identify trends in investment strategies and fund products in reporting funds as well as industry outliers.[928]

Investors, third-party information providers, and other potential users may also experience benefits from the amendments to Forms N–PORT (that relate to information that will be publicly available) and N–CEN, as they will require the disclosure of additional information that is not currently available elsewhere and that may allow the users of this data to better differentiate funds.

As discussed below in section IV.D, our estimated average one-time and ongoing annual costs associated with the amendments to Forms N–PORT take into account the fact that only certain funds—those that rely on the limited derivatives user exception, and those that are subject to the VaR-based limit on fund leverage risk in final rule 18f–4—will incur these costs. We estimate that the total industry cost for these new Form N–PORT reporting requirements in the first year will equal $18,033,889.[929] We also estimate that the total industry cost for all registered funds associated with these new Form N–CEN reporting requirements in the first year will equal $775,570.[930]

b. Amendments to Current Reporting Requirements

We are also adopting current reporting requirements for funds that will rely on rule 18f–4 and will be subject to the VaR-based limit on fund leverage risk. Specifically, if a fund is subject to the relative VaR test, and the VaR of its portfolio exceeds 200% or 250% (depending on whether the fund is a closed-end fund for which the higher threshold is applicable) of the VaR of its designated reference portfolio for five business days, the fund will be required to file a non-public report on Form N–RN.[931] The report must include the following information: (1) The dates on which the fund's portfolio VaR exceeded 200% or 250% of the VaR of the designated reference portfolio; (2) the fund portfolio's VaR for each of these days; (3) the VaR of the designated reference portfolio for each of these days; (4) the designated index or statement that the fund used its securities portfolio as its designated reference portfolio; and (5) the index identifier, if applicable. The fund also will have to file a report on Form N–RN when it is back in compliance with its applicable VaR test.[932] Similarly, if a fund is subject to the absolute VaR test, and its absolute VaR exceeds 20% or 25% (as applicable) of the fund's net asset value for five business days, the fund will be required to file a comparable report on Form N–RN and a report when the fund is back in compliance.[933]

We anticipate that the enhanced current reporting requirements could produce significant benefits. For example, when a fund is out of compliance with the VaR-based limit on fund leverage risk, this may indicate that a fund is experiencing heightened risks as a result of a fund's use of derivatives transactions. Such breaches also could indicate market events that are drivers of potential derivatives risks across the fund industry and therefore complement other sources of information related to such market events for the Commission. As a result, we believe that the final rule's current reporting requirement will increase the effectiveness of the Commission's oversight of the fund industry by providing the Commission with current information regarding potential increased risks and stress events, which in turn will benefit investors.[934]

As discussed below in section IV.E, our estimated average cost burdens associated with the amendments to Form N–RN take into account that only certain funds—those that are out of compliance with the VaR-based limit on fund leverage risk that Form N–RN describes—will be required to file reports on Form N–RN, as amended. We estimate that the total industry cost for this reporting requirement in the first year will be $77,652.[935]

We do not believe there will be any potential indirect costs associated with filing Form N–RN, such as spillover effects or the potential for investor flight due to a VaR test breach (to the extent that investors would leave a fund if they believed a fund's VaR test breaches indicate that a fund has a risk profile that is inconsistent with their investment goals and risk tolerance),

[927] *See supra* footnote 625.

[928] The structuring of the information in Form N–PORT will improve the ability of Commission staff to compile and aggregate information across all reporting funds, and to analyze individual funds or a group of funds, and will increase the overall efficiency of staff in analyzing the information.

[929] The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* section IV.D. The total industry estimate is based on the following calculations: First, (2 hours × $368 (compliance attorney) + 2 hours × $334 (senior programmer) = $1,404), which is the average, one-time cost per limited derivatives user to comply with the new N–PORT requirements of derivatives exposure information in the first reporting quarter of the fiscal year; Second, (3 hours × $368 (compliance attorney) + 3 hours × $334 (senior programmer) = $2,106 per year), which is the ongoing cost per limited derivatives user to comply with the new N–PORT requirements of derivatives exposure information in the final three reporting quarters of the fiscal year; Third, (2 hours × $368 (compliance attorney) + 2 hours × $334 (senior programmer) = $1,404), which is the average, one-time cost per fund to comply with the new N–PORT requirements of VaR-related information in the first reporting quarter of the fiscal year; Fourth, (3 hours × $368 (compliance attorney) + 3 hours × $334 (senior programmer) = $2,106 per year), which is the ongoing cost per fund to comply with the new N–PORT requirements of VaR-related information in the final three reporting quarters of the fiscal year; Lastly, (0.01 hours × $368 (compliance attorney) + 0.01 hours × $334 (senior programmer) = $7), which is the ongoing cost per limited derivatives that reports exceedances of 10% derivatives exposure threshold in the fiscal year. The total industry cost for these reporting requirements in the first year is: ((2,437 registered funds that are limited derivatives users and required to provide information about their derivatives exposure and exceedances of the 10% threshold on N–PORT) × ($1,404 + $2,106 + $7) = $8,570,929) + (2,696 registered funds subject to the VaR-based limit on fund leverage risk in rule 18f–4 × ($1,404 + $2,106) = $9,462,960) = $18,033,889.

[930] The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* section IV.F. The estimate is based on the following calculations: First, we calculate the ongoing annual cost for a registered fund required to prepare amendments to Form N–CEN, which is 0.2 hours × $368 (compliance attorney) + 0.2 hours × $334 (senior programmer) = $73.6 + $66.8 = $140.4 per year; Lastly, the total industry cost for all registered funds associated with this reporting requirement in the first year is (5,524 registered funds required to prepare a report on Form N–CEN as amended) × $140.4 = $775,570.

[931] As proposed, we are requiring all funds that are subject to rule 18f–4's limit on fund leverage risk to file current reports on Form N–RN regarding VaR test breaches. *See also supra* footnote 688.

[932] *See supra* footnote 682.

[933] *See supra* footnote 685.

[934] *See supra* section II.G.2 for a discussion of the comments we received on the proposed current reporting requirements.

[935] The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* sections IV.E and V.D.2.b. This estimate is based on the assumption that 27 funds will have to file reports on Form N–RN per year and corresponds to a cost of $2,876 for each filing fund ($1,438 per filing, and a fund will have to file two reports per breach incident: One to report the breach, and one when the fund is back in compliance with the VaR test ($1,438 × 2 = $2,876)).

because Form N–RN filings will not be publicly disclosed.[936] Because the Form N–RN filing requirements will be triggered by events that are part of a fund's requirement to determine compliance with the applicable VaR test at least daily, any monitoring costs associated with Form N–RN are included in our estimates of the compliance costs for rule 18f–4 above.

10. When-Issued and Forward-Settling Transactions

The final rule includes a provision that will permit funds, as well as money market funds, to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to conditions.[937] This provision reflects our view that the potential for leveraging is limited in these transactions when they meet the conditions in this provision. We do not believe that this provision will result in a significant change in the extent to which funds and money market funds engage in these transactions. For example, money market funds will continue to be able to invest in when-issued U.S. Treasury securities under this provision notwithstanding that these investments trade on a forward basis involving a temporary delay between the transaction's trade date and settlement date. We therefore do not expect these amendments to result in significant costs to funds, as well as money market funds.[938]

D. Effects on Efficiency, Competition, and Capital Formation

This section evaluates the impact of the final rules on efficiency, competition, and capital formation. We are unable to quantify these effects, however, because we lack the information necessary to provide a reasonable estimate. For example, we are unable to predict how the final rules will change investors' propensity to invest in funds and ultimately affect capital formation. Therefore, much of the discussion below is qualitative in nature, although where possible we attempt to describe the direction of the economic effects.

1. Efficiency

Rule 18f–4 in conjunction with the rescission of Release 10666 may make derivatives use more efficient for certain funds, including for those funds that will qualify as limited derivatives users. Specifically, funds' current asset segregation practices may provide a disincentive to use derivatives for which notional amount segregation is the practice, even if such derivatives would otherwise provide a lower-cost method of achieving desired exposures than purchasing the underlying reference asset directly.[939] For example, a fund seeking to sell credit default swaps to take a position in an issuer's credit risk may currently choose not to do so because of the large notional amounts that the fund would segregate for that specific derivatives position. The final rule therefore could increase efficiency by mitigating current incentives for funds to avoid use of certain derivatives (even if foregoing the use of those derivatives would entail cost and operational efficiencies).

In addition, the final rules may change the degree to which some funds choose to use derivatives generally or the degree to which funds use certain derivatives over others.[940] Changes in the degree to which certain derivatives are used by funds could affect the liquidity and price efficiency of these derivatives. Although unaddressed in the academic literature, we expect an increase in the use of derivatives to correspond to an increase in derivatives market liquidity as more derivatives contracts may be easily bought or sold in markets in any given period, as well as an increase in price efficiency since information regarding underlying securities (and other factors that affect derivatives prices) may be better reflected in the prices of derivative contracts.

Changes in the degree to which certain derivatives are used could also affect the pricing efficiency and liquidity of securities underlying these derivatives and those of related securities. For example, one paper provides evidence that the introduction of credit default swap contracts decreases the liquidity and price efficiency of the equity security of the issuer referenced in the swap.[941] Conversely, the paper also observes that the introduction of exchange-traded stock option contracts improves the liquidity and price efficiency of the underlying stocks.

The final rule's VaR-based limit on fund leverage risk will also establish a bright-line limit on the amount of leverage risk that a fund can take on using derivatives.[942] As we stated in the Proposing Release, to the extent that funds are more comfortable with managing their derivatives exposures to a clear outside limit, this could improve the efficiency of funds' portfolio risk management practices.[943] One commenter disagreed with this assessment, stating that a bright-line limit would not improve the efficiency of funds' portfolio risk management

[936] *See also supra* footnote 697 and accompanying text (discussing that a fund may not engage in ''fire sales'' to avoid filing a report on Form N–RN.)

[937] *See supra* sections I.C. and II.A.

[938] Money market funds may be required to make certain disclosure changes to their prospectuses. The burdens associated with this estimate are all paperwork-related burdens, and thus they are also estimated in the Paperwork Reduction Act Analysis section of this release. *See infra* sections IV.B.5 and IV.B.7. We estimate that the total industry cost for disclosure changes for money market funds in the first year would equal $285,600. The estimate is based on the following calculations: First, we calculate the one-time cost for disclosure changes for money market funds, which is 3 hours × $312 (compliance manager) + 3 hours × $368 (compliance attorney) = $936 + $1,104 = $2,040 per year; The total industry cost for disclosure changes for money market funds, in the first year, is (420 registered money market funds) × $2,040 = $856,800.

[939] *See supra* section III.B.3 (for a description of funds' current asset segregation practices).

[940] Specifically, (1) as discussed in the previous paragraph, funds may transact in more notional-value based derivatives as a result of removing the incentive distortion of notional- vs. market-value asset segregation under funds' current asset segregation practices; (2) new potential funds may reduce their use of derivatives transactions to satisfy the VaR-based limit on fund leverage risk (*see supra* section III.C.2); (3) existing funds may change their use of derivatives transactions to respond to risks identified after adopting and implementing their derivatives risk management programs (*see supra* section III.C.1); (4) both existing and new potential funds may increase their use of derivatives transactions as a result of the exemptive rule's bright-line limits on leverage risk (*see supra* section III.C.2); and (5) the use of derivatives transactions of leveraged/inverse funds with exposure exceeding 200% may decrease, to the extent that the final rule has the effect of limiting the growth (or leading to a decline) of assets managed by these funds over time as a result of limiting leveraged/funds with exposures above this limit to those currently in operation (*see supra* section III.C.5). Overall, the effect of the final rules on funds use of derivatives transactions is ambiguous and depends on the type of derivatives transaction.

[941] This paper analyzed NYSE-listed firms and observed that, all else equal, equity markets become less liquid and equity prices become less efficient when single-name credit default swap contracts are introduced, while the opposite results hold when equity options are listed on exchanges. Ekkehart Boehmer, Sudheer Chava, & Heather E. Tookes, *Related Securities and Equity Market Quality: The Case of CDS,* 50 J. Fin. & Quantitative Analysis 509 (2015), *available at https://www.cambridge.org/core/journals/journal-of-financial-and-quantitative-analysis/article/related-securities-and-equity-market-quality-the-case-of-cds/08DE66A250F9950FA486AE818D5E0341.* The latter result, that traded equity options are associated with more liquid and efficient equity prices, is consistent with several other academic papers. *See, e.g.,* Charles Cao, Zhiwu Chen, & John M. Griffin, *Informational Content of Option Volume Prior to Takeovers,* 78 J. Bus. 1073 (2005), as well as Jun Pan & Allen M. Poteshman, *The Information in Option Volume for Future Stock Prices,* 19 Rev. Fin. Stud. 871 (2006). The effects described in the literature are based on studies of the introduction of derivative securities and may therefore apply differently to changes in the trading volume of derivatives securities that may occur as a result of the final rule.

[942] *See supra* section III.C.2.

[943] *See* Proposing Release, *supra* footnote 1, at section III.D.1.

practices.[944] However, the commenter did not provide any data or evidence that contradicts the possibility that funds may find it more efficient to manage to clearly defined limits than the current approach. We therefore continue to believe that some funds may be able to manage portfolio risk more efficiently in the presence of a clear outside limit, as compared to the baseline, which provides less clear and uniform limitations on funds' derivatives use owing to its development on an instrument-by-instrument basis through a combination of Commission guidance in Release 10666, staff no-action letters, and other staff guidance.

In addition, the recordkeeping elements of rule 18f–4 will facilitate efficient evaluation of compliance with the rule while also providing the Commission with information that may be useful in assessing market risks associated with derivatives products. Moreover, the amendments to fund's current reporting requirements could facilitate the Commission's oversight of funds subject to rule 18f–4 with fewer resources.[945]

The amendments to Forms N–PORT and N–CEN will allow investors, to the extent that they use the information, to better differentiate between funds based on their derivatives usage.[946] As a result, investors will be able to more efficiently evaluate the effects of a fund's use of derivatives as part of its investment strategies, allowing them to make better-informed investment decisions.

In addition, the final rules may affect market quality for some of the investments held by leveraged/inverse ETFs, to the extent that the rule changes the amount and composition of investments by leveraged/inverse ETFs as a whole. Specifically, the academic literature to date provides some evidence, albeit inconclusive, that leveraged/inverse ETFs' rebalancing activity may have an impact on the price and volatility of the constituent assets that make up the ETFs. For example, one paper empirically tests whether the rebalancing activity of leveraged/inverse ETFs impacts the price and price volatility of underlying stocks.[947] The authors find a positive association, suggesting that rebalancing demand may affect the price and price volatility of component stocks, and may reduce the degree to which prices reflect fundamental value of the component stocks. As leveraged/inverse ETFs commonly use derivatives to rebalance their portfolios, similar effects could also extend to underlying derivatives, although we are not aware of any academic literature that has examined the effects of leveraged/inverse ETFs' rebalancing activity on derivatives markets. Conversely, another paper argues that the existing literature that studies the effect of leveraged/inverse ETFs' rebalancing activity on the constituent asset prices does not control for the effect of the creation and redemption transactions (*i.e.,* fund flows) by authorized participants.[948] The paper presents evidence that positively leveraged/inverse ETFs tend to have capital flows in the opposite direction of the underlying index, and inverse leveraged/inverse ETFs tend to have capital flows in the same direction as the underlying index, suggesting that investor behavior may attenuate the effect of leveraged/inverse ETFs' rebalancing activity on the prices of underlying securities and derivatives.[949] We are unable to determine, however, which holdings of leveraged/inverse ETFs are likely to be positively affected and which may be negatively affected, as we lack the information necessary to predict the effect that the amendments to rule 6c–11 and the prohibition on launching new funds with exposures above 200% that cannot satisfy rule 18f–4's relative VaR test will have on the size and composition of leveraged/inverse ETFs' portfolios.

2. Competition

Certain aspects of the final rules may have an impact on competition.[950] Certain of these potential competitive effects result from the final rule imposing differential costs on different funds. Specifically: (1) Large fund complexes may find it less costly to comply per fund with the new requirements of rule 18f–4 as a whole;[951] (2) funds that already have robust derivatives risk management practices in place and funds whose advisers already employ someone with the relevant expertise to serve as the fund's derivatives risk manager may incur lower costs associated with the rule's derivatives risk management program requirements;[952] (3) funds that qualify as limited derivatives users will generally incur lower compliance costs associated with the rule than funds that will not qualify for this exception;[953] (4) unlike leveraged/inverse funds with exposures not exceeding 200%, leveraged/inverse funds with exposures in excess of this limit will not be subject to the rule's VaR-based limit on fund leverage risk and will therefore not incur the increased compliance costs associated with this requirement;[954] (5) funds that will comply with the relative VaR test would generally incur higher compliance costs than those that will comply with the absolute VaR test;[955] and (6) BDCs are not subject to the additional reporting requirements on Forms N–CEN or N–PORT and will therefore not incur the increased compliance costs that will be imposed on filers of these forms.[956] To the extent that investors believe that the funds that will incur lower compliance burdens and the funds that will incur higher compliance burdens under the rule are substitutes, the rule may result in a competitive advantage for funds with the lower compliance burden to the extent that a lower burden makes such funds less costly to operate.

The final rule may also put funds that are subject to the outer limit on fund leverage risk at a competitive disadvantage compared to alternative products that can provide leveraged market exposure but will not be subject to the VaR-based limit on fund leverage risk of rule 18f–4, such as existing leveraged/inverse funds with exposures exceeding 200% that satisfy the conditions to the exception from the VaR-based limit on fund leverage risk for such funds, alternative investment vehicles (including the listed commodity pools that would have been subject to the proposed sales practices rules), exchange-traded notes, and structured products.[957]

The Commission has not provided exemptive relief to new prospective sponsors of leveraged/inverse ETFs since 2009.[958] The amendments to rule 6c–11 will allow other leveraged/inverse ETFs with exposures at or below 200% to enter the leveraged/inverse ETF market, subject to the conditions in rules 6c–11 and 18f–4, and therefore

[944] *See* ProShares Comment Letter.

[945] *See supra* section II.G.2.

[946] *See supra* section III.C.9.a.

[947] *See* Qing Bai, Shaun A. Bond & Brian Hatch, *The Impact of Leveraged and Inverse ETFs on Underlying Real Estate Returns,* 43 Real Estate Econ. 37 (2015).

[948] *See* Ivan T. Ivanov & Stephen Lenkey, *Are Concerns About Leveraged ETFs Overblown?,* (FEDS, Working Paper No. 2014–106, 2014).

[949] The literature we are aware of focuses on leveraged/inverse ETFs and does not study similar effects of leveraged/inverse mutual funds, although both types of funds generally engage in similar rebalancing activity. As a result, similar effects may be attributable to leveraged/inverse mutual funds.

[950] *See supra* sections III.B.1 and III.B.5 for an overview of the baseline of the fund industry.

[951] *See supra* sections III.C.1 and III.C.2.

[952] *See supra* section III.C.1.

[953] *See supra* section III.C.3.

[954] *See supra* section II.F.5.

[955] *See supra* section III.C.2.

[956] *See supra* section III.C.9.a.

[957] *See also supra* section III.C.2.

[958] *See supra* text following footnote 821.

help promote a more level playing field. This will likely lead to more competition among leveraged/inverse ETFs (primarily among those with exposures at or below 200%) and between leveraged/inverse ETFs and other products that investors may perceive as substitutes, such as leveraged/inverse mutual funds. This increase in competition could be significant, as the leveraged/inverse ETF market is very concentrated; currently, only two fund sponsors operate leveraged/inverse ETFs. Fees for leveraged/inverse ETFs and substitute products, such as leveraged/inverse mutual funds, could fall as a result of any such increase in competition.

Conversely, the final rule's prohibition on new leveraged/inverse funds with market exposure above 200% of the return, or inverse return, of the relevant index may lead to reduced competition among those funds, to the extent that the provision reduces the number of such funds over time.[959] As a result, fees for leveraged/inverse ETFs with exposures above this limit may rise.[960]

3. Capital Formation

Certain aspects of the final rules may have an impact on capital formation.[961] Certain of these effects may arise from a change in some investors' propensity to invest in funds, depending on their preferences for taking risk. For example, some investors may be more inclined to invest in funds as a result of increased investor protection arising from any decrease in leverage-related risks; or they may reduce their investments in certain funds that may increase their use of derivatives in light of the bright-line VaR-based limit on fund leverage risk.[962] Additionally, the rule may lead investors to increase investments in leveraged/inverse funds with exposures up to 200% as a result of any increase in competition for these funds; and the rule may lead investors to reduce investments in leveraged/inverse funds that exceed this exposure as a result of any decrease in competition or reduced investor choice for those funds.[963] While we are unable to determine whether the final rules will lead to an overall increase or decrease in fund assets, to the extent that overall assets of funds change, this may have an effect on capital formation.

Rule 18f–4 may also decrease the use of reverse repurchase agreements, similar financing transactions, or borrowings by some funds, or reduce some funds' ability to invest the borrowings obtained through reverse repurchase agreements, although the modifications from the proposal to provide funds additional flexibility to treat these investments as derivatives transaction may make any decrease less likely.[964] To the extent that this restricts a fund's ability to obtain financing to invest in debt or equity securities, capital formation may be reduced.

E. Reasonable Alternatives

1. Alternative Implementations of the VaR Tests

a. Different Confidence Level or Time Horizon

Rule 18f–4 will require that a fund's VaR model use a 99% confidence level and a time horizon of 20 trading days.[965] We could alternatively require a different confidence level and/or a different time horizon for the VaR test. As discussed above in section II.D.4, market participants calculating VaR most commonly use 95% or 99% confidence levels and often use time horizons of 10 or 20 days. The VaR parameters in the final rule therefore represent a confidence level and time horizon at the high end of what is commonly used.

Compared to requiring a lower confidence level and a shorter time horizon, the rule's parameters result in a VaR test that is designed to measure, and therefore limit the severity of, less frequent but larger losses. However, estimates of VaR at the larger confidence level and longer time horizon required by the final rule are based on fewer observations, which reduces the accuracy of the VaR estimate compared to using a lower confidence level and a shorter time horizon. As discussed above, we believe certain time- and confidence level scaling techniques discussed by commenters are appropriate for purposes of the final rule, which can help reduce the estimation error associated with VaR calculations and produce more-stable results.[966]

b. Absolute VaR Test Only

To establish an outer limit for a fund's leverage risk, the final rule will generally require a fund engaging in derivatives transactions to comply with a relative VaR test; the fund could instead comply with an absolute VaR test if the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test. As an alternative, we considered requiring all funds that will be subject to the VaR-based limit on fund leverage risk to comply with an absolute VaR test.

Use of an absolute VaR test would be less costly for some funds that will be required to comply with the relative VaR test under the final rule, including because the relative VaR test may require some funds to pay licensing costs associated with the use of a designated index.[967] In addition, use of an absolute VaR test would reduce the compliance challenge for fund risk managers, who would not have to consider if a designated reference portfolio would provide an appropriate reference portfolio for purposes of the relative VaR test.

On the other hand, the absolute VaR test is a static measure of fund risk in the sense that the implied limit on a fund's VaR will not change with the VaR of its designated reference portfolio. The absolute VaR test is therefore less suited for measuring leverage risk and limiting the degree to which a fund can use derivatives to leverage its portfolio, as measuring leverage inherently requires comparing a fund's risk exposure to that of an unleveraged point of reference.[968] An additional implication of this aspect of an absolute VaR test is that a fund may fall out of compliance with an absolute VaR test just because the market it invests in becomes more volatile, even

[959] In the period following the onset of the COVID–19 health crisis, certain leveraged/inverse ETFs changed their investment objectives and strategies. *See supra* footnote 24. As a result, the number of leveraged/inverse ETFs with exposures exceeding 200% was reduced, which is reflected in our baseline statistics in section III.B.5.

[960] Leveraged/inverse funds with exposures above 200% are currently only offered in the form of ETFs and by two fund sponsors. We do not expect that the final rule will reduce the number of sponsors that choose to offer leveraged/inverse ETFs with exposures above this limit; nor do we believe that the final rule represents a change from the baseline in terms of the inability of new sponsors to enter that market, as the Commission has not provided exemptive relief to new prospective sponsors of leveraged/inverse ETFs since 2009. *See supra* text following footnote 821.

[961] *See supra* sections III.B.1 and III.B.5 for an overview of the baseline of the fund industry.

[962] *See supra* section III.C.2.

[963] *See supra* sections III.C.5 and III.D.2. Any net change of assets held by leveraged/inverse funds is likely to have a small effect on capital formation as only positively leveraged funds typically invest some portion of their assets into securities whereas inversely leveraged funds typically achieve their exposures using only derivatives instruments.

[964] *See supra* section III.C.4.

[965] *See supra* section II.D.4.

[966] *See supra* section II.D.5 (for a more detailed discussion of the effects of time- and confidence level scaling and the comments we received on the use of these techniques).

[967] *See supra* section III.C.2. A fund that uses its securities portfolio as its designated reference portfolio would not incur these costs.

[968] *Id.*

though the degree of leverage in the fund's portfolio may not have changed.

c. Choice of Absolute or Relative VaR Tests

As another alternative, we considered allowing derivatives risk managers to choose between an absolute and a relative VaR limit, depending on their preferences and without regard to whether a designated reference portfolio would provide an appropriate reference portfolio for purposes of the relative VaR test.[969] Such an alternative would offer funds more flexibility than the final rule and could reduce compliance costs for funds, to the extent that derivatives risk managers would choose the VaR test that is cheaper to implement for their particular fund. However, this alternative may result in less uniformity in the outer limit on funds' leverage risk across the industry, as individual derivatives risk managers would have the ability to choose between VaR-based tests that could provide for different limits on fund leverage risk. Funds that invest in assets with a low VaR, for example, could obtain significantly more leverage under an absolute VaR test because the VaR of the fund's designated reference portfolio would be low. In addition, the relative VaR test resembles the way that section 18 limits a fund's leverage risk.[970]

We therefore continue to believe that allowing any fund to rely on the absolute VaR test may be inconsistent with investors' expectations where a designated reference portfolio would provide an appropriate reference portfolio for purposes of the relative VaR test.[971] As a result, investors in these funds would be less protected from leverage-related risks compared to the final rule.

d. Third-Party Validation of a Fund's VaR Model

Rule 18f–4 does not require third-party validation of a fund's chosen VaR model. As an alternative, we considered requiring that a fund obtain third-party validation of its VaR model, either at inception or in connection with any material changes to the model, to independently confirm that the model is structurally sound and adequately captures all material risks.[972] While such a requirement could help ensure funds' compliance with the rule's VaR-based limit on fund leverage risk, this incremental benefit may not justify the potentially significant additional costs to funds associated with third-party validation of the fund's VaR model.[973]

e. Expected Shortfall or Stressed VaR

The final rule establishes an outer limit for a fund's leverage risk using VaR. Alternatively, we could require funds to comply with a limit based on stressed VaR or expected shortfall. Compared to the final rule's VaR test, both methodologies focus on more extreme losses, but also are associated with quantitative challenges inherent in estimating tail risk.[974] Stressed VaR, for example, can pose quantitative challenges by requiring funds to identify a stress period with a full set of risk factors for which historical data is available. Expected shortfall, for example, generally is more sensitive to extreme outlier losses than VaR calculations because expected shortfall is based on an average of a small number of observations that are in the tail. This heightened sensitivity could be disruptive to a fund's portfolio management in the context of the final rule because it could result in large changes in a fund's expected shortfall as outlier losses enter and exit the observations that are in the tail or that are used to model the tail's distribution.

A limit on fund leverage risk based on stressed VaR or expected shortfall also would likely be less effective at limiting fund leverage risk during normal conditions and protecting investors from losses resulting from less extreme scenarios. Conversely, the final rule's outside limit on fund leverage risk using VaR is complemented by elements in the final rule's derivatives risk management program, such as the stress testing requirement, designed to address VaR's limitations, including that VaR does not capture tail risk. Finally, as VaR is commonly used, we do not believe that stressed VaR or expected shortfall would be cheaper to implement for funds than the final rule's VaR-based tests.

f. Funds Limited to Certain Investors

The final rule does not provide an exemption from the rule's VaR-based limit for funds that limit their investors to ''qualified clients,'' as defined in rule 205–3 under the Advisers Act, and/or are sold exclusively to ''qualified clients,'' ''accredited investors,'' or ''qualified purchasers.''[975] Some commenters suggested that the Commission exempt these funds from the rule's VaR limits.[976]

We believe that the benefits and costs to investors and funds of the final rule's VaR-based limit on fund leverage risk, as discussed in this economic analysis, generally apply similarly across the various types of funds that will be subject to the final rule.[977] However, the investor protection benefits may be attenuated for some more sophisticated investors, to the extent that these investors would prefer to invest in fund strategies that will not be possible under the final rule's VaR limits and that they fully understand the potential for losses in such funds.[978] As discussed above, however, to the extent that a fund limits its investor base as described by these commenters is able to qualify for the exclusions from the investment company definition in section 3(c)(1) or 3(c)(7), the fund can operate as a private fund under those exclusions and will not be subject to section 18. Where a fund does operate as registered investment company or BDC, however, we do not believe that the potentially attenuated benefits to some more sophisticated investors would justify the final rule exempting funds that limit their investor base from the final rule's VaR-based limit on fund leverage risk.

g. No Modification of VaR Limits for Certain Closed-End Funds

The final rule provides higher VaR limits for closed-end funds that have then-outstanding shares of preferred stock issued to investors, compared to open-end funds. Specifically, the relative VaR limit for these closed-end funds is increased from 200% to 250% of the VaR of the fund's designated reference portfolio and the absolute VaR limit is increased from 20% to 25% of the fund's assets. As an alternative, we considered requiring all funds that are subject to the relative or absolute VaR test to adhere to the same limits of 200% of the VaR of the fund's designated reference portfolio or 20% of the fund's assets, respectively.

As suggested by commenters, providing the same relative and absolute VaR limit for open-end funds and closed-end funds does not incorporate

[969] Several commenters suggested this alternative. *See supra* section II.D.2.a.

[970] *See id.*

[971] *See id.*

[972] We did not receive any comments on the discussion of this alternative in the Proposing Release. *See* Proposing Release, *supra* footnote 1, at section III.E.1.e.

[973] We note that the UCITS regime requires third-party validation of funds' VaR models; as a result, these additional costs could be mitigated for fund that are part of a complex that also includes UCITS funds. *See* Proposing Release, *supra* footnote 1, at n. 243.

[974] *See supra* section II.D.1.

[975] *See supra* footnote 415.

[976] *See supra* footnote 416.

[977] *See supra* section III.C.2.

[978] Investors that meet certain asset holdings and income requirements and thus are presumed sophisticated have the ability to invest in unregistered funds that pursue complex derivatives strategies with significant leverage, and these funds are not subject to the requirements of rule 18f–4.

the fact that closed-end funds that have preferred stock outstanding may have a higher starting VaR than open-end funds. That is, even before entering into any derivatives transactions, such closed-end fund's VaR could be higher than an open-end fund's VaR attributable to the structural leverage obtained through the issuance of preferred stock, which section 18 of the Investment Company Act permits closed-end funds but not open-end funds to issue.[979] As a result, investors may expect closed-end funds to have a higher VaR level. In addition, some closed-end funds could potentially have no or limited flexibility to enter into derivatives transactions if we required them comply with the same VaR limits as open-end funds, which could limit investor choice and impose costs on such funds.

2. Alternatives to the VaR Tests

a. Stress Testing

As an alternative to the final rule's VaR-based limit on fund leverage risk, we considered establishing an outside limit on fund leverage risk using a stress testing approach. We understand that many funds that use derivatives transactions already conduct stress testing for purposes of risk management, and the final rule likewise provides that funds required to establish a derivatives risk management program must conduct stress testing.[980] However, we do not believe that a stress testing approach would impose significantly lower costs on funds compared to a VaR-based approach, with the exception of those funds that already conduct stress testing but not VaR testing.[981]

It would be challenging for the Commission to specify a set of asset class shocks, their corresponding shock levels, and, in the case of multi-factor stress testing, assumptions about the correlations of the shocks, in a manner that applies to all funds and does not become stale over time. While we could also prescribe a principles-based stress testing requirement, we believe that the flexibility such an approach would give to individual funds over how to implement the test would render it less effective than the final rule's VaR test at establishing an outer limit on fund leverage risk.

Finally, stress testing generally focuses on a narrower and more remote range of extreme loss events compared to VaR analysis. As a result, a limit on fund leverage risk based on stress testing would likely be less effective at limiting fund leverage risk during normal conditions and protecting investors from losses resulting from less extreme scenarios.

b. Asset Segregation

As another alternative, we considered an asset segregation approach in lieu of the final rule's VaR-based limit on fund leverage risk. For example, we considered an approach similar to the Commission's position in Release 10666, under which a fund engaging in derivatives transactions would segregate cash and cash equivalents equal in value to the full amount of the conditional and unconditional obligations incurred by the fund (also referred to as ''notional amount segregation'').[982] Such an approach could also permit a fund to segregate a broader range of assets, subject to haircuts.[983] Alternatively, we could require funds to segregate liquid assets in an amount equal to the fund's daily mark-to-market liability plus a ''cushion amount'' designed to address potential future losses.

We believe that asset segregation approaches have several drawbacks as a means for limiting fund leverage risk, compared to the final rule's VaR tests.[984] For example, notional amount segregation is not risk-sensitive and could restrict derivatives transactions that would reduce portfolio risk. Similarly, segregation of liquid assets in an amount equal to the fund's daily mark-to-market liability plus a ''cushion amount'' would be difficult to implement in a manner that is applied uniformly across all funds and types of derivatives. In addition, asset segregation approaches raise certain compliance complexities that may not make them significantly less costly to implement for funds than the VaR tests.[985]

In conjunction with the final rule's VaR-based limit, we also considered requiring a fund that relies on the final rule to maintain an amount of ''qualifying coverage assets'' designed to enable a fund to meet its derivatives-related obligations. However, we believe that the final rule's requirements, including the requirements that funds establish derivatives risk management programs and comply with the rule's VaR-based limit on fund leverage risk, will address the risk that a fund may be required to realize trading losses by selling its investments to generate cash to pay derivatives counterparties.[986]

Some commenters suggested that we adopt narrower asset segregation approaches with regard to only certain kinds of transactions. For example, some commenters suggested that we adopt an asset segregation approach for firm and standby commitment agreements that do not satisfy the conditions in the delayed-settlement securities provision.[987] However, these transactions involve many of the same kinds of risks as other derivatives instruments that are considered derivatives transactions under the rule and will therefore be included in the final rule's definition of ''derivatives transactions''. Some commenters also suggested that we adopt an asset segregation approach for reverse repurchase agreements.[988] These transactions can be used to introduce leverage into a fund's portfolio just like other forms of borrowings, or derivatives.[989] Accordingly, the final rule permits a fund either to limit its reverse repurchase and other similar financing transaction activity to the applicable asset coverage limit of the Act for senior securities representing indebtedness, or, instead, to treat them as derivative transactions. Compared to these alternatives, we believe that the final rule will protect investors more effectively, because it provides a consistent set of requirements for funds engaging in economically similar transactions.

[979] *See supra* sections II.D.2.c.ii and II.D.3.

[980] *See also* Proposing Release, *supra* footnote 1, at section II.D.6.a.

[981] *See also* 2019 ICI Comment Letter (stating that, ''depending on the type of fund managed and whether the fund currently employs the test for risk management purposes, some respondents viewed a stress loss test as being more burdensome to implement, while others viewed a VaR test as being more burdensome to implement.'').

[982] *See also* Direxion Comment Letter (suggesting that the Commission ''codify existing asset segregation practices'')

[983] The 2016 DERA Memo, for example, analyzed different risk-based ''haircuts'' that could apply to a broader range of assets. *See, e.g.,* 2016 DERA Memo, *supra* footnote 5.

[984] As discussed above, as a result of current asset segregation practices, funds' derivatives use—and thus funds' potential leverage through derivatives transactions—does not appear to be subject to a practical limit as the Commission contemplated in Release 10666. *See supra* section I.B.3. Funds' current asset segregation practices also may not assure the availability of adequate assets to meet funds' derivatives obligations. *Id.* Several commenters stated that an asset segregation regime may not be an effective means of addressing undue speculation concerns. *See supra* footnote 308 and accompanying text.

[985] *See* Proposing Release, *supra* footnote 1, at section II.D.6.b.

[986] *See supra* footnote 305 and accompanying text.

[987] *See supra* footnote 112 and accompanying text for a discussion of commenter's suggestions related to this alternative.

[988] *See supra* footnotes 722–725 and accompanying text.

[989] *See supra* section III.C.4.

c. Exposure-Based Test

We alternatively considered an exposure-based approach for limiting fund leverage risk in lieu of the final rule's VaR test, as one commenter suggested.[990] An exposure-based test could limit a fund's derivatives exposure, as defined in the rule, to a specified percentage of the fund's net assets. For example, we considered requiring that a fund limit its derivatives exposure to 50% of net assets, to match the amount an open-end could borrow from a bank, or 100% of net assets to match a level of gross market exposure that generally would satisfy the relative VaR test. A similar approach would be to provide that the sum of a fund's derivatives exposure and the value of its other investments cannot exceed 150% or 200% of its net asset value. This latter approach, and particularly if cash and cash equivalents were not included in the calculation, would allow a fund to achieve the level of market exposure permitted for an open-end fund under section 18 using any combination of derivatives and other investments, or likewise to achieve a level of gross market exposure that generally would satisfy the relative VaR test.

While an exposure-based test may be simpler and therefore less costly to implement for the typical fund than the VaR tests, an exposure-based test has certain limitations compared to VaR tests. One limitation is that measuring derivatives exposure based on notional amounts would not reflect how derivatives are used in a portfolio, whether to hedge or gain leverage, nor would it differentiate derivatives with different risk profiles. Various adjustments to the notional amount are available that may better reflect the risk associated with the derivatives transactions, although even with these adjustments the measure would remain relatively blunt. For example, an exposure-based limit could significantly limit certain strategies that rely on derivatives more extensively but that do not seek to take on significant leverage risk.

Some of the limitations of an exposure-based approach could be addressed if rule 18f–4 were to provide an exposure-based test as an optional alternative to the VaR tests, rather than as the sole means of limiting fund leverage risk. Under this second alternative, funds with less complex portfolios might choose to rely on an exposure-based test if this would lead to lower compliance costs than the VaR tests. If we provided that the sum of a fund's derivatives exposure and the value of its other investments cannot exceed 200% of its net asset value, funds below this threshold would generally also pass the relative VaR test. Conversely, funds with more complex portfolios that rely on derivatives more extensively but that do not seek to take on significant leverage risk might choose to rely on the VaR test. As the final rule will already except limited derivatives users from the VaR-based limit on fund leverage risk, however, we do not believe that also giving funds the option of relying on an exposure-based limit on fund leverage risk would be necessary or that it would significantly reduce the compliance burden associated with the final rule.

3. Stress Testing Frequency

Rule 18f–4 will require funds that enter into derivatives transactions and are not limited derivatives users to adopt and implement a derivatives risk management program that includes stress testing, among other elements. The final rule will permit a fund to determine the frequency of stress tests, provided that the fund must conduct stress testing at least weekly.[991]

As an alternative to the weekly requirement, we considered both shorter and longer minimum stress testing frequencies.[992] On the one hand, more frequent stress testing would reflect changes in risk for fund strategies that involve frequent and significant portfolio turnover as well as increases in market stress in a timelier manner compared to less frequent stress testing. On the other hand, given the forward-looking nature of stress testing, we expect that most funds would take foreseeable changes in market conditions and portfolio composition into account when conducting stress testing. More-frequent stress testing also may impose an increased cost burden on funds, compared to less frequent stress testing, although we would expect any additional cost burden to be small, to the extent that funds perform stress testing in an automated manner. Overall, we believe that the final rule's requirement for stress testing at least weekly appropriately balances the anticipated benefits of relatively frequent stress testing against the burdens of administering stress testing. In addition, some commenters said that a weekly stress-testing frequency is consistent with many fund's current practices.[993]

Another alternative would be to permit a fund to determine its own stress testing frequency without the final rule prescribing a minimum stress testing frequency. This approach would provide maximum flexibility to funds regarding the frequency of their stress tests, and would reduce compliance costs for funds that determine that stress testing less frequently than weekly is warranted in light of their own particular facts and circumstances. However, allowing funds individually to determine the frequency with which stress tests are conducted could result in some funds stress testing their portfolios too infrequently to provide timely information to the fund's derivatives risk manager and board. Taking these considerations into account, we are requiring weekly stress tests, rather than less-frequent testing, to provide for consistent and reasonably frequent stress testing by all funds that will be required to establish a derivatives risk management program.

4. Enhanced Disclosure

As an alternative to the requirements in rule 18f–4, such as the derivatives risk management program and the VaR-based limit on fund leverage risk, we could consider addressing the risks associated with funds' use of derivatives through enhanced disclosures to investors with respect to a fund's use of derivatives and the resulting derivatives-related risks.[994] While an approach focused on enhanced disclosures could result in greater fund investment flexibility, we believe that such an approach would be less effective than the final rule in addressing the purposes and concerns underlying section 18 of the Investment Company Act. Section 18 itself imposes a specific limit on the amount of senior securities that a fund may issue, regardless of the level of risk introduced or the disclosure that a fund provides regarding those risks. Absent additional requirements to limit leverage or potential leverage, requiring enhancement to derivatives disclosure alone would not appear to provide any limit on the amount of leverage or leverage risk a fund may obtain. Indeed,

[990] *See supra* footnotes 303–304 and accompanying text for a discussion of comments we received on using an exposure-based approach to limiting fund leverage risk.

[991] *See supra* section II.B.2.c for a discussion of comments we received on this aspect of the proposal.

[992] *See supra* section II.B.2.c for a discussion of the comment letters that addressed this aspect of the proposal.

[993] *See* J.P. Morgan Comment Letter; Better Markets Comment Letter.

[994] *See, e.g.,* Comment Letter of the Fixed Income Market Structure Advisory Committee on proposed rule 6c–11 under the Investment Company Act (Oct. 29, 2018) (recommending that the Commission consider future rulemaking regarding ''leveraged ETP'' investor disclosure requirements).

the degree to which funds use derivatives varies widely between funds. As a result, an approach focused solely on enhanced disclosure requirements may not provide a sufficient basis for an exemption from the requirements of section 18 of the Investment Company Act.

5. Alternative Treatment for Leveraged/Inverse Funds

Under the final rule, leveraged/inverse funds generally will be subject to the requirements of rule 18f–4 on the same basis as other funds that are subject to that rule, including the VaR-based leverage risk limit. The rule will, however, permit currently operating leveraged/inverse funds that seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index that cannot satisfy the VaR-based leverage limit to continue operating at their current leverage levels, provided they meet certain requirements.[995] As an alternative, we could omit the requirement for leveraged/inverse funds to comply with the VaR-based leverage limit and instead limit these funds to, for example, obtaining 300% of the performance or inverse performance of the relevant index and adopt the proposed sales practices rules, which would have required a broker-dealer or investment adviser to exercise due diligence in approving a retail investor's account to invest in leveraged/inverse investment vehicles.[996]

All existing leveraged/inverse funds will be able to continue operating under the final rule; this also would be the case under the alternative. However, the final rule and the alternative have different implications for the ability of fund sponsors to offer new leveraged/inverse funds. While fund sponsors will be able to launch new funds with exposures up to 200% under the final rule, as they would under the alternative, the final rule will prevent fund sponsors from offering new funds with market exposure exceeding 200% that cannot satisfy the final rule's relative VaR test.

As we discussed in the Proposing Release, broker-dealers and investment advisers would incur direct compliance costs associated with implementing due diligence and account approval requirements under the alternative.[997] Commenters also expressed concerns regarding potential legal liability for broker-dealers and investment advisers associated with implementing the requirements under the proposed sales practices rules.[998]

The alternative also would impose a burden on investors to access leveraged/inverse investment vehicles, including on those investors that understand the risks of these products. Some leveraged/inverse investment vehicles may lose existing or potential investors as a result of some retail investors not being approved by their broker-dealer or investment adviser to transact in leveraged/inverse investment vehicles.[999] This could lead to fewer leveraged/inverse investment vehicles being available to investors who would be approved to transact in these vehicles and decreased competition among these products.[1000] However, the final rule may also lead to a reduction in investor choice and competition for some leveraged/inverse investment vehicles. Specifically, because the rule limits the exception from the final rule's VaR-based limit on fund leverage risk to certain leveraged/inverse funds currently in operation, the number of leveraged/inverse funds exceeding this limit may fall under the final rule.[1001]

The alternative may have increased benefits for investor protection, to the extent that account approval requirements that are specific to leveraged/inverse investment vehicles, which are in addition to advisers' and broker-dealers' existing requirements and practices, are effective at helping ensure that investors in these products are limited to those who are capable of evaluating their risks.[1002] The proposed sales practices rules would not have covered all products that offer leveraged or inverse exposures to an index, however, and some of those substitute products may present additional risks. For example, as one commenter stated, some investors could choose to invest in ETNs, which would not have been covered by the proposed sales practices rules and which are subject to issuer default, potentially hampering the effectiveness of the alternative to improve investor protection.[1003]

As another alternative, we considered placing additional disclosure-based requirements on intermediaries offering leveraged/inverse investment vehicles to retail investors, as suggested by some commenters.[1004] For example, some commenters suggested we require broker-dealers to: (1) Provide their self-directed customers with short, plain-English disclosures of the potential risks of trading leveraged/inverse investment vehicles, both at the point of sale and periodically thereafter; and (2) require such customers to provide an acknowledgement of receipt of these disclosures.[1005] Similar to the proposed sales practices rules, this alternative could have investor protection benefits, to the extent that these disclosures would be effective at helping ensure that investors in these products are limited to those who are capable of evaluating their risks. At the same time, this alternative would also impose costs on the intermediaries that would be required to implement the requirement and would impose a burden on investors to access leveraged/inverse investment vehicles, including on those investors that understand the risks of these products.

As another alternative, we considered requiring all leveraged/inverse funds to comply with the final rule's VaR-based leverage limit. Compared to the final rule, this alternative would therefore not permit any currently operating leveraged/inverse funds that seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index that cannot satisfy the VaR-based

[995] This exception is limited to funds currently in operation, and would therefore not allow a fund sponsor to launch a new leveraged/inverse fund that exceeds this exposure limit.

[996] As defined in the proposed sales practices rules, leveraged/inverse investment vehicles include leveraged/inverse funds and certain exchange-listed commodity- or currency-based trusts or funds that use a similar leveraged/inverse strategy. (*See* Proposing Release, *supra* footnote 1, at section II.G.2.) The provision of rule 18f–4 that provides an exception from the VaR-based limit on fund leverage risk for certain leveraged/inverse funds currently in operation with leverage or inverse multiples exceeding 200% is only available to such a fund if it does not increase the level of leveraged or inverse market exposure that it seeks, directly or indirectly, to provide. This provision effectively limits these funds from operating with a leverage or inverse multiple exceeding 300%, as the Commission proposed for leveraged/inverse funds generally. The alternative considered in this section also includes such a requirement and therefore does not differ from the final rule in this respect. The Proposing Release discussed the effects of alternative exposure limits for leveraged/inverse funds. (*See* Proposing Release, *supra* footnote 1, at section III.E.4.)

[997] *See* Proposing Release, *supra* footnote 1, at section III.C.5.

[998] *See supra* footnote 582.

[999] *See, e.g.,* Americans for Limited Government Comment Letter; Direxion Comment Letter; ProShares Comment Letter; Schwab Comment Letter.

[1000] *See also* Flannery Comment Letter, *supra* footnote 901 (stating that the proposed sales practices rules could lead to reduced demand for leveraged/inverse funds and make offering them economically unviable); and Proposing Release, *supra* footnote 1, at section III.D.2.

[1001] *See supra* sections III.C.5 and III.D.2.

[1002] Neither Regulation Best Interest nor investment advisers' fiduciary obligations apply to investments in leveraged/inverse investment vehicles by self-directed retail investors.

[1003] *See* Flannery Comment Letter, *supra* footnote 901.

[1004] *See, e.g.,* Direxion Comment Letter; Schwab Comment Letter.

[1005] *See, e.g.,* Schwab Comment Letter; TD Ameritrade Comment Letter.

leverage limit to continue operating at their current leverage levels. This alternative would protect investors who may not be capable of evaluating the risks associated with leveraged/inverse funds that cannot satisfy the rule's VaR based leverage limit. At the same time, this alternative would restrict investor choice for investors who are capable of evaluating the risks associated with these funds and would impose a cost on these funds by requiring them to either stop operating or change their investment objectives.

In light of these considerations and the staff review of the effectiveness of the existing regulatory requirements in protecting investors in leveraged/inverse and other complex investment products, we are not adopting the proposed sales practices rules or any of the other alternatives discussed in this section at this time.

IV. Paperwork Reduction Act Analysis

A. Introduction

Rule 18f–4 will result in new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1006] In addition, the amendments to rules 6c–11 and 30b1–10 under the Investment Company Act, as well as to Forms N–PORT, Form N–LIQUID (which will be re-titled Form N–RN), and N–CEN will affect the collection of information burden under those rules and forms.[1007]

The titles for the existing collections of information are: ''Form N–PORT'' (OMB Control No. 3235–0731); ''Rule 30b1–10 and Form N–LIQUID'' (OMB Control No. 3235–0754); ''Form N–CEN'' (OMB Control No. 3235–0730); and ''Rule 6c–11 under the Investment Company Act of 1940, Exchange-traded funds'' (OMB Control No. 3235–0764). The title for the new collection of information will be: ''Rule 18f–4 under the Investment Company Act of 1940, Use of Derivatives by Registered Investment Companies and Business Development Companies.'' The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently-valid control number.

B. Rule 18f–4

Rule 18f–4 permits a fund to enter into derivatives transactions, notwithstanding the prohibitions and restrictions on the issuance of senior securities under section 18 of the Investment Company Act.

A fund that relies on rule 18f–4 to enter into derivatives transactions generally will be required to: Adopt a derivatives risk management program; have its board of directors approve the fund's designation of a derivatives risk manager and receive direct reports from the derivatives risk manager about the derivatives risk management program; and comply with a VaR-based test designed to limit a fund's leverage risk consistent with the investor protection purposes underlying section 18. Rule 18f–4 includes an exception from the derivatives risk management program requirement and limit on fund leverage risk if a fund limits its derivatives exposure to 10% of its net assets (the fund may exclude from this calculation derivatives transactions that it uses to hedge certain currency and interest rate risks). A fund relying on this exception will be required to adopt policies and procedures that are reasonably designed to manage its derivatives risks.

Rule 18f–4 also includes an exception from the VaR-based limit on leverage risk for a leveraged/inverse fund that cannot comply with rule 18f–4's limit on fund leverage risk and that, as of October 28, 2020, is: (1) In operation, (2) has outstanding shares issued in one or more public offerings to investors, and (3) discloses in its prospectus that it has a leverage multiple or inverse multiple that exceeds 200% of the performance or the inverse of the performance of the underlying index. A fund relying on this exception must disclose in its prospectus that it is not subject to rule 18f–4's limit on fund leverage risk.[1008] Rule 18f–4 also requires a fund to meet certain recordkeeping requirements that are designed to provide the Commission, and the fund's board of directors and compliance personnel, the ability to evaluate the fund's compliance with the rule's requirements. Finally, rule 18f–4 includes provisions that will permit funds to enter into reverse repurchase agreements (and similar financing transactions) and ''unfunded commitments'' to make certain loans or investments, and to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, subject to conditions tailored to these transactions.

The purpose of rule 18f–4 is to address the investor protection purposes and concerns underlying section 18 of the Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives and the other transactions addressed in the rule. The respondents to rule 18f–4 will be registered open- and closed-end management investment companies and BDCs.[1009] We estimate that 5,203 funds will likely rely on rule 18f–4.[1010] Compliance with rule 18f–4 will be mandatory for all funds that seek to engage, in reliance on the rule, in derivatives transactions and certain other transactions that the rule addresses, which would otherwise be subject to the restrictions of section 18. To the extent that records required to be created and maintained by funds under the rule are provided to the Commission in connection with examinations or

[1006] 44 U.S.C. 3501–3520.

[1007] We do not believe that the final conforming amendment to Form N–2, to reflect a clarification that funds do not have to disclose in their senior securities table the derivatives transactions and unfunded commitment agreements entered into in reliance on rule 18f–4, makes any new substantive recordkeeping or information collection within the meaning of the PRA. The Commission stated this view in the Proposing Release and did not receive any comments regarding any burden and cost estimates to Form N 2. Accordingly, we do not revise any burden and cost estimates in connection with this amendment.

Similarly, we do not believe that the final conforming amendments to rule 22e–4 and Form N–PORT, to remove references to assets ''segregated to cover'' derivatives transactions in the rule and form and to amend the Form N–PORT general instructions to clarify the term ''derivatives transaction'' in light of the adoption of rule 18f–4, result in any new substantive recordkeeping or information collection within the meaning of the PRA. Accordingly, we do not revise any burden and cost estimates in connection with these amendments.

[1008] *See* rule 18f–4(c)(5)(iii); *supra* section II.F.2.

[1009] *See* rule 18f–4(a) (defining ''fund'').

[1010] We estimate this number as follows: 2,766 funds that will be subject to the derivatives risk management program requirement + 2,437 funds relying on the limited derivatives user exception and complying with the related limited derivatives user requirements = 5,203 funds. *See supra* text accompanying footnote 849 (estimated number of funds subject to the derivatives risk management program requirement), and *supra* paragraph following footnote 892 (estimated number of funds that will qualify as limited derivatives users).

The Commission's estimates of the relevant wage rates for internal time costs in the tables below are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013. The estimated wage figures are modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, overhead, and adjusted to account for the effects of inflation. *See* Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013 (''SIFMA Report''). These wage figures differ slightly from the same figures the Commission used in its estimates in the Proposing Release to account for incremental inflation effects. The Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, takes into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

investigations, such information will be kept confidential subject to the provisions of applicable law.

1. Derivatives Risk Management Program

Rule 18f–4 requires certain funds relying on the rule to adopt and implement a written derivatives risk management program, which includes policies and procedures reasonably designed to manage the fund's derivatives risks and a periodic review requirement.[1011] We estimate that 2,766 funds will be subject to the program requirement.[1012]

Table 1 below summarizes the initial and ongoing annual burden estimates associated with the derivatives risk management program requirement under rule 18f–4 as adopted. While the Commission did not receive any comments specifically addressing the estimated PRA burdens in the Proposing Release associated with the derivatives risk management program, it did receive comments suggesting that the implementation of the program, including the associated collections of information as defined in the PRA, may be more burdensome than the Commission estimated at proposal.[1013] As such, we have increased the annual burden estimates associated with the derivatives risk management program, as shown in Table 1 below.

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[1011] *See* rule 18f–4(c)(1); *supra* section II.B (discussing the derivatives risk management program requirements).

[1012] *See supra* sentence following footnote 882. A fund that is a limited derivatives user will not be required to comply with the program requirement. Funds that are limited derivatives users will be required to adopt policies and procedures that are reasonably designed to manage their derivatives risks. *See* rule 18f–4(c)(4); *infra* section IV.B.6 (discussing collections of information related to limited derivatives users).

[1013] *See supra* section II.B.

Table 1: Derivatives Risk Management Program PRA Estimates

	Internal initial burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Annual external cost burden
PROPOSED ESTIMATES						
Written derivatives risk management program development	12 hours	4 hours	×	$357 (derivatives risk manager)	$1,428	$0
	12 hours	4 hours	×	$466 (assistant general counsel)	$1,864	
	12 hours	4 hours	×	$365 (compliance attorney)	$1,460	
Periodic review and revisions of the program	0 hours	2 hours	×	$357 (derivatives risk manager)	$714	$0
	0 hours	2 hours	×	$466 (assistant general counsel)	$932	
	0 hours	2 hours	×	$365 (compliance attorney)	$730	
Total annual burden per fund		**18 hours**			**$7,128**	**$0**
Number of funds		× 2,693			× 2,693	× 2,693
Total annual burden		**48,474 hours**			**$19,195,704**	**$0**
FINAL ESTIMATES						
Written derivatives risk management program development	45 hours	15 hours	×	$360 (derivatives risk manager)	$5,400	$4,890[3]
	45 hours	15 hours	×	$470 (assistant general counsel)	$7,050	
	45 hours	15 hours	×	$368 (compliance attorney)	$5,520	
Periodic review and revisions of the program	0 hours	8 hours	×	$360 (derivatives risk manager)	$2,880	$2,934[4]
	0 hours	8 hours	×	$470 (assistant general counsel)	$3,760	
	0 hours	8 hours	×	$368 (compliance attorney)	$2,944	
Total annual burden per fund		**69 hours**			**$27,554**	**$7,824**
Number of funds		× 2,766			× 2,766	× 1,383[5]
Total annual burden		**190,854**			**$76,214,364**	**$10,820,592**

Notes:
1. For "Written Derivatives Risk Management Program Development," these estimates include initial burden estimates annualized over a three-year period.
2. *See supra* footnote 1010.
3. This estimated burden is based on the estimated wage rate of $489/hour, for 10 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).
4. This estimated burden is based on the estimated wage rate of $489/hour, for 6 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).
5. We estimate that 50% of funds will use outside legal services for these collections of information. This estimate takes into account that funds may elect to use outside legal services (along with in-house counsel) in connection with these requirements of rule 18f-4, based on factors such as fund budget and the fund's standard practices for using outside legal services, as well as personnel availability and expertise.

2. Board Oversight and Reporting

Rule 18f–4 requires: (1) A fund's board of directors to approve the designation of the fund's derivatives risk manager, (2) the derivatives risk manager to provide certain written reports to the board.[1014] We estimate that 2,766 funds will be subject to these requirements.[1015]

Table 2 below summarizes the initial and ongoing annual burden estimates associated with the board oversight and reporting requirements under rule 18f–4. While the Commission did not receive any comments specifically addressing the estimated PRA burdens in the Proposing Release associated with the board oversight and reporting requirements, it did receive comments suggesting that requiring the fund's board of directors to approve the designation of the fund's derivatives risk manager would place increased burdens on the fund's board of directors.[1016] Accordingly, we have adjusted the proposal's estimated annual burden hours and total time costs to account for the potential for increased time burdens on the board of directors and to reflect the Commission's updated views on typical time burdens associated with similar board reporting requirements in other Commission regulations.

[1014] *See* rule 18f–4(c)(3)(i) through (iii); *supra* section II.C. Burdens associated with reports to the fund's board of directors of material risks arising from the fund's derivatives transactions, as described in rule 18f–4(c)(1)(v), are discussed above in *supra* section IV.B.1.

[1015] *See supra* footnotes 849, 1010 and accompanying text.

[1016] *See* Dechert Comment Letter I; IDC Comment Letter; *see also supra* section II.C.1.

Table 2: Board Oversight and Reporting PRA Estimates

	Internal initial burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Annual external cost burden
PROPOSED ESTIMATES						
Approving the designation of the derivatives risk manager	3 hours	1 hour	×	$17,860 (combined rate for 4 directors)	$17,860	
Derivatives risk manager written reports[3]		8 hours	×	$357 (derivatives risk manager)	$2,856	
		1 hour	×	$17,860 (combined rate for 4 directors)	$17,860	
Total annual burden per fund		**10 hours**			**$38,576[3]**	
Number of funds		× 2,693			× 2,693	
Total annual burden		**26,930 hours**			**$103,885,168**	
FINAL ESTIMATES						
Approving the designation of the derivatives risk manager	3 hours	2 hours	×	$4,770 (combined rate for 9 directors)[4]	$9,540	$1,467[5]
Derivatives risk manager written reports	12 hours	18 hours	×	$360 (derivatives risk manager)	$6,480	$1,956[6]
	1.5 hours	2 hours	×	$4,770 (combined rate for 9 directors)[4]	$9,540	
	6 hours	6 hours	×	$368 (compliance attorney)	$2,208	
Total annual burden per fund		**28 hours**			**$27,768**	**$3,423**
Number of funds		× 2,766			× 2,766	1,383[7]
Total annual burden		**77,448 hours**			**$76,806,288**	**4,734,009**

Notes:
1. This estimate includes initial burden estimates annualized over a three-year period, plus any estimated ongoing annual burden hours.
2. *See supra* footnote 1012 (regarding wage rates).
3. This reflects an increase to the estimate that appeared in the Proposing Release, to account for a correction to the total internal time costs calculation as it appeared in the Proposing Release.
4. This reflects a reduction of the proposed estimate, to account for: (1) inadvertent quadrupling of the estimated rate in the proposal; and (2) updated assumptions about the number of directors sitting on a fund's board.
5. This estimated burden is based on the estimated wage rate of $489/hour, for 3 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).
6. This estimated burden is based on the estimated wage rate of $489/hour, for 4 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).
7. We estimate that 50% of funds will use outside legal services to assist with these collections of information. This estimate takes into account that funds may elect to use outside legal services (along with in-house counsel) in connection with these requirements of rule 18f-4, based on factors such as fund budget and the fund's standard practices for using outside legal services, as well as personnel availability and expertise.

3. VaR Remediation

Rule 18f–4 requires that if a fund is not in compliance within five business days, following an exceedance of the VaR-based fund leverage limit, the derivatives risk manager must provide certain written reports to the fund's board.[1017] In contrast, the proposed rule would have required the derivatives risk manager to notify the fund's board (and would not have specifically required a written report for such notification) following the fund being out of compliance with the VaR-based fund leverage limit for three business days.[1018]

Table 3 below summarizes the initial and ongoing annual burden estimates associated with the VaR-related remediation reports required under rule 18f–4. For purposes of the PRA analysis, we do not estimate that there will be any initial or ongoing external costs associated with the VaR-related remediation requirements.

[1017] *See* rule 18f–4(c)(2)(ii)(A) through (C); *supra* section II.D.6.b.

[1018] *See supra* section II.D.6.b.

Table 3: VaR Remediation PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs
		FINAL ESTIMATES			
VaR-related remediation reports		0.1 hours[2]	×	$360 (derivatives risk manager)	$36.00
		0.1 hours[2]	×	$332 (senior portfolio manager)	$33.20
		0.1 hours[2]		$368 (compliance attorney)	$36.80
		0.02 hours[3]	×	$4,770 (combined rate for 9 directors)	$95.40
Total annual burden per fund		**0.32 hours**			**$201.40**
Number of funds		× 2,696			× 2,696
Total annual burden		**863 hours**			**$542,974**

Notes:

1. *See supra* footnote 1010 (regarding wage rates).
2. This estimate is based on the assumption that, of the 2,696 funds that will be required to comply with either of the VaR tests, on average 27 funds (or 1%), breach the relative or absolute VaR test annually. Each of the derivatives risk manager, a senior portfolio manager, and a compliance attorney will spend 10 hours preparing and reviewing related remediation reports. However, because we estimate that only 1% of funds will breach the relative or absolute VaR test annually, the hours burden is being decreased by 99%. 10 hours x 1%= 0.1 hours.
3. This estimate is based on the assumption that, of the 2,696 funds that will be required to comply with either of the VaR tests, on average 27 funds (or 1%), breach the relative or absolute VaR test annually. The board will spend 2 hours reviewing related remediation reports. However, because we estimate that only 1% of funds will breach the relative or absolute VaR test annually, the hours burden is being decreased by 99%. 2 hours x 1%= 0.02 hours.

4. Disclosure Requirement for Certain Leveraged/Inverse Funds

Under the final rule, an over-200% leveraged/inverse fund currently in operation will not have to comply with the VaR-based leverage risk limit. Such a fund is required to disclose in its prospectus that it is not subject to rule 18f–4's limit on fund leverage risk.[1019] This requirement represents a change from the proposal, in which we proposed to require that all leveraged/inverse funds (*i.e.,* not only those with a leverage or inverse multiple above 200% of the underlying index) disclose that they are not subject to the rule's VaR-based leverage risk limit. As such, whereas in the proposal the Commission estimated that 269 leveraged/inverse funds would be subject to this prospectus disclosure requirement, we now estimate that 70 over-200% leveraged/inverse funds will be subject to this requirement.[1020]

Table 4 below summarizes the initial and ongoing annual burden estimates associated with the rule's disclosure requirement for over-200% leveraged/inverse funds. We do not estimate that there will be any initial or ongoing external costs associated with this disclosure requirement. The Commission did not receive any comments relating to the estimated PRA burdens set forth in the Proposing Release associated with the prospectus disclosure requirement for leveraged/inverse funds.[1021] As shown in Table 4 below, we are making a modest increase to the estimated per-fund burden associated with the prospectus disclosure requirement for over-200% leveraged/inverse funds to reflect updated views on the burdens related to similar prospectus disclosure requirements.

[1019] *See* rule 18f–4(c)(5)(iii); *supra* section II.F.

[1020] *See supra* paragraph accompanying footnote 819 (estimating 70 leveraged/inverse ETFs (and 0 leveraged/inverse mutual funds) that currently seek to provide leveraged or inverse market exposure exceeding 200% of the return or inverse return of the relevant index).

[1021] *See supra* footnote 612 and accompanying text (discussing comment received on proposed prospectus disclosure requirement generally).

Table 4: Disclosure Requirement Associated with Certain Leveraged/Inverse Funds PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs
PROPOSED ESTIMATES					
Leveraged/inverse fund prospectus disclosure	0 hours	.25 hours	×	$309 (compliance manager)	$77
	0 hours	.25 hours	×	$365 (compliance attorney)	$91
Total annual burden per fund		**.5 hour[2]**			**$168**
Number of funds		× 269			× 269
Total annual burden		**135 hours**			**$45,192**
FINAL ESTIMATES					
Leveraged/inverse fund prospectus disclosure	1.5 hours	0.5 hours[3]	×	$312 (compliance manager)	$156
	1.5 hours	0.5 hours[3]	×	$368 (compliance attorney)	$184
Total annual burden per fund		**1 hour**			**$340**
Number of funds		× 70			× 70
Total annual burden		**70 hours**			**$23,800**

Notes:
1. *See supra* footnote 1010 (regarding wage rates).
2. This reflects a reduction of the annual burden hours estimate that appeared in the Proposing Release, to account for inadvertent doubling of the estimated burden hours in the Proposing Release.
3. This estimate includes initial burden estimates annualized over a three-year period.

5. Disclosure Changes for Money Market Funds

In a change from the proposal, the final rule includes a provision that will permit money market funds to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle (''delayed-settlement securities provision''). As in the proposal, money market funds are excluded from the full scope of the final rule because they do not typically enter into derivatives transactions, as defined in the rule.[1022] To the extent a money market fund currently discloses in its prospectus that it may enter into transactions covered by the final rule other than transactions covered by the delayed-settlement securities provision, money market funds will be subject to the burdens associated with making disclosure changes to their prospectuses. We estimate that 420 funds could be subject to such disclosure changes.[1023]

Table 5 below summarizes the initial and ongoing annual burden estimates associated with disclosure changes that money market funds could make because of rule 18f–4. For purposes of this PRA analysis, we do not estimate that there will be any initial or ongoing external costs associated with this disclosure change requirement. The Commission did not receive any comments relating to the estimated PRA burdens set forth in the Proposing Release associated with potential disclosure changes for money market funds. However, we have adjusted the proposal's estimated annual burden hours and total time costs to reflect the Commission's updated views on typical time burdens associated with similar disclosure requirements in other Commission regulations.

[1022] *See* rule 18f–4(a) (defining the term ''Fund'' to ''. . .not include a registered open-end company that is regulated as a money market fund'').

[1023] *See supra* footnote 804 and accompanying text. This likely overestimates the total number of funds subject to these disclosure changes, because we believe that money market funds currently do not typically engage in derivatives transactions.

Table 5: Disclosure Changes for Money Market Funds PRA Estimates

	Internal initial burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs
PROPOSED ESTIMATES					
Money market prospectus disclosure changes	.75 hours	.25 hours	×	$309 (compliance manager)	$77
	.75 hours	.25 hours	×	$365 (compliance attorney)	$91
Total annual burden per fund		**.5 hours**			**$168**
Number of funds		× 413			× 413
Total annual burden		**207 hours**			**$69,384**
FINAL ESTIMATES					
Money market prospectus disclosure changes	3 hours	1 hour	×	$312 (compliance manager)	$312
	3 hours	1 hour	×	$368 (compliance attorney)	$368
Total annual burden per fund		**2 hours**			**$680**
Number of funds		× 420			× 420
Total annual burden		**840 hours**			**$285,600**

Notes:
1. These estimates include initial burden estimates annualized over a three-year period.
2. See supra footnote 1010 (regarding wage rates).

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6. Requirements for Limited Derivatives Users

Rule 18f–4 will require funds relying on the limited derivatives user provisions to adopt and implement written policies and procedures reasonably designed to manage the fund's derivatives risks.[1024] In addition to the initial burden to document the policies and procedures, we estimate that limited derivatives users will have an ongoing burden associated with any review and revisions to their policies and procedures to ensure that they are ''reasonably designed'' to manage the fund's derivatives risks. Rule 18f–4 also requires that the adviser for any limited derivatives user that exceeds the 10% derivatives exposure threshold and does not reduce its exposure within five business days, must provide a written report to the fund's board of directors informing them whether the adviser intends to reduce the exposure promptly, but within no more than 30 days of the exceedance, or put in place a derivatives risk management program and comply with the VaR-based limit on fund leverage risk as soon as reasonably practicable.[1025] We estimate that 2,437 funds will be subject to these limited derivatives users requirements.[1026]

Table 6 below summarizes the initial and ongoing annual burden estimates associated with the requirements for limited derivatives users under rule 18f–4. The Commission did not receive comments relating to the estimated hour and costs burdens associated with the preparation and maintenance of a limited derivatives user's policies and procedures. However, we have increased the proposal's estimated burden hours and internal and external total time costs to account for the potential that funds may implement additional policies and procedures related to the changes we have incorporated into the final rule to address exceedances of the 10% derivatives exposure threshold. This increase also reflects the Commission's updated views on typical time burdens and costs associated with the development of fund risk management policies and procedures.

Some commenters did state that many funds already have policies and procedures in place to manage certain risks associated with their derivatives transactions.[1027] We do not have data to determine how many funds currently have written policies and procedures in place that will satisfy the rule's requirement. However, for purposes of our estimated hour and costs burden, we assume that all limited derivatives users will incur a cost associated with this requirement. Accordingly, our estimate may be over-inclusive, to the extent that it counts funds that already have in place policies and procedures reasonably designed to manage the fund's derivatives risks. Our estimate also may be under-inclusive, to the extent that it does not count funds that do not currently use derivatives, but that might want to implement policies and procedures reasonably designed to manage derivatives risks in order to have future flexibility to engage in derivatives transactions under the final's rule's limited derivatives user provision.

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[1024] *See* rule 18f–4(c)(4); *supra* section II.E.3 (discussing the policies and procedures requirement for limited derivatives users).

[1025] *See* rule 18f–4(c)(4)(ii); *supra* section II.E.4.

[1026] *See supra* paragraph following footnote 892.

[1027] *See* Fidelity Comment Letter; IAA Comment Letter*; see also supra* footnote 893 and accompanying paragraph (stating that the Commission believes that ''these policies and procedures could be readily adapted to meet the final rule's requirements without significant additional cost'').

Table 6: Requirements for Limited Derivatives Users PRA Estimates

	Internal initial burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Annual external costs burdens
PROPOSED ESTIMATES						
Written policies and procedures	3 hours	1 hour	×	$329 (senior portfolio manager)	$329	$0
	3 hours	1 hour	×	$365 (compliance attorney)	$365	
Review of policies and procedures	0 hours	.25 hours		$329 (senior portfolio manager)	$82.25	$0
	0 hours	.25 hours		$365 (compliance attorney)	$91.25	
Total annual burden per fund		**2.5 hours**			**$867.50**	
Number of funds		× 2,398			× 2,398	
Total annual burden		**5,995 hours**			**$2,080,265**	**$0**
FINAL ESTIMATES						
Written policies and procedures	18 hours	6 hours	×	$332 (senior portfolio manager)	$1,992	$1,956[5]
	18 hours	6 hours	×	$368 (compliance attorney)	$2,208	
Review of policies and procedures	0 hours	3 hours		$332 (senior portfolio manager)	$996	$978[6]
	0 hours	3 hours		$368 (compliance attorney)	$1,104	
Limited derivatives user-related remediation reports		0.1 hours[3]	×	$332 (senior portfolio manager)	$33.20	$0
		0.1 hours[3]		$368 (compliance attorney)	$36.80	
		0.02 hours[4]	×	$4,770 (combined rate for 9 directors)	$95.40	
Total annual burden per fund		**18.22 hours**			**$6,465.40**	**$2,934**
Number of funds		× 2,437			× 2,437	× 1,219[7]
Total annual burden		**44,402 hours**			**$15,756,180**	**$3,576,546**

Notes:
1. For "Written Policies and Procedures," these estimates include initial burden estimates annualized over a three-year period.
2. *See supra* footnote 1010 (regarding wage rates).
3. This estimate is based on the assumption that, of the 2,437 funds that will be limited derivatives user, on average 25 funds (or 1%), will be subject to the board reporting requirement in the exception's remediation provision annually. Each of the senior portfolio manager and compliance attorney will spend 10 hours preparing and reviewing the related remediation reports. However, because we estimate that only 1% of funds will be subject to the board reporting requirement in the exception's remediation provision annually, the hours burden is being decreased by 99%. 10 hours x 1%= 0.1 hours.
4. This estimate is based on the assumption that, of the 2,437 funds that will be limited derivatives user, on average 25 funds (or 1%), will be subject to the board reporting requirement in the exception's remediation provision annually. The board will spend 2 hours reviewing related remediation reports. However, because we estimate that only 1% of funds will be subject to the board reporting requirement in the exception's remediation provision annually, the hours burden is being decreased by 99%. 2 hours x 1%= 0.02 hours.
5. This estimated burden is based on the estimated wage rate of $489/hour, for 4 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).
6. This estimated burden is based on the estimated wage rate of $489/hour, for 2 hours, for outside legal services. *See supra* footnote 1010 (regarding wage rates with respect to external cost estimates).

7. We estimate that 50% of funds will use outside legal services for these collections of information. This estimate takes into account that funds may elect to use outside legal services (along with in-house counsel) in connection with these requirements of rule 18f-4, based on factors such as fund budget and the fund's standard practices for using outside legal services, as well as personnel availability and expertise.

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7. Recordkeeping Requirements

Rule 18f–4 will require a fund that enters into derivatives transactions to maintain certain records. As proposed, if the fund is not a limited derivatives user, the fund will be required to maintain records related to the fund's derivatives risk management program and the VaR-based limit on fund leverage risk, including records related to board oversight and reporting (including records of the written reporting that the rule requires to occur between the derivatives risk manager and the fund's board when the fund is out of compliance with the applicable VaR test).[1028] As a modification to the proposal the final rule includes further obligations for a fund that is out of compliance with its applicable VaR test to provide written reports to the board.[1029] These additional reports will be covered by the final recordkeeping requirements.

If the fund is a limited derivatives user, the fund will be required to maintain a written record of its policies and procedures that are reasonably designed to manage derivatives risks.[1030] As a conforming change in the final rule, a limited derivatives user will also be required to maintain records of written reports provided to the board upon any exceedance by the fund of the 10% derivatives exposure threshold, in accordance with the rule.[1031]

Further, in light of the final rule providing two separate treatment options for a fund that enters into a reverse repurchase agreement or similar financing transaction, we have conformed the recordkeeping provision to require that a fund that enters into reverse repurchase agreements or similar financing transactions to maintain a written record documenting whether it is complying with the asset coverage requirements of section 18 with respect to these transactions, or alternatively whether it is treating these transactions as derivatives transactions for all purposes under rule 18f–4.

Finally, a fund engaging in unfunded commitment agreements will be required to maintain records documenting the sufficiency of its cash and cash equivalents to meet its obligations with respect to each unfunded commitment agreement.[1032]

We estimate that 5,203 funds will be subject to recordkeeping requirements under the final rule (although not all funds will be subject to all of the rule's recordkeeping requirements).[1033] Below we estimate the average initial and ongoing annual burdens associated with the recordkeeping requirements. This average takes into account that some funds such as limited derivatives users may have less extensive recordkeeping burdens than other funds that use derivatives, or the other transactions that final rule 18f–4 addresses, more substantially.

Table 7 below summarizes the proposed PRA estimates associated with the recordkeeping requirements in rule 18f–4. The Commission did not receive any comments related to the estimated PRA burdens set forth in the Proposing Release associated with the rule's recordkeeping requirements. However, we have adjusted the proposal's estimated annual burden hours and total time costs, on account of the conforming modifications to the proposed recordkeeping requirements that we are adopting, as well as to reflect the Commission's updated views on typical time burdens and personnel associated with similar recordkeeping requirements in other Commission regulations.

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[1028] *See* rule 18f–4(c)(6)(i)(A) through (C).

[1029] *See supra* footnote 772 and accompanying text.

[1030] *See* rule 18f–4(c)(6)(i)(D).

[1031] *Id.*

[1032] *See* rule 18f–4(e)(2).

[1033] We estimate that the number of funds that will be subject to the recordkeeping requirements includes the number of funds that we estimate will be required to comply with the derivatives risk management program requirement (2,766 funds, which number encompasses the 2,696 funds that we estimate will be subject to the VaR test requirements) and the number of funds that we estimate will qualify as limited derivatives users (2,437 funds). *See supra* footnote 1010 and sections III.C.1–III.C.3. 2,766 funds + 2,437 funds = 5,203 funds.

Based on staff review of filings on Forms N–PORT and N–CEN for 2019, we estimate that 181 funds, or 1% of all funds subject to the final rule, will enter into reverse repurchase agreements or similar financing transactions (excluding BDCs, which we do not believe enter into such transactions to a significant degree) and will be subject to the recordkeeping requirements in the final rule. We further estimate that approximately 8.5% of open-end funds, 30% of registered closed-end funds, and 100% of BDCs, or 1,339 funds (10% of all funds subject to the rule) will enter into unfunded commitments and will incur be subject to the recordkeeping requirements in the final rule. To prevent over-counting, we are not adding these numbers of funds that engage in reverse repurchase agreements and unfunded commitment agreements to the sum of 5,203 funds discussed above, because we assume that these funds generally either would have to comply with the derivatives risk management program requirement or would qualify as limited derivatives users.

Table 7: Recordkeeping PRA Estimates

	Internal initial burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Initial external cost burden	Annual external cost burden
PROPOSED ESTIMATES							
Establishing recordkeeping policies and procedures	1.5 hours	.5 hours		$62 (general clerk)	$31	$1,800	$600
	1.5 hours	.5 hours		$95 (senior computer operator)	$47.50		
Recordkeeping	0 hours	2 hours	×	$62 (general clerk)	$124	$0	$0
	0 hours	2 hours	×	$95 (senior computer operator)	$190		
Total annual burden per fund		**5 hours**			$392.50		**$600**
Number of funds		× 5,091			× 5,091		5,091
Total annual burden		**25,455 hours**			$1,998,218[3]		**$3,054,600**
FINAL ESTIMATES							
Establishing recordkeeping policies and procedures for derivatives risk management program and VaR requirements	9 hours	3 hours		$63 (general clerk)	$189	$1,800[5]	$600
	9 hours	3 hours		$96 (senior computer operator)	$288		
	9 hours	3 hours		$368 (compliance attorney)	$1,104		
Recordkeeping for derivatives risk management program and VaR requirements	0 hours	16 hours	×	$63 (general clerk)	$1,008	$0	$0
	0 hours	16 hours	×	$96 (senior computer operator)	$1,536		
	0 hours	16 hours		$368 (compliance attorney)	$5,888		
Total annual burden per fund		**57 hours**			**$10,013**		**$600**
Number of funds		× 2,766[4]			× 2,766[4]		2,766
Total annual burden		**157,662 hours**			**$27,695,958**		**$1,659,600**
Establishing recordkeeping policies and procedures for limited derivatives users	1.5 hours	.5 hours		$63 (general clerk)	$31.50	$1,800	$600
	1.5 hours	.5 hours		$96 (senior computer operator)	$48		
	1.5 hours	.5 hours		$368 (compliance attorney)	$184		
Recordkeeping for limited derivatives users	0 hours	2 hours	×	$63 (general clerk)	$126	$0	$0
	0 hours	2 hours	×	$96 (senior computer operator)	$192		
	0 hours	2 hours		$368 (compliance attorney)	$736		
Total annual burden per fund		**7.5 hours**			**$1,317.50**		**$600**

Number of funds		× 2,437		× 2,437		x2,437
Total annual burden		**18,278 hours**		**$3,210,748**		**$1,462,200**
Establishing recordkeeping policies and procedures for funds engaging in unfunded commitment agreements	1.5 hours	.5 hours	$63 (general clerk)	$31.50	$0	$0
	1.5 hours	.5 hours	$96 (senior computer operator)	$48		
	1.5 hours	.5 hours	$368 (compliance attorney)	$184		
Recordkeeping for unfunded commitment agreements	0 hours	2 hours	$63 (general clerk)	$126		
	0 hours	2 hours	$96 (senior computer operator)	$192		
	0 hours	2 hours	$368 (compliance attorney)	$736		
Total annual burden per fund		**7.5 hour**		**$1,317.50**		**$0**
Number of funds		× 1,339		× 1,339		
Total annual burden		**10,043 hours**		**$1,764,133**		**$0**
Establishing recordkeeping policies and procedures for funds engaging in reverse repurchase agreements	1.5 hours	.5 hours	$63 (general clerk)	$31.50	$0	$0
	1.5 hours	.5 hours	$96 (senior computer operator)	$48		
	1.5 hours	.5 hours	$368 (compliance attorney)	$184		
Recordkeeping for reverse repurchase agreements	0 hours	1 hour	$63 (general clerk)	$63		
	0 hours	1 hour	$96 (senior computer operator)	$96		
	0 hours	1 hour	$368 (compliance attorney)	$368		
Total annual burden per fund		**4.5 hour**		**$790.50**		**$0**
Number of funds		× 181		×181		
Total annual burden		**815 hours**		**$143,081**		**$0**
Total annual burden for all record keeping requirements		**186,798 hours**		**$32,813,920**		**$3,121,800**
Number of funds		5,203		5,203		5,203
Average annual burden per fund		**35.90 hours**		**$6,307**		**$600**

Notes:

1. These estimates include initial burden estimates annualized over a three-year period.
2. See *supra* footnote 1010 (regarding wage rates).
3. This reflects an increase to the estimate that appeared in the Proposing Release, to account for inadvertent halving of the internal time costs for the recordkeeping burdens in the Proposing Release.
4. Note that this estimate may be over-inclusive because not all funds included in this calculation will be subject to a derivatives risk management program and compliance with the rule's VaR requirements. For instance, certain leveraged/inverse funds will not be subject to compliance with the rule's VaR requirements.
5. See *supra* footnote 1010 (regarding external cost estimates). Estimates of external costs for recordkeeping burdens reflect costs that funds may pay to third parties to assist in fulfilling funds' recordkeeping duties.

8. Rule 18f–4 Total Estimated Burden

As summarized in Table 8 below, we estimate that the total hour burdens and time costs associated with rule 18f–4, amortized over three years, will result in an average aggregate annual burden of 501,275 hours and an average aggregate annual monetized time cost of $202,443,126. We also estimate that, amortized over three years, there will be external costs of $22,252,947 associated with this collection of information. Therefore, each fund that relies on the rule will incur an average annual burden of approximately 96.34 hours, at an average annual monetized time cost of approximately $38,909, and an external cost of $4,277 to comply with rule 18f–4.[1034]

[1034] These per-fund burden estimates likely overestimate the total burden of rule 18f–4 because not all funds (*e.g.,* limited derivatives users) would incur the various burdens set forth in the table.

Table 8: Rule 18f-4 Total PRA Estimates

	Internal hour burden	Internal burden time cost	External cost burden
	Proposed Estimates		
Derivatives risk management program	48,474 hours	$19,195,704	$0
Board oversight and reporting	26,930 hours	$103,885,168[1]	$0
Disclosure requirement associated with limit on fund leverage risk	2,424 hours	$816,888	$0
Disclosure requirement associated with alternative requirements for certain leveraged/inverse funds	135 hours[2]	$45,192	$0
Disclosure changes for money market funds	207 hours	$69,384	$0
Policies and procedures for limited derivatives users	5,995 hours	$2,080,265	$0
Recordkeeping requirements	25,455 hours	$1,998,218[3]	$3,054,600
Total annual burden	**109,620**	**$128,090,819**	**$3,054,600**
Number of funds	÷ 5,091	÷ 5,091	÷ 5,091
Average annual burden per fund	**21.53 hours**	**$25,160**	**$600**
	Final Estimates		
Derivatives risk management program	190,854 hours	$76,214,364	$10,820,592
Board oversight and reporting	77,448 hours	$76,806,288	$4,734,009
VaR remediation	863 hours	$542,974	$0
Disclosure requirement associated with alternative requirements for certain leveraged/inverse funds	70 hours	$23,800	$0
Disclosure changes for money market funds	840 hours	$285,600	$0
Requirements for limited derivatives users	44,402 hours	$15,756,180	$3,576,546
Recordkeeping requirements	186,798 hours	$32,813,920	$3,121,800
Total annual burden	**501,275**	**$202,443,126**	**$22,252,947**
Number of funds	÷ 5,203	÷ 5,203	÷ 5,203
Average annual burden per fund	**96.34 hours**	**$38,909**	**$4,277**

1 This reflects an increase to the estimate that appeared in the Proposing Release ($31,739,698), to account for a correction to the total internal time costs calculation as it appeared in the Proposing Release.
2. This reflects a reduction of the annual burden hours estimate that appeared in the Proposing Release (269 hours), to account for inadvertent doubling of the estimated burden hours in the Proposing Release.
3. This reflects an increase to the estimate that appeared in the Proposing Release ($799,287), to account for inadvertent halving of the internal time costs for the recordkeeping burdens in the Proposing Release.

C. Rule 6c–11

Rule 6c–11 permits ETFs that satisfy certain conditions to operate without first obtaining an exemptive order from the Commission.[1035] We are amending rule 6c–11 to permit leveraged/inverse ETFs to rely on that rule, provided they satisfy the applicable requirements of rule 18f–4. Because we believe this amendment will increase the number of funds relying on rule 6c–11, we are updating the PRA analysis for rule 6c–11 to account for the aggregate burden increase that will result from this increase in respondents to that rule. We are not updating the rule 6c–11 PRA analysis in any other respect.

Rule 6c–11 requires an ETF to disclose certain information on its publicly-available website, to maintain certain records, and to adopt and implement certain written policies and procedures. The purpose of these collections of information is to provide useful information to investors who purchase and sell ETF shares in secondary markets and to allow the Commission to better monitor reliance on rule 6c–11 and will assist the Commission with its accounting, auditing and oversight functions. Information provided to the Commission in connection with staff

[1035] *See supra* footnotes 613–616 and accompanying text.

examinations or investigations will be kept confidential subject to the provisions of applicable law.

The respondents to rule 6c–11 will be ETFs registered as open-end management investment companies other than share class ETFs and non-transparent ETFs. This collection will not be mandatory, but will be necessary for those ETFs seeking to operate without individual exemptive orders, including all ETFs whose existing exemptive orders will be rescinded.

Under the currently approved PRA estimates, 1,735 ETFs would be subject to these requirements. The current PRA estimates for rule 6c–11 include 74,466.2 total internal burden hours, $24,771,740.10 in internal time costs, and $1,735,000 in external time costs.

In the Proposing Release, we estimated that the proposed amendments to rule 6c–11 would result in an additional 164 leveraged/inverse ETFs relying on that rule, resulting in an increase in the number of respondents to 1,899 ETFs. This updated number of respondents resulted in a total of 81,505.08 burden hours, $27,113,276.34 in internal time costs, and $1,899,000 in external costs.

We did not receive public comment relating to the PRA estimates for rule 6c–11 in the Proposing Release. We continue to believe that the current annual burden and cost estimates for rule 6c–11 are appropriate, but that the amendments to rule 6c–11 will result in an increase in the number of respondents. Specifically, we estimate that an additional 172 ETFs (all leveraged/inverse ETFs) will rely on rule 6c–11, resulting in an increase in the number of respondents to 1,907 ETFs. Table 9 below summarizes these revisions to the estimated annual responses, burden hours, and burden-hour costs based on the amendments to rule 6c–11.

Table 9: Rule 6c-11 PRA Estimates

	Currently approved annual internal hour burden[1]	Updated estimated annual internal hour burden[2]	Currently approved annual internal burden time cost	Updated estimated annual internal time burden cost	Currently approved annual external cost burden	Updated estimated annual external cost burden
Website disclosure	33,398.75 hours	36,709.75 hours	$10,717,945.15	$11,780,473.43	$1,735,000	$1,907,000
Recordkeeping	8,675 hours	9,535 hours	$680,987.50	$748,497.50	$0	$0
Policies and procedures	32,392.45 hours	35,603.69 hours	$13,372,807.45	$14,698,526.69	$0	$0
Total annual burden	**74,466.2 hours**	**81,848.44 hours**	**$24,771,740.10**	**$27,227,497.62**	**$1,735,000**	**$1,907,000**
Number of affected ETFs	÷ 1,735	÷1,907	÷ 1,735	÷ 1,907	÷ 1,735	÷ 1,907
Average annual burden per ETF	**42.92 hours**	**42.92 hours**	**$14,277.66**	**$14,277.66**	**$1,000**	**$1,000**

Notes:

1. The previously approved burdens and costs in this table are based on the currently approved estimate of 1,735 ETFs relying on rule 6c-11.
2. The updated estimated burdens and costs in this table are based on an estimate of 172 leveraged/inverse ETFs that will rely on rule 6c-11 pursuant to the amendments to that rule, for a total estimate of 1,907 ETFs that will rely on rule 6c-11.

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D. Form N–PORT

We are amending Form N–PORT to add new items to Part B (''Information About the Fund''), as well as to make certain amendments to the form's General Instructions. Form N–PORT, as amended, will require funds that are limited derivatives users under final rule 18f–4 to provide information about their derivatives exposure, and exceedances of their derivatives exposure over 10% of their net assets.[1036] It also will require funds that are subject to the limit on fund leverage risk in rule 18f–4 to provide certain information about the fund's VaR during the reporting period.[1037] The final amendments to Form N–PORT incorporate several modifications from the proposal: (1) The proposed requirements would have required all funds, not just limited derivatives users, to report derivatives exposure information; (2) the proposed requirements did not include the requirement for funds that are limited derivatives users to report exceedances of their derivatives exposure over the 10% threshold; and (3) the final VaR reporting requirements decrease the number of reported items that the proposal would have required and make certain VaR-related information non-public. We estimate that 5,133 funds in the aggregate, consisting of 2,437 limited derivatives users and 2,696 funds that are subject to the VaR-based limit on fund leverage risk, will be subject to aspects of the Form N–PORT reporting requirements in the final rule.

Preparing reports on Form N–PORT is mandatory for all management investment companies (other than money market funds and small business investment companies) and UITs that operate as ETFs and is a collection of information under the PRA. Responses to the reporting requirements will be kept confidential, subject to the provisions of applicable law, for reports filed with respect to the first two months of each quarter. The information that funds will report regarding limited derivatives users' derivatives exposure and exceedances of the 10% derivatives exposure threshold, information about a fund's median daily VaR and median VaR Ratio, as applicable, and VaR backtesting exceptions will not be made publicly available. All other responses to the new Form N–PORT reporting requirements for the third month of the quarter will not be kept confidential, but made public sixty days after the quarter end. Form N–PORT is designed to assist the Commission in its regulatory, disclosure review, inspection, and policymaking roles, and to help investors and other market participants better assess different fund products.[1038]

Based on current PRA estimates, we estimate that funds prepare and file their reports on Form N–PORT either by (1) licensing a software solution and preparing and filing the reports in house, or (2) retaining a service provider to provide data aggregation, validation and/or filing services as part of the preparation and filing of reports on behalf of the fund. We estimate that 35% of funds subject to the N–PORT filing requirements will license a software solution and file reports on Form N–PORT in house, and the remainder will retain a service provider to file reports on behalf of the fund.

Table 10 below summarizes our initial and ongoing annual burden estimates associated with the amendments to Form N–PORT. One commenter broadly opposed any new Form N–PORT reporting requirements on the grounds that they generally increase burdens on funds, but did not comment on PRA related burdens specifically.[1039] Otherwise, the Commission did not receive comments specifically addressing the estimated burdens associated with the proposed Form N–PORT reporting requirements. We have adjusted the proposal's estimated annual burden hours and total time costs, on account of the modifications to the proposed Form N–PORT requirements that we are adopting.

[1036] *See* Item B.9 of Form N–PORT; *supra* section II.G.1.a.

[1037] *See* Item B.10 of Form N–PORT; *see supra* section II.G.1.b.

[1038] The specific purposes for each of the new reporting items are discussed in section II.G.1 *supra.*

[1039] ISDA Comment Letter.

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Table 10: Form N-PORT PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs	Initial external cost burden	Annual external cost burden
PROPOSED ESTIMATES							
Report derivatives exposure information	2 hours	4.33 hours[2, 3]	×	$365 (compliance attorney)	$1,580		
	2 hours	4.33 hours	×	$331 (senior programmer)	$1,433		
Total new burden for derivatives exposure information		**8.66 hours**			**$3,013**		
Number of funds for derivatives exposure information		× 5,091			× 5,091		
Total new annual burden for derivatives exposure information (I)		**44,088 hours**			**$15,339,183**		
Report VaR-related information	2 hours	4.33 hours	×	$365 (compliance attorney)	$1,580	$5,590	$4,210
	2 hours	4.33 hours	×	$331 (senior programmer)	$1,433		
Total new burden for VaR-related information		**8.66 hours**			**$3,013**		
Number of funds for VaR-related information		× 2,424			× 2,424		
Total new annual burden for VaR-related information (II)		**20,992 hours**			**$7,303,512**		
Total new annual burden (I + II)		**65,080 hours**			**$22,642,695**		**$21,433,110[4]**
Current burden estimates		1,803,826 hours					$103,776,240
Revised burden estimates		**1,868,906 hours**					**$125,209,350**
FINAL ESTIMATES							
Report derivatives exposure information for limited derivative users	2 hours	4.33 hours[2]	×	$368 (compliance attorney)	$1,593		$912[5]
	2 hours	4.33 hours	×	$334 (senior programmer)	$1,446		
Total new burden for derivatives exposure information for limited derivatives users		**8.66 hours**			**$3,039**		
Number of funds		× 2,437			× 2,437		× 2,437
Total new annual burden for limited derivatives user derivatives exposure information (I)		**21,104 hours**			**$7,406,043**		$2,222,544[6]
Report exceedance of 10% derivatives exposure threshold for limited derivatives users	0 hours	0.01 hours	×	$368 (compliance attorney)	$3.68		

	0 hours	0.01 hours	×	$334 (senior programmer)	$3.34	
Total new burden for exceedance-related information		**0.02 hours**			**$7.02**	
Number of funds		× 2,437			× 2,437	
Total new annual burden for limited derivatives users exceedance-related information (II)		**48.74 hours**			**$ 17,108**	
Report VaR-related information	2 hours	4.33 hours	×	$368 (compliance attorney)	$1,593	$912[5]
	2 hours	4.33 hours	×	$334 (senior programmer)	$1,446	
Total new burden for VaR-related information		**8.66 hours**			**$3,039**	
Number of funds		× 2,696			× 2,696	× 2,696
Total new annual burden for VaR-related information (III)		**23,347 hours**			**$8,193,144**	$2,458,752
Total new annual burden (I + II + III)		**44,500 hours**			**$15,616,295**	$4,681,296
Current burden estimates		1,803,826 hours				$103,776,240
Revised burden estimates		**1,848,326 hours**				**$108,457,536**

Notes:

1. *See supra* footnote 1010 (regarding wage rates). These PRA estimates assume that the same types of professionals will be involved in the reporting requirements that we believe otherwise will be involved in preparing and filing reports on Form N-PORT.
2. Includes initial burden estimates annualized over a three-year period.
3. This estimate assumes that, annually after the initial 2 hours to comply with the new N-PORT requirements, each of a compliance attorney and a senior programmer will incur 1 burden hour per filing associated with the new reporting requirements. The estimate of 4.33 hours is based on the following calculation: ((2 hours for the first filing x 1 = 2) + (3 additional filings in year 1 x 1 hour for each of the additional 3 filings in year 1 = 3) + (4 filings in years 2 and 3 x 1 hour per filing x 2 years) = 8) / 3 = 4.33.
4. This estimate is based on the following calculation: $4,210 (average costs for funds reporting the information on Form N-PORT) * 5,091 funds (which includes funds reporting derivative exposure information and VaR-related information).
5. This estimate is based on the following information and calculations: (35% x $4,805 (the average cost to license a third-party software solution per year) = $1,681.75) + (65% x $11,440 (the average cost of retaining the services of a third-party vendor to prepare and file reports on Form N-PORT on the fund's behalf) = $7,436) = basis for existing external N-PORT filing costs. We estimate that the new N-PORT requirements will add an additional 10% costs (e.g., ($1,681.75 + $7,436 = $9,117.75) x 10% = $912 per fund).
6. This estimate of the external annual cost burden of Form N-PORT reporting for limited derivatives users encompasses any external costs burdens associated with reporting derivatives exposure and any reporting related to exceedances of the 10% derivatives exposure threshold on the Form N-PORT.

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E. Form N–RN and Rule 30b1–10

We are amending Form N–LIQUID (which we are re-titling as ''Form N–RN'') to add new reporting requirements for funds subject to the VaR-based limit on fund leverage risk pursuant to rule 18f–4 as well as conforming amendments to rule 30b1–10.[1040] We are adopting these requirements substantially as proposed, with conforming amendments to reflect changes to the proposed VaR requirements in the final rule.

[1040] *See* Parts E, F, and G of Form N–RN; *see also supra* section II.G.2 (noting that, in addition to registered open-end funds, the scope of funds that will be subject to the requirements of Form N–RN will expand to include registered closed-end funds and BDCs).

A fund that determines that it is out of compliance with the VaR test and has not come back into compliance within five business days after such determination will have to file a non-public report on Form N–RN providing certain information regarding its VaR test breaches.[1041] In addition, a fund that has come back into compliance with either the relative VaR test or the absolute VaR test, as applicable, must file a report on Form N–RN within one business day to indicate that. We estimate that 2,696 funds per year will be required to comply with either of the VaR tests, and the Commission will receive approximately 54 filing(s) in aggregate per year in response to the new VaR-related items that we proposed to include on Form N–RN, as amended.[1042]

Pursuant to the amendments to Form N–RN, preparing a report on this form will be mandatory for any fund that is out of compliance with its applicable VaR test for more than five business days, and for any fund that has come back into compliance with its applicable VaR test. A report on Form N–RN is a collection of information under the PRA. The VaR test breach information provided on Form N–RN, as well as the information a fund provides when it has come back into compliance, will enable the Commission to receive information on events that could impact funds' leverage-related risk more uniformly and efficiently and will enhance the Commission's oversight of funds when significant fund and/or market events occur. The Commission will be able to use the newly required information that funds will provide on Form N–RN in its regulatory, disclosure review, inspection, and policymaking roles. Responses to the reporting requirements and this collection of information will be kept confidential, subject to provisions of applicable law.

Table 11 below summarizes our initial and ongoing annual burden estimates associated with preparing current reports in connection with the amendments we are adopting to funds' current reporting requirements. Staff estimates there will be no external costs associated with this collection of information. We further assume similar hourly and cost burdens, as well as similar response rates, for responses to either a breach of the absolute VaR test or the relative VaR test. Our assumptions furthermore take into account that the information that funds must report on Form N–RN regarding a VaR test breach includes data that will be available to funds in connection with their compliance with rule 18f–4, and therefore funds will not need to obtain or compile this information anew when they prepare reports on Form N–RN. Several commenters expressed that the proposed rule would result in more breaches of the VaR limits than estimated by the Commission at proposal.[1043] Although the final rule provides incremental higher VaR limits than proposed, we have increased the number of funds that we expect to be subject to the VaR-related items on Form N–RN to reflect the potential that there could be more VaR limit breaches than we had initially estimated. We have also adjusted the proposal's estimated annual burden hours and total time costs to reflect the Commission's updated views on typical time burdens associated with similar reporting requirements.

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[1041] *See supra* footnote 688. For purposes of this PRA analysis, the burden associated with the amendments to rule 30b1–10 and rule 18f–4(c)(7) is included in the collection of information requirements for Form N–RN.

[1042] The estimate at proposal was 30 filings in aggregate per year. *See* Proposing Release, *supra* footnote 1, at n.682 and accompanying text. However, in a modification from the calculation at proposal, the final PRA analysis increases this total by approximately 75% to 54 filings in aggregate per year.

[1043] *See supra* sections II.D.2 and II.D.3 (discussing requests from commenters to raise both the relative VaR and absolute VaR limits in the proposal).

Table 11: Form N-RN PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs
PROPOSED ESTIMATES					
Relative or absolute VaR test breach reports	0 hour	0.005 hours	×	$365 (compliance attorney)	$1.83
	0 hour	0.005 hours	×	$331 (senior programmer)	$1.66
Total new annual burden per fund		**0.01 hours**			**$3.49**
Number of funds		× 2,424			× 2,424
Total new annual burden		**24 hours**			**$8,460**
Current burden estimates		941 hours			
Revised burden estimates		**965 hours**			
FINAL ESTIMATES					
Relative or absolute VaR test breach reports	0 hour	0.06 hours[2]	×	$368 (compliance attorney)	$22.08
	0 hour	0.02 hours[2]	×	$334 (senior programmer)	$6.68
Total new annual burden per fund		**0.08 hours**			**$28.76**
Number of funds		× 2,696			× 2,696
Total new annual burden		**216 hours**			**$77,537**
Current burden estimates		941 hours			
Revised burden estimates		**1,157 hours**			

Notes:
1. *See supra* footnote 1010 (regarding wage rates). These PRA estimates assume that the same types of professionals will be involved in the reporting requirements that we believe otherwise will be involved in preparing and filing reports on Form N-RN.
2. This estimate is based on the assumption that, of the 2,696 funds that will be required to comply with either of the VaR tests, on average the Commission will receive 54 reports regarding a relative or absolute VaR test breach (representing 1% of funds (2,696 x 1% = 27 funds) filing twice (27 funds x 2 = 54 filings), once upon initial breach and once upon coming back into compliance). We estimate that a compliance attorney will spend 3 hours, and a senior programmer will spend 1 hour, preparing and submitting each report. However, because we estimate that only 1% of funds will have to File Form N-RN each year because they breach the relative or absolute VaR test, the estimated hour burden is being decreased by 99%. (3 hours x 1%) x 2 filings (one on initial breach and one when back in compliance) = 0.06 hours (for a compliance attorney); (1 hour x 1%) x 2 filings (one on initial breach and one when back in compliance) = 0.02 hours (for a senior programmer).

F. Form N–CEN

Form N–CEN is a structured form that requires registered funds to provide census-type information to the Commission on an annual basis. We are amending Form N–CEN to require a fund to identify whether it relied on rule 18f–4 during the reporting period and whether the fund has relied on certain provisions of the rule, substantially as proposed.[1044] In a modification from the proposal, we also are amending Form N–CEN to require a fund to identify whether it has invested in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, in reliance on the final rule.

[1044] *See supra* section II.G.3.

Preparing a report on Form N–CEN, as amended, will be mandatory for all registered funds, including money market funds. Responses will not be kept confidential. We estimate that 5,524 funds will be subject to the amendments to the Form N–CEN reporting requirements.[1045]

[1045] We estimate that the number of funds that will be subject to the amendments to the Form N–CEN reporting requirements includes the number of funds that we estimate will be required to comply with the derivatives risk management program requirement (2,766 funds), plus the number of funds that we estimate will qualify as limited derivatives users (2,437 funds), plus the number of money market funds (420 funds), minus BDCs, which are not required to report on Form N–CEN (99 BDCs). 2,766 + 2,437 + 420 − 99 = 5,524.

The purpose of Form N–CEN is to satisfy the filing and disclosure requirements of section 30 of the Investment Company Act, and of amended rule 30a–1 thereunder. The information required to be filed with the Commission assures the public availability of the information and is designed to facilitate the Commission's oversight of registered funds and its ability to monitor trends and risks.

Table 12 below summarizes our initial and ongoing annual burden estimates associated with the amendments to Form N–CEN based on current Form N–CEN practices and burdens associated with minor amendments to the form. Staff estimates there will be no external costs associated with this collection of information. One commenter broadly opposed any new Form N–CEN reporting requirements on the grounds that they generally increase burdens on funds, but did not comment on PRA related burdens specifically.[1046] We have adjusted the proposal's estimated annual burden hours and total time costs, on account of the additions to the proposed Form N–CEN requirements that we are adopting and the Commission's updated views on typical time burdens associated with similar reporting requirements.

[1046] ISDA Comment Letter.

Table 12: Form N-CEN PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs
PROPOSED ESTIMATES					
Reporting derivatives-related fund census information	0 hour	0.01 hours[2]	×	$365 (compliance attorney)	$3.7
	0 hour	0.01 hours	×	$331 (senior programmer)	$3.3
Total new annual burden per fund		**0.02 hours**			**$7**
Number of funds		× 12,375			× 12,375
Total new annual burden		**248 hours**			**$86,625**
Current burden estimates		74,425 hours			
Revised burden estimates		**74,673 hours**			
FINAL ESTIMATES					
Reporting derivatives-related fund census information	0 hour	0.2 hours[3]	×	$368 (compliance attorney)	$73.60
	0 hour	0.2 hours	×	$334 (senior programmer)	$66.80
Total new annual burden per fund		**0.4 hours**			**$140.40**
Number of funds		× 5,524			× 5,524
Total new annual burden		**2,210 hours**			**$775,570**
Current burden estimates		74,598 hours			
Revised burden estimates		**76,808 hours**			

Notes:
1. *See supra* footnote 1010 (regarding wage rates). These PRA estimates assume that the same types of professionals will be involved in the reporting requirements that we believe otherwise will be involved in preparing and filing reports on Form N-CEN.
2. This estimate assumes each fund reporting on Form N-CEN will spend approximately 1 minute reporting these new data elements.
3. This estimate assumes each fund reporting on Form N-CEN will spend approximately 10 minutes reporting these new data elements.

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V. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 604 of the Regulatory Flexibility Act (''RFA'').[1047] It relates to new rule 18f–4 and the final amendments to Forms N–PORT, N–LIQUID (re–titled ''Form N–RN''), and N–CEN.[1048] An

[1047] 5 U.S.C. 604.

[1048] As discussed above, we do not believe the conforming amendments to Form N–2 (clarifying that funds do not have to disclose in their senior securities table the derivatives transactions and unfunded commitment agreements entered into in reliance on rule 18f–4) or rule 22e–4 and Form N–

Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and included in the Proposing Release.[1049]

A. Need for and Objectives of the Rule and Form Amendments

The Commission is adopting new rule 18f–4, as well as amendments to rule 6c–11, and Forms N–PORT, N–LIQUID (re-titled N–RN), and N–CEN. This final rule, and final rule amendments, are designed to address the investor protection purposes and concerns underlying section 18 of the Investment Company Act and to provide an updated and more comprehensive approach to the regulation of funds' use of derivatives and the other transactions covered by rule 18f–4.[1050]

Rule 18f–4 is designed to provide an updated, comprehensive approach to the regulation of funds' use of derivatives and certain other transactions, generally through the implementation of a derivatives risk management program, limits on fund leverage risk, board oversight and reporting, and related recordkeeping requirements.[1051] The amendments to Forms N–PORT, N–LIQUID (re–titled N–RN), and N–CEN will enhance the Commission's ability to effectively oversee funds' use of the rule and provide the Commission and the public with additional information regarding funds' use of derivatives.[1052] All of these requirements are discussed in detail in section II of this release. The costs and burdens of these requirements on small funds are discussed below, as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the applicable costs and burdens on funds.[1053]

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be affected by the proposed rule and form amendments, the existence or nature of the potential impact of the proposals on small entities discussed in the analysis, and how to quantify the impact of the proposed amendments. We also requested comment on the proposed compliance burdens and the effect these burdens would have on smaller entities.

Although we did not receive comments specifically addressing the IRFA, some commenters noted the impact of certain aspects of proposed rule 18f–4 on smaller funds.[1054] Commenters in particular expressed concern that the proposed requirements concerning the appointment of a derivatives risk manager could adversely affect smaller funds. One commenter that urged the Commission to permit the fund's adviser to serve as the derivatives risk manager, instead of requiring the board to consider and select an individual to serve in this role, cited unspecified cost burdens, particularly for smaller funds, associated with the proposed approach.[1055] Another commenter generally supported the proposed requirement for an individual to serve as the derivatives risk manager, but expressed concern ''that the specificity of the requirements could hamstring smaller and mid-sized investment managers in particular whose key personnel often carry out multiple responsibilities.'' [1056] Similarly, one commenter stated that smaller firms may have significant difficulty complying with the proposed requirement that a fund's derivatives risk management functions be reasonably segregated from the fund's portfolio management functions because ''the portfolio managers may be the principal employees possessing the essential derivatives experience and hiring a person to be a separate [derivatives risk manager] may not be economical (and may not represent full time employment).'' [1057]

In addition to discussing the derivatives risk manager requirement in particular, commenters observed that the proposed rule's requirements as a whole could adversely affect smaller funds. One commenter described the impact of the rule's requirements generally on smaller funds, stating that like larger fund complexes, ''smaller fund complexes may need to significantly increase the financial and human capital resources to meet the detailed requirements under the Proposed Rule,'' and ''[f]und complexes of all sizes may need to draft licensing agreements and engage in due diligence regarding the capabilities of potential vendors.'' [1058] Another commenter urged us to broadly exempt from the rule funds sold exclusively to accredited investors, qualified purchasers, or qualified clients, stating that ''a small advisory organization that offers a closed-end fund or BDC to Qualifying Investors, as an extension of its sponsorship of private funds, may not have the resources to hire and maintain separate risk personnel, including a [derivatives risk manager], or develop and maintain a [derivatives risk management program].'' [1059] Several commenters that recommended extending the transition period for all funds beyond the one–year period we proposed noted a longer timeframe could be particularly beneficial to smaller funds. One commenter stated that ''certain smaller and midsize investment advisers that serve as subadvisers to registered funds would benefit from more time to meet these implementation challenges.'' [1060] Similarly, another commenter suggested that a longer transition period would be useful for smaller funds with limited resources that may need to hire additional personnel or redirect current resources in order to comply with the new requirements.[1061]

After considering the comments we received, we are adopting the proposed rule and form amendments, with certain modifications intended to reduce many of the operational challenges commenters identified. For example, we are adopting certain changes to the proposal that will be cost-reducing to all funds, including small funds, such as requiring weekly backtesting, instead of daily, as proposed.[1062] This release also clarifies that the final rule provides flexibility for the fund's derivatives risk manager to rely on others, such as employees of the fund's adviser, in carrying out activities associated with

PORT (removing references to assets ''segregated to cover'' rendered obsolete by rule 18f–4) result in any new reporting, recordkeeping, or compliance burdens. *See supra* footnote 1007.

Similarly, we do not believe the conforming amendment to rule 30b1–10 (adding registered closed-end funds to the scope of this rule, reflecting the requirement in final rule 18f–4 for all funds that experience certain VaR breach events to report information about these events confidentially to the Commission on Form N–RN) result in any new reporting, recordkeeping, or compliance burdens. *See supra* footnote 1007.

[1049] *See* Proposing Release *supra* footnote 1, at section VI.

[1050] *See supra* section I.B (discussing the requirements of section 18, and as well as Congress' concerns underlying the limits of section 18). Other transactions specified in the rule include reverse repurchase agreements and similar financing transactions, unfunded commitments, and when-issued, forward-settling, and non-standard settlement cycle securities.

[1051] *See supra* section II.A.

[1052] *See supra* section II.G.

[1053] *See supra* sections III and IV.

[1054] *See, e.g.,* IDC Comment Letter; SIFMA AMG Comment Letter; ABA Comment Letter; NYC Bar Comment Letter; Dechert Comment Letter I. We did not receive any comments discussing the impact of amendments to rules 6c–11, 22e–4 or 30b1–10 on smaller funds.

[1055] IDC Comment Letter; *see also supra* section II.B.1.

[1056] SIFMA AMG Comment Letter.

[1057] ABA Comment Letter.

[1058] Dechert Comment Letter I.

[1059] NYC Bar Comment Letter.

[1060] ICI Comment Letter.

[1061] Dechert Comment Letter I.

[1062] *See supra* section II.B.2.d.

the fund's derivatives risk management.[1063] We believe that this flexibility will benefit all funds, including smaller funds. We also believe there will be certain compliance efficiencies associated with raising the relative and absolute VaR limits to 200% and 20%, respectively, which match the VaR limits in the UCITS framework, and could benefit small funds with an adviser that also manages UCITS funds.[1064] While the proposal would have required all funds to report their derivatives exposure, the final amendments we are adopting will require only a fund that relies on the limited derivatives exception in rule 18f–4 to report its derivatives exposure on Form N–PORT, which will reduce reporting burdens on any smaller funds that do not rely on the exception.[1065] In addition, we are adopting an eighteen-month transition period, instead of the proposed one-year transition period, which provides more time for all funds, including smaller funds, to comply with the new requirements.[1066]

C. Small Entities Subject to the Final Rule

An investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year.[1067] Commission staff estimates that, as of June 2020, approximately 40 registered mutual funds, 8 registered ETFs, 26 registered closed-end funds, and 12 BDCs (collectively, 86 funds) were small entities.[1068]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The new rule and form amendments will impact current reporting, recordkeeping and other compliance requirements for funds, including those considered to be small entities.

1. Rule 18f–4

a. Derivatives Risk Management Program, and Board Oversight and Reporting

Rule 18f–4 will generally require a fund relying on the rule when engaging in derivatives transactions—including small entities, but not funds that are limited derivatives users—to adopt and implement a derivatives risk management program.[1069] This derivatives risk management program will include policies and procedures reasonably designed to assess and manage the risks of the fund's derivatives transactions. The program requirement is designed to permit a fund to tailor the program's elements to the particular types of derivatives that the fund uses and related risks, as well as how those derivatives impact the fund's investment portfolio and strategy. The final rule will require a fund's program to include the following elements: (1) Risk identification and assessment; (2) risk guidelines; (3) stress testing; (4) backtesting; (5) internal reporting and escalation; and (6) periodic review of the program. The final rule also will require: (1) A fund's board of directors to approve the designation of the fund's derivatives risk manager and (2) the derivatives risk manager to provide written reports to the board regarding the program's implementation and effectiveness.[1070]

As discussed above, we estimate that the one-time operational costs necessary to establish and implement a derivatives risk management program will range from $150,000 to $500,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund.[1071] We also estimate that each fund will incur ongoing program-related costs that range from 65% to 75% of the one-time costs necessary to establish and implement a derivatives risk management program, or approximately $97,500 to $375,000.[1072] We estimate that approximately 21% of funds will be required to implement a derivatives risk management program, including board oversight.[1073] We therefore similarly estimate that approximately 21% of small funds, or approximately 18 small funds, will establish a derivatives risk management program.[1074]

There are different factors that will affect whether a smaller fund incurs program-related costs that are on the higher or lower end of the estimated range. For example, we would expect that smaller funds that are not part of a fund complex—or their advisers—may not have existing personnel capable of fulfilling the responsibilities of the derivatives risk manager. Some smaller funds may have more limited employee resources, making it more difficult to segregate the portfolio management and derivatives risk management function. In addition, some smaller entities may choose to hire a derivatives risk manager rather than assigning that responsibility to a current officer or officers of the fund's investment adviser who is not a portfolio manager and has the requisite experience. Also, while we would expect larger funds or funds that are part of a large fund complex to incur higher program-related costs in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, a smaller fund may find it more costly, per dollar managed, to comply with the derivatives risk management program requirement because it will not be able to benefit from a larger fund complex's economies of scale.[1075]

b. Limit on Fund Leverage Risk

Rule 18f–4 will generally require a fund relying on the rule to engage in derivatives transactions to comply with an outer limit on fund leverage risk based on VaR.[1076] This requirement is applicable to small entities, except for those that are limited derivatives users or that are leveraged/inverse funds that cannot comply with the VaR limit and meet other conditions, as the rule describes. This outer limit is based on a relative VaR test that compares the fund's VaR to the VaR of a designated reference portfolio. If the fund's derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, the fund will be required to comply with an absolute VaR test. In either case, a fund must apply the test at least once each

[1063] *See supra* section II.B.1.

[1064] *See supra* footnote 376.

[1065] *See supra* section II.G.1.b.

[1066] *See supra* section II.L.

[1067] Rule 0–10(a) under the Investment Company Act [17 CFR 270.0–10(a)]. Recognizing the growth in assets under management in investment companies since rule 0–10(a) was adopted, the Commission plans to revisit the definition of a small entity in rule 0–10(a).

[1068] This estimate is derived from an analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending June 2020. This estimate of small entities include one money market fund, which has net assets of less than $100,000.

[1069] *See supra* section II.B; *see also* rule 18f–4(c)(1).

[1070] *See supra* sections II.C and III.C.1.

[1071] *See supra* section III.C.1. This section, along with sections IV.B.1 and IV.B.2, also discusses the professional skills that we believe compliance with this aspect of the final rule will entail.

[1072] *See supra* footnote 847.

[1073] *See supra* footnote 849 and accompanying text (estimating that 21% of funds, or 2,766 funds total, will be required to implement a derivatives risk management program). These are funds that hold some derivatives and will not qualify as a limited derivatives user under the final rule.

[1074] We estimate that there are 86 small funds that meet the small entity definition. *See supra* footnote 1068 and accompanying text. 86 small funds × 21% = approximately 18 funds that are small entities that will be required to implement a derivatives risk management program.

[1075] *See supra* section III.C.1.

[1076] *See supra* sections II.D, II.E, and II.F.

business day. This requirement is designed to limit fund leverage risk consistent with the investor protection purposes underlying section 18.

As discussed above, we estimate that the one-time operational costs necessary to establish and implement a VaR calculation model consistent with the limit on fund leverage risk will range from $5,000 to $100,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund.[1077] We estimate that approximately 21% of funds will be required to comply with the limit on fund leverage risk.[1078] We therefore similarly estimate that approximately 21% of small funds, or approximately 18 small funds, will be required to comply with the limit on fund leverage risk.[1079]

There are multiple factors that could affect whether the costs that smaller funds will incur in complying with the limit on fund leverage risk will be on the lower versus higher end of this estimated range. To the extent that funds (including smaller funds) have already established and implemented portfolio VaR testing practices and procedures, these funds will incur fewer costs relative to those funds that have not already established and implemented VaR-based analysis in their risk management. As a result of fewer resources, a smaller fund, and more specifically a smaller fund not part of a fund complex, may be particularly likely to hire a third-party vendor to comply with the VaR-based limit on fund leverage risk, which could increase costs of complying with the limit for those funds. Finally, costs will vary based on factors such as whether the fund uses multiple types of derivatives or uses derivatives more extensively, whether the fund implements the absolute VaR test versus the relative VaR test, and whether (for a fund that uses the relative VaR test) the fund uses a designated reference portfolio for which the index provider charges a licensing fee.[1080]

c. Requirements for Limited Derivatives Users

Rule 18f–4 includes an exception from the rule's derivatives risk management program requirement and limit on fund leverage risk for ''limited derivatives users.'' [1081] The exception is available to a fund that limits its derivatives exposure to 10% of its net assets, excluding derivatives transactions used to hedge certain currency and/or interest rate risks. A fund that relies on the exception—small funds as well as large funds—will also be required to adopt policies and procedures that are reasonably designed to manage its derivatives risks. In a change from the proposal, the final rule provides two alternative paths for remediation for limited derivatives users that are out of compliance with the 10% derivatives exposure threshold requirement.[1082] We believe that the risks and potential impact of these funds' derivatives use may not be as significant, compared to those of funds that do not qualify for the exception, and that a principles-based policies and procedures requirement will appropriately address these risks. These ''reasonably designed'' policies and procedures will have a scope that that reflects the extent and nature of a fund's use of derivatives within the parameters that the exception provides.

As discussed above, we estimate that the one-time costs to establish and implement policies and procedures reasonably designed to manage a fund's derivatives risks will range from $15,000 to $100,000 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund.[1083] We also estimate that the ongoing annual costs that a fund that is a limited derivatives user will incur range from 65% to 75% of the one-time costs to establish and implement the policies and procedures. Thus, we estimate that a fund will incur ongoing annual costs associated with the limited derivatives user exception that will range from $9,750 to $75,000.[1084] We anticipate that larger funds that are limited derivatives users—or limited derivatives user funds that are part of a large fund complex—will likely experience economies of scale in complying with the requirements for limited derivatives users that smaller funds will not necessarily experience.[1085] Thus, smaller funds that are limited derivatives users could incur costs on the higher end of the estimated range. However, a smaller fund whose derivatives use is limited could benefit from the limited derivatives user exception because it will not be required to adopt a derivatives risk management program (including all of the program elements).[1086]

We estimate that approximately 19% of funds will qualify for the limited derivatives user exception.[1087] We would expect some small funds to fall within the limited derivatives user exception.[1088] However, not all small funds that use derivatives will necessarily qualify as limited derivatives users. We estimate—applying to small funds the same estimated percentage of funds overall that will qualify as limited derivatives users—that approximately 19% of small funds (approximately 16 small funds) will qualify for the limited derivatives user exception under the final rule.[1089]

d. Reverse Repurchase Agreements

Rule 18f–4 will permit a fund to engage in reverse repurchase agreements and other similar financing transactions so long as they either are subject to the relevant asset coverage requirements of section 18 for senior securities representing indebtedness, or treated as derivative transactions for all purposes under the rule.[1090] A fund's election will apply to all of its reverse repurchase agreements and similar financing transactions, and therefore all of a fund's such transactions will be subject to consistent treatment under the final rule.[1091]

[1077] *See supra* section III.C.2. This section also discusses the professional skills that we believe compliance with this aspect of the final rule will entail.

[1078] *See supra* text following footnote 857 (estimating that 21% of funds, or 2,696 funds total, will be required to implement VaR tests). This estimate excludes both: (1) Limited derivatives users, and (2) funds that are leveraged/inverse funds that cannot comply with the VaR limit and meet other conditions, as the rule describes.

[1079] We estimate that there are 86 small funds that meet the small entity definition. *See supra* footnote 1068 and accompanying text. 86 small funds × 21% = approximately 18 funds that are small entities that will be subject to a VaR test.

[1080] *See supra* footnote 880 and accompanying paragraph.

[1081] *See supra* section II.E; rule 18f–4(c)(4).

[1082] *See supra* section II.E.4.

[1083] *See supra* section III.C.3 (discussing the one-time range of costs for implementing the limited derivatives user requirements under rule 18f–4 and the variables impacting a fund incurring costs at the lower or higher end of the estimated cost range). This section, along with section IV.B.6, also discusses the professional skills that we believe compliance with this aspect of the rule will entail.

[1084] *See supra* footnote 892.

[1085] *See supra* footnote 1075 and accompanying text.

[1086] *See supra* section II.E.

[1087] *See supra* paragraph following footnote 892 (estimating that 19% of funds, or 2,437 funds total, will qualify as limited derivatives users). This estimate excludes funds that will comply with the derivatives risk management program. *See also supra* sections II.F, III.C.1, III.C.3, III.C.5, IV.B.3, and V.D.1.a.

[1088] *Id.*

[1089] *Id.* We estimate that there are 86 small funds that meet the small entity definition. *See supra* footnote 1068 and accompanying text. 86 small funds × 19% = approximately 16 funds that are small entities that will qualify for the limited derivatives user exception.

[1090] *See supra* section II.H.

[1091] Rule 18f–4(d)(1)(i) and (ii).

Today, funds rely on the asset segregation approach that Release 10666 describes with respect to reverse repurchase agreements, which funds may view as separate from the limitations established on bank borrowings (and other senior securities that are evidence of indebtedness) by the asset coverage requirements of section 18. To the extent that funds elect to rely on the asset coverage requirements of section 18 with respect to their reverse repurchase agreements and similar financing transactions, these funds will have to take these transactions into account in monitoring their compliance with the asset coverage requirements of section 18. Alternatively, to the extent that a fund chooses to treat its reverse repurchase and other similar financing transaction activity as derivatives for all purposes of the final rule, the fund must adopt and implement policies and procedures reasonably designed to manage the fund's derivatives risks in order to qualify as a limited derivatives user (assuming that the fund's use of reverse repurchase agreements and similar financing transactions, in addition to its derivatives exposure, was limited to 10% of its net assets). If such a fund's use of reverse repurchase agreements and similar financing transactions, in addition to derivatives exposure associated with the fund's other derivatives transactions, exceeds 10% of its net assets, the fund must adopt a derivatives risk management program and comply with the VaR-based limit on fund leverage risk.

We estimate that about 0.27% of all funds, excluding BDCs, will enter into these transactions in amounts that exceed the asset coverage requirements.[1092] If these funds choose not to adjust their use of reverse repurchase agreements, similar financing transactions, or borrowings in order to comply with the asset coverage requirements, these funds will have to qualify as a limited derivatives user under the final rule (and adopt the policies and procedures that the limited derivatives user exception requires) or else be subject to the final rule's VaR and program requirements. We similarly estimate—applying to small funds the same estimated percentage of funds that will engage in reverse repurchase agreements or similar financing activities—that no small funds will engage in these transactions in combined amounts that exceed the asset coverage requirement.[1093] We therefore do not estimate a cost burden to small funds associated with the provisions regarding reverse repurchase agreements in rule 18f–4.

e. Unfunded Commitment Agreements

The rule also addresses funds' participation in unfunded commitment agreements. The approach in the final rule recognizes that while entering into unfunded commitment agreements may raise the risk that a fund may be unable to meet its obligations under these transactions, unfunded commitments do not generally involve the leverage and other risks associated with derivatives transactions.[1094] Rule 18f–4 will permit a fund to enter into unfunded commitment agreements if it reasonably believes, at the time it enters into such agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to each of its unfunded commitment agreements, in each case as they come due. The rule prescribes factors that a fund must consider in forming such a reasonable belief. If a fund enters into unfunded commitment agreements in compliance with this requirement, the rule specifies that unfunded commitment agreements will not be considered for purposes of computing asset coverage, as defined in section 18(h) of the Investment Company Act. This approach for unfunded commitment agreements reflects current industry practice, as discussed above.[1095] We therefore do not expect that this provision in rule 18f–4 will result in significant costs to small (or large) funds.

f. When-Issued, Forward-Settling, and Non-Standard Settlement Cycle Securities Transactions

In a change from the proposal, the final rule also includes a new provision that will permit funds, as well as money market funds, to invest in securities on a when-issued or forward-settling basis, or with a non-standard settlement cycle, and the transactions will be deemed not to involve a senior security subject to certain conditions.[1096] This provision will permit funds and money market funds, including smaller entities, to invest in securities on a when-issued basis under rule 18f–4 notwithstanding that these investments trade on a forward basis involving a temporary delay between the transaction's trade date and settlement date. We do not believe that this approach will result in a significant change in the extent to which funds and money market funds engage in these transactions. We therefore do not expect these amendments to result in significant costs to small (or large) funds.

g. Recordkeeping

Rule 18f–4 includes certain recordkeeping provisions that are designed to provide the Commission, and the fund's board of directors and compliance personnel, the ability to evaluate the fund's compliance with the final rule's requirements.[1097]

First, the rule will require a fund to maintain certain records documenting its derivatives risk management program, including a written record of: (1) Its policies and procedures designed to manage the fund's derivatives risks, (2) the results of any stress testing of its portfolio, (3) the results of any VaR test backtesting it conducts, (4) records documenting any internal reporting or escalation of material risks under the program, and (5) records documenting any periodic reviews of the program.[1098]

Second, the rule will also require a fund to maintain a written record of any materials provided to the fund's board of directors in connection with approving the designation of the derivatives risk manager. The rule also requires a fund to keep records of any written reports provided to the board of directors relating to the program, and any written reports provided to the board that the rule requires regarding the fund's non-compliance with the applicable VaR test.[1099]

Third, a fund that is required to comply with the VaR test also has to maintain written records documenting the determination of: Its portfolio VaR; the VaR of its designated reference portfolio, as applicable; its VaR ratio (the value of the VaR of the fund's portfolio divided by the VaR of the designated reference portfolio), as applicable; and any updates to the VaR calculation models used by the fund, as well as the basis for any material changes made to those models.[1100]

Fourth, the rule requires a fund that is a limited derivatives user to maintain a written record of its policies and procedures that are reasonably designed to manage its derivatives risks.[1101]

Fifth, a fund that enters into unfunded commitment agreements will be required to maintain a record documenting the basis for the fund's

[1092] *See supra* footnote 1033.

[1093] We estimate that there are 86 small funds that meet the small entity definition. *See supra* footnote 1068 and accompanying text. 86 small funds × 0.27% = 0 (rounded for convenience).

[1094] *See supra* section II.I.

[1095] *See id.*

[1096] *See supra* section II.A.

[1097] *See supra* section II.J.

[1098] Rule 18f–4(c)(6)(i)(A).

[1099] Rule 18f–4(c)(6)(i)(B).

[1100] Rule 18f–4(c)(6)(i)(C).

[1101] Rule 18f–4(c)(6)(i)(D).

belief regarding the sufficiency of its cash and cash equivalents to meet its obligations with respect to its unfunded commitment agreements.[1102] A record must be made each time a fund enters into such an agreement.

Sixth, the rule requires a fund that enters into reverse repurchase agreements or similar financing transactions to maintain a record documenting whether it is complying with the asset coverage requirements of section 18 with respect to these transactions, or alternatively whether it is treating these transactions as derivatives transactions for all purposes under the rule.[1103]

Finally, funds must maintain the required records for a period of five years.[1104]

As reflected above, we estimate that the average annual recordkeeping costs for funds that will not qualify as limited derivatives users (that is, recordkeeping costs associated with the program and VaR requirements) will be $10,613 per fund, depending on the particular facts and circumstances and current derivatives risk management practices of the fund.[1105] We separately estimate that the average annual recordkeeping costs for a limited derivatives user will be $1,917.50.[1106]

To the extent that we estimate that small funds will be subject to the various provisions of the rule that will necessitate recordkeeping requirements, as discussed above, these small funds also will be subject to the associated recordkeeping requirements. Therefore, we estimate that: 21% of small funds (approximately 18 small funds) will have to comply with the program-related recordkeeping requirements and requirements regarding materials provided to the fund's board; 21% of small funds (approximately 18 small funds) will have to comply with requirements to maintain records of compliance with the VaR test; and 19% of small funds (approximately 16 funds) will have to comply with the recordkeeping requirements for limited derivatives users.[1107]

In addition, we estimate that 1% of small funds (approximately 1 small fund) will use reverse repurchase agreements or similar financing agreements and be required to comply with the recordkeeping requirements associated with this aspect of the rule.[1108] We further estimate that the average annual recordkeeping cost for each fund—large or small—that chooses to enter into reverse repurchase agreements or similar financing transactions is $790.50 to document how the fund elects treat these transactions for all purposes under the rule (*i.e.,* either subject to section 18's asset coverage requirements, or treated as derivatives transactions).[1109]

Finally, we estimate that 10% of small funds, or 9 small funds, will enter into at least one unfunded commitment agreement annually, thus triggering the requisite recordkeeping requirements.[1110] We also estimate an average annual cost of $1,317.50 for a fund to create and maintain a record documenting its ''reasonable belief'' regarding its ability to meet its obligations with respect to each unfunded commitment agreement, each time it enters such an agreement.[1111]

A fund's recordkeeping-related costs will vary, depending on the provisions of rule 18f–4 that the fund relies on. For example, funds that are required to adopt derivatives risk management programs, versus funds that are limited derivatives users under the rule, will be subject to different recordkeeping requirements. However, while small funds' recordkeeping burdens will vary based on the provisions of the rule that a fund relies on, their recordkeeping burdens will not vary solely because they are small funds. We do not anticipate that larger funds, or funds that are part of a large fund complex, will experience any significant economies of scale related to the final rule's additional recordkeeping requirements.

2. Amendments to Forms N–PORT, N–RN, and N–CEN

a. Amendments to Form N–PORT

The amendments to Form N–PORT will require limited derivatives users to report information about their derivatives exposure, and also—as applicable for funds that are subject to the rule 18f–4 VaR-based limit on fund leverage risk—to report certain VaR-related information.[1112] These amendments will help the Commission assess compliance with rule 18f–4.

Under the final rule, limited derivatives users that file Form N–PORT will have to provide information regarding their derivatives exposure on this form, specifically: (1) The fund's aggregate derivatives exposure; and (2) the fund's derivatives exposure attributable to currency or interest rate derivatives entered into and maintained by the fund for hedging purposes. In addition, if a limited derivatives user has derivatives exposure exceeding 10% of the fund's net assets, and this exceedance persists beyond the five-business-day period that the final rule provides for remediation, the fund will have to report the number of business days beyond the five-business-day remediation period that its derivatives exposure exceeded 10% of net assets. We estimate that 19% of small funds that file Form N–PORT (approximately 14 small funds) are limited derivatives users that will report information in response to this new exposure-related disclosure requirement.[1113] In addition, funds that are subject to the limit on fund leverage risk will have to report certain VaR-related information for the reporting period. We estimate that 21% of small funds (approximately 16 small funds) will be subject to these VaR-related disclosure requirements.[1114]

[1102] Rule 18f–4(e)(2).

[1103] Rule 18f–4(d)(2).

[1104] Rule 18f–4(c)(6)(ii); rule 18f–4(d)(2); rule 18f–4(e)(2).

[1105] *See supra* section IV.B.7. The components of this estimate include average annual estimates of $10,013 internal cost and $600 average annual external cost per fund ($10,013 + $600 = $10,613). This section also discusses the professional skills that we believe compliance with this aspect of the rule will entail.

[1106] *Id.* The components of this estimate include average annual estimates of $1,317.50 internal cost and $600 average annual external cost per fund ($1,317.50 + $600 = $1,917.50).

[1107] *See supra* sections III.C.1, III.C.2, III.C.3, V.D.1.a, V.D.1.b, and V.D.1.c.

[1108] We estimate that 1% of all funds subject to the final rule (excluding BDCs), will enter into such transactions. *See supra* footnote 1033. Applying the same percentage, we estimate that 1 small fund will use reverse repurchase agreements or similar financing transactions ((86 small funds − 12 small BDCs) = 74 small funds × 1% = 1 (rounded for convenience).

[1109] *See supra* section IV.B.7.

[1110] We believe the final rule's approach to unfunded commitments is generally consistent with the current practices of funds that enter into unfunded commitments. *See supra* section II.I. Based on our staff's review of fund filings, we estimate that 1,339 funds (approximately 10% of all funds subject to the rule) entered into an unfunded commitment agreement as of December 2019, *see supra* footnote 1033, and 9 small funds (10% of 86 small funds) did likewise.

[1111] *See supra* section IV.B.7.

[1112] *See supra* section II.G.1; *see also* Items B.9 and B.10 of Form N–PORT.

[1113] *See supra* sections V.C, V.D.1.a, and V.D.1.c. Because BDCs do not file reports on Form N–PORT, we deducted BDCs from our estimate of small Form N–PORT filers (86 small funds − 12 small BDCs = 74 small funds that file reports on Form N–PORT). *See supra* footnote 1068 and accompanying text.

We estimate that approximately 19% of funds will qualify for the limited derivatives user exception. *See supra* footnote 1087 and accompanying text. Although this estimated percentage includes BDCs, because the total number of BDCs relative to the number of registered open- and closed-end funds is small, so we did not adjust our estimated percentage to reflect the fact that BDCs do not file Forms N–PORT. *See supra* section III.B.1. Therefore, we estimate the total number of small funds subject to this Form N–PORT requirement as follows: 74 small funds that file reports on Form N–PORT × 19% = approximately 14 small funds.

[1114] We estimate that 74 small funds file reports on Form N–PORT. *See supra* footnote 1113. We

Continued

We estimate that each fund that reports information in response to the VaR-related disclosure requirements on Form N–PORT will incur an average cost of $3,951 per year.[1115] We also estimate that limited derivatives users reporting information in response to the requirement to report derivatives exposure, including the number of business days its derivatives exposure exceeds 10% of net assets, will incur a cost of $3,958 per year.[1116] Notwithstanding the economies of scale experienced by large versus small funds, we would not expect the costs of compliance associated with the new Form N–PORT requirements to be meaningfully different for small versus large funds. The costs of compliance will vary only based on fund characteristics tied to their derivatives use. For example, a limited derivatives user that uses derivatives more extensively (while still under the 10% threshold) will incur more costs to calculate its derivatives exposure than a limited derivatives user that uses derivatives to a more limited degree. And a fund that is a limited derivatives user, or that otherwise is not subject to the VaR test, will not incur any costs to comply with the new VaR-related N–PORT items. Similarly, a fund that is a limited derivatives user will report derivatives exposure, but if it does not exceed the 10% threshold, will not incur costs to report exceedances.

b. Amendments to Current Reporting Requirements

We are re-titling Form N–LIQUID as Form N–RN, and amending this form to include new reporting events for funds that are subject to rule 18f–4's limit on fund leverage risk.[1117] We are adopting these amendments in light of final rule 18f–4's requirement for funds to file current reports on Form N–RN about VaR test breaches under certain circumstances, as well as conforming amendments to rule 30b1–10.[1118] These current reporting requirements are designed to aid the Commission in assessing funds' compliance with the VaR tests. We are requiring funds to provide this information in a current report because we believe that the Commission should be notified promptly when a fund is out of compliance with the VaR-based limit on fund leverage risk (and also when it has come back into compliance with its applicable VaR test). We believe this information could indicate that a fund is experiencing heightened risks as a result of a fund's use of derivatives transactions, as well as provide the Commission insight about the duration and severity of those risks, and whether those heightened risks are fund-specific or industry-wide.

We estimate that each report that a fund will file in response to the new VaR-related reporting requirements of Form N–RN will entail costs of approximately $1,438.[1119] Furthermore, because each report that a fund files initially reporting a VaR test breach must be accompanied by a second report when the fund comes back into compliance with the VaR test, each VaR test breach that requires a report will entail costs of two times the estimated cost for filing a single report ($1,438 × 2 = $2,876). We estimate that approximately 18 small funds will be required to comply with the limit on fund leverage risk and may report VaR test related information on Form N–RN.[1120] However, we also estimate that only 1% of funds that must comply with the leverage limit will file Form N–RN each year because they breached the relative or absolute VaR test, and applying the same percentage, estimate that that no small fund will file the form.[1121] Regardless, because the amendments to Form N–RN will require both large and small funds to report VaR test breaches, the burden to report is not associated with fund size, and consequently, we would not expect the costs of compliance with the new Form N–RN requirements to be meaningfully different for small versus large funds.

c. Amendments to Form N–CEN

The amendments to Form N–CEN will require a fund to identify whether it relied on rule 18f–4 during the reporting period.[1122] The amendments also require a fund to identify whether it relied on any of the exemptions from various requirements under the rule, specifically whether it: (1) Is a limited derivatives user; (2) is a leveraged/inverse fund as defined in the rule that is excepted from the requirement to comply with the VaR-based limit on fund leverage risk; (3) has entered into reverse repurchase agreements or similar financing transactions in reliance either on the rule provision that requires compliance with section 18's asset coverage requirements, or the provision that treats such transactions as derivative transactions under the final rule; (4) has entered into unfunded commitment agreements; or (5) has invested in a security on a when-issued or forward-settling basis, or with a non-standard settlement cycle.[1123] The amendments to Form N–CEN are designed to assist the Commission with its oversight functions by allowing it to identify which funds were excepted from, or relied on, certain of the rule's provisions.

We estimate that each fund subject to the new Form N–CEN reporting requirements will incur additional paperwork-related burdens associated with responding to the new form items that average $140.40 per year on a per-fund basis.[1124] We estimate that approximately 31 registered open- and closed-end funds are small entities that will be subject to the new Form N–CEN reporting requirements.[1125]

estimate that approximately 21% of funds will be subject to the proposed limit on fund leverage risk. *See supra* section III.C.2. Although this estimated percentage includes BDCs, we note that the total number of BDCs relative to the number of registered open- and closed-end funds is small, and therefore our estimate does not adjust this percentage to reflect the fact that BDCs do not file Form N–PORT. *See supra* section III.B.1. Therefore, we estimate the total number of small funds that will make VaR-related disclosures on Form N–PORT as follows: 74 small funds that file reports on Form N–PORT × 21% = approximately 16 small funds.

Under the final rule, funds that choose not to adjust their use of reverse repurchase agreements, similar financing transactions, or borrowings to comply with section 18's asset coverage requirements must treat such transactions as derivatives and either qualify as a limited derivatives user or be subject to the VaR tests and program requirements. We do not estimate any small funds will use these transactions in combined amounts that exceed the asset coverage requirement, and accordingly do not expect this requirement to substantively affect our estimate regarding the number of smaller funds that are likely to report VaR-related information on Form N–PORT.

[1115] *See supra* section IV.D. The components of this $3,951 estimate include average annual estimates of $3,039 internal cost and $912 average annual external cost per fund ($3,039 + $912 = $3,951).

[1116] *See supra* section IV.D. The components of this $3,958 estimate include average annual estimates of $3,039 internal cost (to report exposure information), $7.02 internal cost (to report exceedance-related information), and $912 average annual external cost per fund ($3,039 + $7.02 + $912 = approximately $3,958).

[1117] *See supra* section II.G.3.

[1118] *See* rule 18f–4(c)(7); *see also* rule 30b1–10.

[1119] *See supra* section IV.E. The components of this $1,438 estimate include 3 hours of compliance attorney time ($368) and 1 hour of senior programmer time ($334) ((3 × $368 = $1,104) + (1 × $334 = $334) = $1,438).

[1120] *See supra* footnote 1079 and accompanying text (estimating that 21% of small funds, or 18 small funds, will be subject to a VaR-based limit on fund leverage risk). We therefore similarly estimate that the same percentage and number of small funds may be required to report VaR-related information on Form N–RN.

[1121] *See supra* section IV.E. Calculated as follows: 18 small funds subject to the VaR-based limit × 1% = 0 (rounded for convenience).

[1122] *See supra* section II.G.3; *see also* Item C.7.n of Form N–CEN.

[1123] *See* Item C.7.n.i–vi of Form N–CEN; *see also* rule 18f–4(c)(4); (c)(5); (d)(i); (d)(ii); (e); and (f).

[1124] *See supra* section IV.F.

[1125] Because BDCs do not file reports on Form N–CEN, we deduct the number of BDCs from the total number of small funds that we estimate (86 small

Notwithstanding any economies of scale experienced by large versus small funds, we do not expect the costs of compliance with the new Form N–CEN requirements to be meaningfully different for small versus large funds.

3. Amendments to Rule 6c–11

We are amending the provision in rule 6c–11 excluding leveraged/inverse ETFs from the scope of that rule so that a leveraged/inverse ETF may rely on that rule if the fund complies with the applicable requirements of rule 18f–4.[1126] Rule 6c–11 permits ETFs that satisfy certain conditions to operate without obtaining an exemptive order from the Commission.[1127] The rule is designed to create a consistent, transparent, and efficient regulatory framework for such ETFs and facilitate greater competition and innovation among ETFs. As a consequence of our amendment to rule 6c–11, and our rescission of the exemptive orders we previously issued to leveraged/inverse ETFs, the amendment to rule 6c–11 will newly permit leveraged/inverse ETFs to come within scope of the rule's exemptive relief. As a result, fund sponsors will be allowed to operate a leveraged/inverse ETF subject to the conditions in rules 6c–11 and 18f–4 without obtaining an exemptive order.

Currently, there are 172 leveraged/inverse ETFs.[1128] As a result of the amendments, we expect the number of funds relying on rule 6c–11 to increase, and all 172 leveraged/inverse ETFs will rely on rule 6c–11. However, Commission staff estimates that none of these leveraged/inverse ETFs is a small entity.[1129] In addition, we do not estimate our amendments to rule 6c–11 will change the estimated per-fund cost burden associated with rule 6c–11. The costs associated with complying with rule 6c–11 are discussed in the ETFs Adopting Release.[1130]

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant economic impact on small entities. We considered the following alternatives for small entities in relation to the adopted regulations: (1) Exempting funds that are small entities from the reporting, recordkeeping, and other compliance requirements, to account for resources available to small entities; (2) establishing different reporting, recordkeeping, and other compliance requirements or frequency, to account for resources available to small entities; (3) consolidating or simplifying the compliance requirements under the proposal for small entities; and (4) using performance rather than design standards.

1. Alternative Approaches to Rule 18f–4

We do not believe that exempting small funds from the provisions in rule 18f–4 would permit us to achieve our stated objectives. Because rule 18f–4 is an exemptive rule, it will require funds to comply with new requirements only if they wish to enter into derivatives or certain other transactions.[1131] Therefore, if a small entity does not enter into derivatives or such other transactions as part of its investment strategy, then the small entity will not be subject to the provisions of rule 18f–4. In addition, a small fund whose derivatives use is limited could benefit from the limited derivatives user exception because it will not be required to adopt a derivatives risk management program (including all of the program elements). Although smaller funds that are limited derivatives users will still have to adopt policies and procedures that are reasonably designed to manage their derivatives risks, the estimated costs associated with this requirement are expected to be significantly lower than the cost of adopting a full derivatives risk management program.[1132] Thus, we estimate that small funds that rely on the exception will not have to incur a signification portion of the costs associated with new rule 18f–4.

We estimate that 60% of all funds do not have any exposure to derivatives or such other transactions.[1133] This estimate indicates that many funds, including many small funds, will be unaffected by the final rule. However, for small funds that are affected by our rule, providing an exemption for them could subject investors in small funds that engage in derivatives transactions (or other transactions that the rule covers) to a higher degree of risk than investors to large funds that will be required to comply with the elements of the rule.

The undue speculation concern expressed in section 1(b)(7) of the Investment Company Act, and the asset sufficiency concern reflected in section 1(b)(8) of the Act—both of which the rule is designed to address—apply to both small as well as large funds. As discussed throughout this release, we believe that the rule will result in investor protection benefits, and these benefits should apply to investors in smaller funds as well as investors in larger funds. We therefore do not believe it would be appropriate to exempt small funds from the rule's program requirement or VaR-based limit on fund leverage risk, or to establish different requirements applicable to funds of different sizes under these provisions to account for resources available to small entities. We believe that all of the elements of rule 18f–4 should work together to produce the anticipated investor protection benefits, and therefore do not believe it is appropriate to except smaller funds because we believe this would limit the benefits to investors in such funds.

We also do not believe that it would be appropriate to subject small funds to different reporting, recordkeeping, and other compliance requirements or frequency. Similar to the concerns discussed above, if the rule included different requirements for small funds, it could raise investor protection concerns for investors in small funds, including subjecting small fund investors to a higher degree of risk. We also believe that all fund investors will benefit from enhanced Commission monitoring and oversight of the fund

funds − 12 BDCs that are small entities = 74 small funds that file reports on Form N–CEN). *See supra* footnote 1068 and accompanying text.

The estimate of 31 funds is based on the percentage of funds we believe will be subject to the derivatives risk management program requirement (21% of funds, *see supra* footnote 849 and accompanying text, which encompasses the percentage of funds that we estimate will be subject to the VaR test requirements) plus the percentage of funds we believe will qualify as limited derivatives users (19% of funds, *see supra* footnote 1087 and accompanying text). We assume generally that funds that will enter into reverse repurchase agreements or similar financing transactions, and unfunded commitments either would have to comply with the derivatives risk management program or would qualify as a limited derivatives user. *See supra* footnote 1033. In addition, we include money market funds in this estimate, as they may report their reliance on rule 18f–4's provisions for when-issued and forward-settling transactions on Form N–CEN.

We therefore estimate that approximately 30 small funds that file reports on Form N–CEN ((86 total small funds less 12 small BDCs = 74 small funds) × 40% (21% + 19%) = approximately 30 small funds) + 1 small money market fund = 31 small funds subject to the new Form N–CEN reporting requirements.

[1126] *See supra* section II.F.6.

[1127] *Id.*

[1128] *See supra* footnote 820 and accompanying paragraph.

[1129] *Id.*

[1130] *See* ETFs Adopting Release, *supra* footnote 76, at sections IV–VI.

[1131] *See supra* sections II.A and III.E.

[1132] *See supra* sections III.C.1 and IV.B.1 (Derivatives Risk Management Program) and III.C.3 and IV.B.6 (Requirements for Limited Derivatives Users) for a discussion of estimated costs associated with these elements of the rule.

[1133] *See supra* footnote 807 and accompanying paragraph.

industry, which we anticipate will result from the disclosure and reporting requirements.

We do not believe that consolidating or simplifying the compliance requirements under the rule for small funds would permit us to achieve our stated objectives. Again, this approach would raise investor protection concerns for investors in small funds using derivatives and the other transactions that the final rule addresses.[1134] However, as discussed above, the rule contains an exception for limited derivatives users that we anticipate will subject funds that qualify for this exception to fewer compliance burdens. We recognize that the risks and potential impact of derivatives transactions on a fund's portfolio generally increase as the fund's level of derivatives usage increases and when funds use derivatives for speculative purposes. Therefore the rule will entail a less significant compliance burden for funds—including small funds—that choose to limit their derivatives usage in the manner that the exception specifies. The final rule, therefore, includes provisions designed to consider the requirement burdens based on the fund's use of derivatives (rather than the size of the fund).

The costs associated with rule 18f–4 will vary depending on the fund's particular circumstances, and thus the rule could result in different burdens on funds' resources. In particular, we expect that a fund that pursues an investment strategy that involves greater derivatives risk may have greater costs associated with its derivatives risk management program. For example, a fund that qualifies as a limited derivatives user under the rule will be exempt from the requirements to adopt and implement a derivatives risk management program, to adhere to the rule's VaR-based limit on fund leverage risk, and to comply with related board oversight and reporting provisions. The costs of compliance with the rule will vary even for limited derivatives users, as these funds will be required to adopt policies and procedures that are ''reasonably designed'' to manage their derivatives risks. Thus, to the extent a fund that is a small entity faces relatively little derivatives risk, we believe it will incur relatively low costs to comply with the rule. However, we believe that it is appropriate to correlate the costs associated with the rule with the level of derivatives risk facing a fund, and not necessarily with the fund's size in light of our investor protection objectives.

Finally, with respect to the use of performance rather than design standards, the rule generally uses performance standards for all funds relying on the rule, regardless of size. We believe that providing funds with the flexibility with respect to investment strategies and use of derivatives transactions is appropriate, as well as the derivatives risk management program design. However, the rule also uses design standards with respect to certain requirements such as complying with the VaR-based limit on fund leverage risk and the specified program elements in the derivatives risk management program. For the reasons discussed above, we believe that this use of design standards is appropriate to address investor protection concerns, particularly the concerns expressed in sections 1(b)(7), 1(b)(8), and 18 of the Investment Company Act.

2. Alternative Approaches to Amendments to Forms N–PORT, N–LIQUID (N–RN), and N–CEN

We do not believe that the interests of investors would be served by exempting funds that are small entities from the reporting requirements. We believe that the form amendments are necessary to help identify and provide the Commission timely information about funds that comply with rule 18f–4.[1135] Exempting small funds from coverage under all or any part of the form amendments could compromise the effectiveness of the reporting requirements, which the Commission believes would not be consistent with its goals of industry oversight and investor protection. We believe that fund investors will benefit from enhanced Commission monitoring and oversight of the fund industry, which we anticipate will result from the new reporting requirements.

For similar reasons, although we considered establishing different reporting requirements for small funds, we believe this would subject investors in small funds that enter into derivatives transactions to a higher degree of risk and information asymmetry than investors to large funds that will be required to comply with the new reporting requirements for which the reported information will be publicly available. We also note that registered open- and closed-end management investment companies, including those that are small entities, have already updated their systems and have established internal processes to prepare, validate, and file reports on Forms N–PORT and N–CEN.[1136] For funds that will be required to file reports on Form N–RN pursuant to rules 18f–4 and 30b1–10, the vast majority of them are open-end funds, which already are required to submit the form upon specified events. With respect to the additional registered closed-end funds and BDCs newly required to file reports on Form N–RN, we do not believe they will need more time than other types of funds to comply with the new reporting requirements, given the limited set of reporting requirements they will be subject to and the relatively low burden we estimate of filing reports on Form N–RN.

We also do not believe that the interests of investors would be served by consolidating or simplifying the reporting requirements under the final rule for small funds. Small funds are as vulnerable to the same potential risks associated with their derivatives use as larger funds are, and therefore we believe that simplifying or consolidating the reporting requirements for small funds would not allow us to meet our stated objectives. Moreover, we believe many of the reporting requirements involve minimal burden. For example, the Form N–CEN ''checking a box'' reporting requirement is completed on an annual basis.

Finally, we did not prescribe performance standards rather than design standards for small funds because we believe this too could diminish the ability of the new rules to achieve their intended regulatory purpose by creating inconsistent reporting requirements between small and large funds, and weakening the benefits of the reporting requirement for investors in small funds.

3. Alternative Approaches to Rule 6c–11

Rule 6c–11 is designed to modernize the regulatory framework for ETFs and to create a consistent, transparent, and efficient regulatory framework.[1137] The Commission's full Regulatory Flexibility Act Analysis regarding rule 6c–11, including analysis of significant alternatives, appears in the 2019 ETFs

[1134] *See, e.g.,* rules 18f–4(d) (reverse repurchase agreements and similar financing transactions); (e) (unfunded commitments); and (f) (when-issued, forward-settling, and non-standard settlement cycle securities).

[1135] *See supra* section III.C.9.

[1136] *See supra* footnote 625 (noting that the funds that will rely on rule 18f–4, other than BDCs, generally are subject to reporting requirements of Forms N–PORT and N–CEN); *see also* Reporting Modernization Adopting Release, Release No. 32936 (Dec. 8, 2017) [82 FR 58731 (Dec. 14, 2017)] (requiring larger registered fund groups to submit reports on Form N–PORT by April 30, 2019, and smaller fund groups to submit reports on Form N–PORT by April 30, 2020).

[1137] *See* ETFs Adopting Release, *supra* footnote 76, at section I.

Adopting Release.[1138] This analysis of alternatives for small leveraged/inverse ETFs here is consistent with the Commission's analysis of alternatives for small ETFs in that release.

We do not believe that permitting or requiring different treatment for any subset of leveraged/inverse ETFs, including small leveraged/inverse ETFs, under the amendments to rule 6c–11, and the rule's related recordkeeping, disclosure and reporting requirements, will permit us to achieve our stated objectives. Similarly, we do not believe that we can establish simplified or consolidated compliance requirements for small leveraged/inverse ETFs under the amendments to rule 6c–11 without compromising our objectives. The Commission discussed the bases for this determination (with respect to ETFs other than leveraged/inverse ETFs) in more detail in the ETFs Adopting Release, and we are extending that analysis to leveraged/inverse ETFs in this FRFA.

VI. Statutory Authority

The Commission is adopting new rule 18f–4 under the authority set forth in sections 6(c), 12(a), 18, 31(a), 38(a), and 61 of the Investment Company Act of 1940 [15 U.S.C. 80a–6(c), 80a–12(a), 80a–18, 80a–30(a), 80a–37(a), and 80a–60]. The Commission is adopting amendments to rule 6c–11 under the authority set forth in sections 6(c), 22(c), and 38(a) of the Investment Company Act [15 U.S.C. 80a–6(c), 22(c), and 80a–37(a)]. The Commission is adopting amendments to rule 22e–4 under the authority set forth in 22(c), 22(e), 34(b) and 38(a) of the Investment Company Act [15 U.S.C. 80a–22(c), 80a–22(e), 80a–35(b), and 80a–37(a)], the Investment Advisers Act, particularly, section 206(4) thereof [15 U.S.C. 80b–6(4)], the Exchange Act, particularly section 10(b) thereof [15 U.S.C. 78a *et seq.*], the Securities Act, particularly section 17(a) thereof [15 U.S.C. 77a *et seq.*]. The Commission is adopting amendments to rule 30b1–10 under the authority set forth in sections 22(c), 22(e), 34(b) and 38(a) of the Investment Company Act [15 U.S.C. 80a–22(c), 80a–22(e), 80a–35(b), and 80a–37(a)], the Investment Advisers Act, particularly, section 206(4) thereof [15 U.S.C. 80b–6(4)], the Exchange Act, particularly section 10(b) thereof [15 U.S.C. 78a *et seq.*], the Securities Act, particularly section 17(a) thereof [15 U.S.C. 77a *et seq.*]. The Commission is adopting amendments to Form N–PORT, Form N–LIQUID (re-titled ''Form N–RN''), Form N–CEN, and Form N–2 under the authority set forth in sections 6(c), 8, 18, 30, and 38 of the Investment Company Act of 1940 [15 U.S.C. 80a–8, 80a–18, 80a–29, 80a–37, 80a–63], sections 6, 7(a), 10 and 19(a) of the Securities Act of 1933 [15 U.S.C. 77f, 77g(a), 77j, 77s(a)], and sections 10, 13, 15, 23, and 35A of the Exchange Act [15 U.S.C. 78j, 78m, 78o, 78w, and 78ll].

[1138] *See id.* at section VI.

List of Subjects

17 CFR Part 239

Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rules and Form Amendments

For the reasons set out in the preamble the Commission amends title 17, chapter II of the Code of Federal Regulations as follows:

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

■ 1. The authority citation for part 239 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78 *l,* 78m,78n, 78o(d), 78o–7 note, 78u–5, 78w(a), 78*ll,* 78mm, 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37; and sec. 107, Pub. L. 112–106, 126 Stat. 312, unless otherwise noted.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 2. The authority citation for part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), and Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), unless otherwise noted.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 3. The authority citation for part 270 continues to read, in part, as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

Section 270.6c–11 is also issued under 15 U.S.C. 80a–6(c) and 80a–37(a).

* * * * *

■ 4. Amend § 270.6c–11 by revising paragraph (c)(4) to read as follows:

§ 270.6c–11 Exchange traded-funds.

* * * * *

(c) * * *

(4) An exchange-traded fund that seeks, directly or indirectly, to provide investment returns that correspond to the performance of a market index by a specified multiple, or to provide investment returns that have an inverse relationship to the performance of a market index, over a predetermined period of time, must comply with all applicable provisions of § 270.18f–4.

* * * * *

■ 5. Section 270.18f–4 is added to read as follows:

§ 270.18f–4 Exemption from the requirements of section 18 and section 61 for certain senior securities transactions.

(a) *Definitions.* For purposes of this section:

Absolute VaR test means that the VaR of the fund's portfolio does not exceed 20% of the value of the fund's net assets, or in the case of a closed-end company that has issued to investors and has then outstanding shares of a class of senior security that is a stock, that the VaR of the fund's portfolio does not exceed 25% of the value of the fund's net assets.

Derivatives exposure means the sum of the gross notional amounts of the fund's derivatives transactions described in paragraph (1) of the definition of the term ''derivatives transaction'' of this section, and in the case of short sale borrowings, the value of the assets sold short. If a fund's derivatives transactions include reverse repurchase agreements or similar financing transactions under paragraph (d)(1)(ii) of this section, the fund's derivatives exposure also includes, for each transaction, the proceeds received but not yet repaid or returned, or for which the associated liability has not been extinguished, in connection with the transaction. In determining derivatives exposure a fund may convert the notional amount of interest rate derivatives to 10-year bond equivalents and delta adjust the notional amounts of options contracts and exclude any closed-out positions, if those positions were closed out with the same counterparty and result in no credit or market exposure to the fund.

Derivatives risk manager means an officer or officers of the fund's investment adviser responsible for administering the program and policies

and procedures required by paragraph (c)(1) of this section, provided that the derivatives risk manager:

(1) May not be a portfolio manager of the fund, or if multiple officers serve as derivatives risk manager, may not have a majority composed of portfolio managers of the fund; and

(2) Must have relevant experience regarding the management of derivatives risk.

Derivatives risks means the risks associated with a fund's derivatives transactions or its use of derivatives transactions, including leverage, market, counterparty, liquidity, operational, and legal risks and any other risks the derivatives risk manager (or, in the case of a fund that is a limited derivatives user as described in paragraph (c)(4) of this section, the fund's investment adviser) deems material.

Derivatives transaction means:

(1) Any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument (''derivatives instrument''), under which a fund is or may be required to make any payment or delivery of cash or other assets during the life of the instrument or at maturity or early termination, whether as margin or settlement payment or otherwise;

(2) Any short sale borrowing; and

(3) If a fund relies on paragraph (d)(1)(ii) of this section, any reverse repurchase agreement or similar financing transaction.

Designated index means an unleveraged index that is approved by the derivatives risk manager for purposes of the relative VaR test and that reflects the markets or asset classes in which the fund invests and is not administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, unless the index is widely recognized and used. In the case of a blended index, none of the indexes that compose the blended index may be administered by an organization that is an affiliated person of the fund, its investment adviser, or principal underwriter, or created at the request of the fund or its investment adviser, unless the index is widely recognized and used.

Designated reference portfolio means a designated index or the fund's securities portfolio. Notwithstanding paragraph (2) of the definition of *designated index* of this section, if the fund's investment objective is to track the performance (including a leverage multiple or inverse multiple) of an unleveraged index, the fund must use that index as its designated reference portfolio.

Fund means a registered open-end or closed-end company or a business development company, including any separate series thereof, but does not include a registered open-end company that is regulated as a money market fund under § 270.2a–7.

Leveraged/inverse fund means a fund that seeks, directly or indirectly, to provide investment returns that correspond to the performance of a market index by a specified multiple (''leverage multiple''), or to provide investment returns that have an inverse relationship to the performance of a market index (''inverse multiple''), over a predetermined period of time.

Relative VaR test means that the VaR of the fund's portfolio does not exceed 200% of the VaR of the designated reference portfolio, or in the case of a closed-end company that has issued to investors and has then outstanding shares of a class of senior security that is a stock, that the VaR of the fund's portfolio does not exceed 250% of the VaR of the designated reference portfolio.

Securities portfolio means the fund's portfolio of securities and other investments, excluding any derivatives transactions, that is approved by the derivatives risk manager for purposes of the relative VaR test, provided that the fund's securities portfolio reflects the markets or asset classes in which the fund invests (*i.e.,* the markets or asset classes in which the fund invests directly through securities and other investments and indirectly through derivatives transactions).

Unfunded commitment agreement means a contract that is not a derivatives transaction, under which a fund commits, conditionally or unconditionally, to make a loan to a company or to invest equity in a company in the future, including by making a capital commitment to a private fund that can be drawn at the discretion of the fund's general partner.

Value-at-risk or *VaR* means an estimate of potential losses on an instrument or portfolio, expressed as a percentage of the value of the portfolio's assets (or net assets when computing a fund's VaR), over a specified time horizon and at a given confidence level, provided that any VaR model used by a fund for purposes of determining the fund's compliance with the relative VaR test or the absolute VaR test must:

(1) Take into account and incorporate all significant, identifiable market risk factors associated with a fund's investments, including, as applicable:

(i) Equity price risk, interest rate risk, credit spread risk, foreign currency risk and commodity price risk;

(ii) Material risks arising from the nonlinear price characteristics of a fund's investments, including options and positions with embedded optionality; and

(iii) The sensitivity of the market value of the fund's investments to changes in volatility;

(2) Use a 99% confidence level and a time horizon of 20 trading days; and

(3) Be based on at least three years of historical market data.

(b) *Derivatives transactions.* If a fund satisfies the conditions of paragraph (c) of this section, the fund may enter into derivatives transactions, notwithstanding the requirements of sections 18(a)(1), 18(c), 18(f)(1), and 61 of the Investment Company Act (15 U.S.C. 80a–18(a)(1), 80a–18(c), 80a–18(f)(1), and 80a–60), and derivatives transactions entered into by the fund in compliance with this section will not be considered for purposes of computing asset coverage, as defined in section 18(h) of the Investment Company Act (15 U.S.C. 80a–18(h)).

(c) *Conditions*—(1) *Derivatives risk management program.* The fund adopts and implements a written derivatives risk management program (''program''), which must include policies and procedures that are reasonably designed to manage the fund's derivatives risks and to reasonably segregate the functions associated with the program from the portfolio management of the fund. The program must include the following elements:

(i) *Risk identification and assessment.* The program must provide for the identification and assessment of the fund's derivatives risks. This assessment must take into account the fund's derivatives transactions and other investments.

(ii) *Risk guidelines.* The program must provide for the establishment, maintenance, and enforcement of investment, risk management, or related guidelines that provide for quantitative or otherwise measurable criteria, metrics, or thresholds of the fund's derivatives risks. These guidelines must specify levels of the given criterion, metric, or threshold that the fund does not normally expect to exceed, and measures to be taken if they are exceeded.

(iii) *Stress testing.* The program must provide for stress testing to evaluate potential losses to the fund's portfolio in response to extreme but plausible market changes or changes in market risk factors that would have a significant adverse effect on the fund's portfolio,

taking into account correlations of market risk factors and resulting payments to derivatives counterparties. The frequency with which the stress testing under this paragraph is conducted must take into account the fund's strategy and investments and current market conditions, provided that these stress tests must be conducted no less frequently than weekly.

(iv) *Backtesting.* The program must provide for backtesting to be conducted no less frequently than weekly, of the results of the VaR calculation model used by the fund in connection with the relative VaR test or the absolute VaR test by comparing the fund's gain or loss that occurred on each business day during the backtesting period with the corresponding VaR calculation for that day, estimated over a one-trading day time horizon, and identifying as an exception any instance in which the fund experiences a loss exceeding the corresponding VaR calculation's estimated loss.

(v) *Internal reporting and escalation*—(A) *Internal reporting.* The program must identify the circumstances under which persons responsible for portfolio management will be informed regarding the operation of the program, including exceedances of the guidelines specified in paragraph (c)(1)(ii) of this section and the results of the stress tests specified in paragraph (c)(1)(iii) of this section.

(B) *Escalation of material risks.* The derivatives risk manager must inform in a timely manner persons responsible for portfolio management of the fund, and also directly inform the fund's board of directors as appropriate, of material risks arising from the fund's derivatives transactions, including risks identified by the fund's exceedance of a criterion, metric, or threshold provided for in the fund's risk guidelines established under paragraph (c)(1)(ii) of this section or by the stress testing described in paragraph (c)(1)(iii) of this section.

(vi) *Periodic review of the program.* The derivatives risk manager must review the program at least annually to evaluate the program's effectiveness and to reflect changes in risk over time. The periodic review must include a review of the VaR calculation model used by the fund under paragraph (c)(2) of this section (including the backtesting required by paragraph (c)(1)(iv) of this section) and any designated reference portfolio to evaluate whether it remains appropriate.

(2) *Limit on fund leverage risk.* (i) The fund must comply with the relative VaR test unless the derivatives risk manager reasonably determines that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test, taking into account the fund's investments, investment objectives, and strategy. A fund that does not apply the relative VaR test must comply with the absolute VaR test.

(ii) The fund must determine its compliance with the applicable VaR test at least once each business day. If the fund determines that it is not in compliance with the applicable VaR test, the fund must come back into compliance promptly after such determination, in a manner that is in the best interests of the fund and its shareholders.

(iii) If the fund is not in compliance with the applicable VaR test within five business days:

(A) The derivatives risk manager must provide a written report to the fund's board of directors and explain how and by when (*i.e.,* number of business days) the derivatives risk manager reasonably expects that the fund will come back into compliance;

(B) The derivatives risk manager must analyze the circumstances that caused the fund to be out of compliance for more than five business days and update any program elements as appropriate to address those circumstances; and

(C) The derivatives risk manager must provide a written report within thirty calendar days of the exceedance to the fund's board of directors explaining how the fund came back into compliance and the results of the analysis and updates required under paragraph (c)(2)(iii)(B) of this section. If the fund remains out of compliance with the applicable VaR test at that time, the derivatives risk manager's written report must update the report previously provided under paragraph (c)(2)(iii)(A) of this section and the derivatives risk manager must update the board of directors on the fund's progress in coming back into compliance at regularly scheduled intervals at a frequency determined by the board.

(3) *Board oversight and reporting*—(i) *Approval of the derivatives risk manager.* A fund's board of directors, including a majority of directors who are not interested persons of the fund, must approve the designation of the derivatives risk manager.

(ii) *Reporting on program implementation and effectiveness.* On or before the implementation of the program, and at least annually thereafter, the derivatives risk manager must provide to the board of directors a written report providing a representation that the program is reasonably designed to manage the fund's derivatives risks and to incorporate the elements provided in paragraphs (c)(1)(i) through (vi) of this section. The representation may be based on the derivatives risk manager's reasonable belief after due inquiry. The written report must include the basis for the representation along with such information as may be reasonably necessary to evaluate the adequacy of the fund's program and, for reports following the program's initial implementation, the effectiveness of its implementation. The written report also must include, as applicable, the derivatives risk manager's basis for the approval of any designated reference portfolio or any change in the designated reference portfolio during the period covered by the report; or an explanation of the basis for the derivatives risk manager's determination that a designated reference portfolio would not provide an appropriate reference portfolio for purposes of the relative VaR test.

(iii) *Regular board reporting.* The derivatives risk manager must provide to the board of directors, at a frequency determined by the board, a written report regarding the derivatives risk manager's analysis of exceedances described in paragraph (c)(1)(ii) of this section, the results of the stress testing conducted under paragraph (c)(1)(iii) of this section, and the results of the backtesting conducted under paragraph (c)(1)(iv) of this section since the last report to the board. Each report under this paragraph must include such information as may be reasonably necessary for the board of directors to evaluate the fund's response to exceedances and the results of the fund's stress testing.

(4) *Limited derivatives users.* (i) A fund is not required to adopt a program as prescribed in paragraph (c)(1) of this section, comply with the limit on fund leverage risk in paragraph (c)(2) of this section, or comply with the board oversight and reporting requirements as prescribed in paragraph (c)(3) of this section, if:

(A) The fund adopts and implements written policies and procedures reasonably designed to manage the fund's derivatives risk; and

(B) The fund's derivatives exposure does not exceed 10 percent of the fund's net assets, excluding, for this purpose, currency or interest rate derivatives that hedge currency or interest rate risks associated with one or more specific equity or fixed-income investments held by the fund (which must be foreign-currency-denominated in the case of currency derivatives), or the fund's borrowings, provided that the currency

or interest rate derivatives are entered into and maintained by the fund for hedging purposes and that the notional amounts of such derivatives do not exceed the value of the hedged investments (or the par value thereof, in the case of fixed-income investments, or the principal amount, in the case of borrowing) by more than 10 percent.

(ii) If a fund's derivatives exposure exceeds 10 percent of its net assets, as calculated in accordance with paragraph (c)(4)(i)(B) of this section, and the fund is not in compliance with that paragraph within five business days, the fund's investment adviser must provide a written report to the fund's board of directors informing them whether the investment adviser intends either:

(A) To reduce the fund's derivatives exposure to less than 10 percent of the fund's net assets promptly, but within no more than thirty calendar days of the exceedance, in a manner that is in the best interests of the fund and its shareholders; or

(B) For the fund to establish a program as prescribed in paragraph (c)(1) of this section, comply with the limit on fund leverage risk in paragraph (c)(2) of this section, and comply with the board oversight and reporting requirements as prescribed in paragraph (c)(3) of this section, as soon as reasonably practicable.

(5) *Leveraged/inverse funds.* A leveraged/inverse fund that cannot comply with the limit on fund leverage risk in paragraph (c) of this section is not required to comply with the limit on fund leverage risk if, in addition to complying with all other applicable requirements of this section:

(i) As of October 28, 2020, the fund is in operation; has outstanding shares issued in one or more public offerings to investors; and discloses in its prospectus a leverage multiple or inverse multiple that exceeds 200% of the performance or the inverse of the performance of the underlying index;

(ii) The fund does not change the underlying market index or increase the level of leveraged or inverse market exposure the fund seeks, directly or indirectly, to provide; and

(iii) The fund discloses in its prospectus that it is not subject to the limit on fund leverage risk in paragraph (c)(2) of this section.

(6) *Recordkeeping*—(i) *Records to be maintained.* A fund must maintain a written record documenting, as applicable:

(A) The fund's written policies and procedures required by paragraph (c)(1) of this section, along with:

(*1*) The results of the fund's stress tests under paragraph (c)(1)(iii) of this section;

(*2*) The results of the backtesting conducted under paragraph (c)(1)(iv) of this section;

(*3*) Records documenting any internal reporting or escalation of material risks under paragraph (c)(1)(v)(B) of this section; and

(*4*) Records documenting the reviews conducted under paragraph (c)(1)(vi) of this section.

(B) Copies of any materials provided to the board of directors in connection with its approval of the designation of the derivatives risk manager, any written reports provided to the board of directors relating to the program, and any written reports provided to the board of directors under paragraphs (c)(2)(iii)(A) and (C) of this section.

(C) Any determination and/or action the fund made under paragraphs (c)(2)(i) and (ii) of this section, including a fund's determination of: The VaR of its portfolio; the VaR of the fund's designated reference portfolio, as applicable; the fund's VaR ratio (the value of the VaR of the fund's portfolio divided by the VaR of the designated reference portfolio), as applicable; and any updates to any VaR calculation models used by the fund and the basis for any material changes thereto.

(D) If applicable, the fund's written policies and procedures required by paragraph (c)(4) of this section, along with copies of any written reports provided to the board of directors under paragraph (c)(4)(ii) of this section.

(ii) *Retention periods.* (A) A fund must maintain a copy of the written policies and procedures that the fund adopted under paragraph (c)(1) or (4) of this section that are in effect, or at any time within the past five years were in effect, in an easily accessible place.

(B) A fund must maintain all records and materials that paragraphs (c)(6)(i)(A)(*1*) through (*4*) and (c)(6)(i)(B) through (D) of this section describe for a period of not less than five years (the first two years in an easily accessible place) following each determination, action, or review that these paragraphs describe.

(7) *Current reports.* A fund that experiences an event specified in the parts of Form N–RN [referenced in 17 CFR 274.223] titled ''Relative VaR Test Breaches,'' ''Absolute VaR Test Breaches,'' or ''Compliance with VaR Test'' must file with the Commission a report on Form N–RN within the period and according to the instructions specified in that form.

(d) *Reverse repurchase agreements.* (1) A fund may enter into reverse repurchase agreements or similar financing transactions, notwithstanding the requirements of sections 18(c) and 18(f)(1) of the Investment Company Act, if the fund:

(i) Complies with the asset coverage requirements of section 18, and combines the aggregate amount of indebtedness associated with all reverse repurchase agreements or similar financing transactions with the aggregate amount of any other senior securities representing indebtedness when calculating the asset coverage ratio; or

(ii) Treats all reverse repurchase agreements or similar financing transactions as derivatives transactions for all purposes under this section.

(2) A fund relying on paragraph (d) of this section must maintain a written record documenting whether the fund is relying on paragraph (d)(1)(i) or (ii) of this section for a period of not less than five years (the first two years in an easily accessible place) following the determination.

(e) *Unfunded commitment agreements.* (1) A fund may enter into an unfunded commitment agreement, notwithstanding the requirements of sections 18(a), 18(c), 18(f)(1), and 61 of the Investment Company Act, if the fund reasonably believes, at the time it enters into such agreement, that it will have sufficient cash and cash equivalents to meet its obligations with respect to all of its unfunded commitment agreements, in each case as they come due. In forming a reasonable belief, the fund must take into account its reasonable expectations with respect to other obligations (including any obligation with respect to senior securities or redemptions), and may not take into account cash that may become available from the sale or disposition of any investment at a price that deviates significantly from the market value of those investments, or from issuing additional equity. Unfunded commitment agreements entered into by the fund in compliance with this section will not be considered for purposes of computing asset coverage, as defined in section 18(h) of the Investment Company Act (15 U.S.C. 80a–18(h)).

(2) For each unfunded commitment agreement that a fund enters into under paragraph (e)(1) of this section, a fund must document the basis for its reasonable belief regarding the sufficiency of its cash and cash equivalents to meet its unfunded commitment agreement obligations, and maintain a record of this documentation for a period of not less than five years (the first two years in an easily

accessible place) following the date that the fund entered into the agreement.

(f) *When issued, forward-settling, and non-standard settlement cycle securities transactions.* Notwithstanding the requirements of sections 18(a)(1), 18(c), 18(f)(1), and 61 of the Investment Company Act (15 U.S.C. 80a–18(a)(1), 80a018(c), 80a–18(f)(1), and 80a–60), a fund or registered open-end company that is regulated as a money market fund under § 270.2a–7 may invest in a security on a when-issued or forward-settling basis, or with a non-standard settlement cycle, and the transaction will be deemed not to involve a senior security, provided that: The fund intends to physically settle the transaction; and the transaction will settle within 35 days of its trade date.

■ 6. Amend § 270.22e–4 by revising paragraph (b)(1)(ii)(C), note to paragraph (b)(1)(ii)(C) and paragraph (b)(1)(iii)(B) to read as follows:

§ 270.22e–4 Liquidity risk management programs.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(C) For derivatives transactions that the fund has classified as moderately liquid investments, less liquid investments, and illiquid investments, identify the percentage of the fund's highly liquid investments that it has pledged as margin or collateral in connection with derivatives transactions in each of these classification categories.

Note to paragraph (b)(1)(ii)(C): For purposes of calculating these percentages, a fund that has pledged highly liquid investments and non-highly liquid investments as margin or collateral in connection with derivatives transactions classified as moderately liquid, less liquid, or illiquid investments first should apply pledged assets that are highly liquid investments in connection with these transactions, unless it has specifically identified non-highly liquid investments as margin or collateral in connection with such derivatives transactions.

* * * * *

(iii) * * *

(B) For purposes of determining whether a fund primarily holds assets that are highly liquid investments, a fund must exclude from its calculations the percentage of the fund's assets that are highly liquid investments that it has pledged as margin or collateral in connection with derivatives transactions that the fund has classified as moderately liquid investments, less liquid investments, and illiquid investments, as determined pursuant to paragraph (b)(1)(ii)(C) of this section.

* * * * *

■ 7. Revise § 270.30b1–10 to read as follows:

§ 270.30b1–10 Current report for open-end and closed-end management investment companies.

Every registered open-end management investment company, or series thereof, and every registered closed-end management investment company, but not a fund that is regulated as a money market fund under § 270.2a–7, that experiences an event specified on Form N–RN, must file with the Commission a current report on Form N–RN within the period and according to the instructions specified in that form.

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 8. The authority for part 274 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78l, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, 80a–29, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 9. Amend Form N–2 (referenced in §§ 239.14 and 274.11a–1) by revising instruction 2. to sub-item ''3. *Senior Securities*'' of ''Item 4. Financial Highlights'' to read as follows:

Note: The text of Form N–2 does not, and this amendment will not, appear in the *Code of Federal Regulations.*

Form N–2

* * * * *

Item 4. Financial Highlights

* * * * *

3. Senior Securities

* * * * *

Instructions

* * * * *

2. Use the method described in section 18(h) of the 1940 Act [15 U.S.C. 80a–18(h)] to calculate the asset coverage to be set forth in column (3). However, in lieu of expressing asset coverage in terms of a ratio, as described in section 18(h), express it for each class of senior securities in terms of dollar amounts per share (in the case of preferred stock) or per $1,000 of indebtedness (in the case of senior indebtedness). A fund should not consider any derivatives transactions, or any unfunded commitment agreements, that it enters into in compliance with rule 18f–4 under the Investment Company Act [17 CFR 270.18f–4] for purposes of computing asset coverage.

* * * * *

■ 10. Amend Form N–CEN (referenced in §§ 249.330 and 274.101) by adding new Item C.7.n. to read as follows:

Note: The text of Form N–CEN does not, and this amendment will not, appear in the *Code of Federal Regulations.*

FORM N–CEN

ANNUAL REPORT FOR REGISTERED INVESTMENT COMPANIES

* * * * *

Item C.7. * * *

n. Rule 18f–4 (17 CFR 270.18f–4):_____

i. Is the Fund excepted from the rule 18f–4 (17 CFR 270.18f–4) program requirement and limit on fund leverage risk under rule 18f–4(c)(4) (17 CFR 270.18f–4(c)(4))? _____

ii. Is the Fund a leveraged/inverse fund that, under rule 18f–4(c)(5) (17 CFR 270.18f–4(c)(5)), is excepted from the requirement to comply with the limit on fund leverage risk described in rule 18f–4(c)(2) (17 CFR 270.18f–4(c)(2))? _____

iii. Did the Fund enter into any reverse repurchase agreements or similar financing transactions under rule 18f–4(d)(i) (17 CFR 270.18f–4(d)(i))? _____

iv. Did the Fund enter into any reverse repurchase agreements or similar financing transactions under rule 18f–4(d)(ii) (17 CFR 270.18f–4(d)(ii))? _____

v. Did the Fund enter into any unfunded commitment agreements under rule 18f–4(e) (17 CFR 270.18f–4(e))? _____

vi. Did the Fund invest in a security on a when-issued or forward-settling basis, or with a non-standard settlement cycle, in reliance on rule 18f–4(f) (17 CFR 270.18f–4(f))? _____

* * * * *

■ 11. Amend Form N–PORT (referenced in § 274.150) by:

■ a. Adding to General Instruction E. ''Definitions'' the parenthetical ''(including rule 18f–4 solely for Items B.9 and 10 of the Form)'' in the introductory paragraph, and adding in alphabetical order, the following definitions:

■ i. ''Absolute VaR Test'';

■ ii. ''Derivatives Exposure'';

■ iii. ''Designated Index'';

■ iv. ''Designated Reference Portfolio'';

■ v. ''Relative VaR Test'';

■ vi. ''Securities Portfolio'';

■ vii. ''Value-at-Risk''; and

■ viii. ''VaR Ratio''.

■ b. Revising General Instruction F ''Public Availability'' to add the text ''Derivatives Exposure for limited derivatives users (Item B.9), median daily VaR (Item B.10.a), median VaR Ratio (Item B.10.b.iii),'' and ''VaR backtesting results (Item B.10.c),''.

■ c. Revising Item B.8 to replace the text ''segregated to cover or pledged to satisfy margin requirements'' with ''pledged as margin or collateral,'' and to add after the enumerated liquidity categories the text ''For purposes of Item B.8, when computing the required percentage, the denominator should only include assets (and exclude liabilities) that are categorized by the Fund as Highly Liquid Investments.''

■ d. Adding Items B.9 and B.10.

The additions and revisions read as follows:

Note: The text of Form N–PORT does not, and this amendment will not, appear in the *Code of Federal Regulations.*

FORM N–PORT

MONTHLY PORTFOLIO INVESTMENTS REPORT

* * * * *

GENERAL INSTRUCTIONS

* * * * *

E. Definitions

References to sections and rules in this Form N–PORT are to the Act, unless otherwise indicated. Terms used in this Form N–PORT have the same meanings as in the Act or related rules (including rule 18f–4 solely for Items B.9 and 10 of the Form), unless otherwise indicated.

* * * * *

''Absolute VaR Test'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Derivatives Exposure'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Designated Index'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Designated Reference Portfolio'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Relative VaR Test'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Securities Portfolio'' has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''Value-at-Risk'' or VaR has the meaning defined in rule 18f–4(a) [17 CFR 270.18f–4(a)].

* * * * *

''VaR Ratio'' means the value of the Fund's portfolio VaR divided by the VaR of the Designated Reference Portfolio.

* * * * *

F. Public Availability

Information reported on Form N–PORT for the third month of each Fund's fiscal quarter will be made publicly available 60 days after the end of the Fund's fiscal quarter.

The SEC does not intend to make public the information reported on Form N–PORT for the first and second months of each Fund's fiscal quarter that is identifiable to any particular fund or adviser, or any information reported with respect to a Fund's Highly Liquid Investment Minimum (Item B.7), derivatives transactions (Item B.8), Derivatives Exposure for limited derivatives users (Item B.9), median daily VaR (Item B.10.a), median VaR Ratio (Item B.10.b.iii), VaR backtesting results (Item B.10.c), country of risk and economic exposure (Item C.5.b), delta (Items C.9.f.v, C.11.c.vii, or C.11.g.iv), liquidity classification for portfolio investments (Item C.7), or miscellaneous securities (Part D), or explanatory notes related to any of those topics (Part E) that is identifiable to any particular fund or adviser. However, the SEC may use information reported on this Form in its regulatory programs, including examinations, investigations, and enforcement actions.

* * * * *

PART B. * * *

Item B.8. Derivatives Transactions. For portfolio investments of open-end management investment companies, provide the percentage of the Fund's Highly Liquid Investments that it has pledged as margin or collateral in connection with derivatives transactions that are classified among the following categories as specified in rule 22e–4 [17 CFR 270.22e–4]:

1. Moderately Liquid Investments
2. Less Liquid Investments
3. Illiquid Investments

For purposes of Item B.8, when computing the required percentage, the denominator should only include assets (and exclude liabilities) that are categorized by the Fund as Highly Liquid Investments.

Item B.9. Derivatives Exposure for limited derivatives users. If the Fund is excepted from the rule 18f–4 [17 CFR 270.18f–4] program requirement and limit on fund leverage risk under rule 18f–4(c)(4) [17 CFR 270.18f–4(c)(4)], provide the following information:

a. Derivatives exposure (as defined in rule 18f–4(a) [17 CFR 270.18f–4(a)]), reported as a percentage of the Fund's net asset value.

b. Exposure from currency derivatives that hedge currency risks, as provided in rule 18f–4(c)(4)(i)(B) [17 CFR 270.18f–4(c)(4)(i)(B)], reported as a percentage of the Fund's net asset value.

c. Exposure from interest rate derivatives that hedge interest rate risks, as provided in rule 18f–4(c)(4)(i)(B) [17 CFR 270.18f–4(c)(4)(i)(B)], reported as a percentage of the Fund's net asset value.

d. The number of business days, if any, in excess of the five-business-day period described in rule 18f–4(c)(4)(ii) [17 CFR 270.18f–4(c)(4)(ii)], that the Fund's derivatives exposure exceeded 10 percent of its net assets during the reporting period.

Item B.10. VaR information. For Funds subject to the limit on fund leverage risk described in rule 18f–4(c)(2) [17 CFR 270.18f–4(c)(2)], provide the following information, as determined in accordance with the requirement under rule 18f–4(c)(2)(ii) to determine the fund's compliance with the applicable VaR test at least once each business day:

a. Median daily VaR during the reporting period, reported as a percentage of the Fund's net asset value.

b. For Funds that were subject to the Relative VaR Test during the reporting period, provide:

i. As applicable, the name of the Fund's Designated Index, or a statement that the Fund's Designated Reference Portfolio is the Fund's Securities Portfolio.

ii. As applicable, the index identifier for the Fund's Designated Index.

iii. Median VaR Ratio during the reporting period, reported as a percentage of the VaR of the Fund's Designated Reference Portfolio.

c. Backtesting Results. Number of exceptions that the Fund identified as a result of its backtesting of its VaR calculation model (as described in rule 18f–4(c)(1)(iv) [17 CFR 270.18f–4(c)(1)(iv)] during the reporting period.

* * * * *

■ 12. Revise § 274.223 to read as follows:

§ 274.223 Form N–RN, Current report, open- and closed-end investment company reporting.

This form shall be used by registered open-end management investment companies, or series thereof, and closed-end management investment companies, to file reports pursuant to

§ 270.18f–4(c)(7) and § 270.30b1–10 of this chapter.

■ 13. Revise Form N–LIQUID (referenced in § 274.223) and its title to read as follows:

Note: The text of Form N–RN does not, and this amendment will not, appear in the *Code of Federal Regulations.*

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC 20549

FORM N–RN

CURRENT REPORT FOR REGISTERED MANAGEMENT INVESTMENT COMPANIES AND BUSINESS DEVELOPMENT COMPANIES

Form N–RN is to be used by a registered open-end management investment company or series thereof, but not including a fund that is regulated as a money market fund under rule 2a–7 under the Act (17 CFR 270.2A–7) (a ''registered open-end fund''), a registered closed-end management investment company (a ''registered closed-end fund''), or a closed-end management investment company that has elected to be regulated as a business development company (a ''business development company''), to file current reports with the Commission pursuant to rule 18f–4(c)(7) and rule 30b1–10 under the Investment Company of 1940 Act [15 U.S.C. 80a] (''Act'') (17 CFR 270.18f–4(c)(7); 17 CFR 270.30b1–10). The Commission may use the information provided on Form N–RN in its regulatory, disclosure review, inspection, and policymaking roles.

General Instructions

A. Rules as To Use of Form N–RN

(1) Form N–RN is the reporting form that is to be used for current reports of registered open-end funds (not including funds that are regulated as money market funds under rule 2a–7 under the Act), registered closed-end funds, and business development companies (together, ''registrants'') required by, as applicable, section 30(b) of the Act and rule 30b1–10 under the Act, as well as rule 18f–4(c)(7) under the Act. The Commission does not intend to make public information reported on Form N–RN that is identifiable to any particular registrant, although the Commission may use Form N–RN information in an enforcement action.

(2) Unless otherwise specified, a report on this Form N–RN is required to be filed, as applicable, within one business day of the occurrence of the event specified in Parts B–G of this form. If the event occurs on a Saturday, Sunday, or holiday on which the Commission is not open for business, then the one business day period shall begin to run on, and include, the first business day thereafter.

(3) For registered open-end funds required to comply with rule 22e–4 under the Investment Company Act [17 CFR 270.22e–4], complete Parts B–D of this form, as applicable. For registrants that are subject to a VaR test under rule 18f–4(c)(2)(i) [17 CFR 270.18f–4(c)(2)(i)], complete Parts E–G of this form, as applicable.

B. Application of General Rules and Regulations

The General Rules and Regulations under the Act contain certain general requirements that are applicable to reporting on any form under the Act. These general requirements should be carefully read and observed in the preparation and filing of reports on this form, except that any provision in the form or in these instructions shall be controlling.

C. Information To Be Included in Report Filed on Form N–RN

Upon the occurrence of the event specified in Parts B–G of Form N–RN, as applicable, a registrant must file a report on Form N–RN that includes information in response to each of the items in Part A of the form, as well as each of the items in the applicable Parts B–G of the Form.

D. Filing of Form N–RN

A registrant must file Form N–RN in accordance with rule 232.13 of Regulation S–T (17 CFR part 232). Form N–RN must be filed electronically using the Commission's Electronic Data Gathering, Analysis and Retrieval System (''EDGAR'').

E. Paperwork Reduction Act Information

A registrant is not required to respond to the collection of information contained in Form N–RN unless the form displays a currently valid Office of Management and Budget (''OMB'') control number. Please direct comments concerning the accuracy of the information collection burden estimate and any suggestions for reducing the burden to the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. The OMB has reviewed this collection of information under the clearance requirements of 44 U.S.C. 3507.

F. Definitions

References to sections and rules in this Form N–RN are to the Investment Company Act (15 U.S.C 80a), unless otherwise indicated. Terms used in this Form N–RN have the same meaning as in the Investment Company Act, rule 22e–4 under the Investment Company Act (for Parts B–D of the Form), or rule 18f–4 under the Investment Company Act (for Part E–G of the Form), unless otherwise indicated. In addition, as used in this Form N–RN, the term registrant means the registrant or a separate series of the registrant, as applicable.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC 20549

FORM N–RN

CURRENT REPORT FOR REGISTERED MANAGEMENT INVESTMENT COMPANIES AND BUSINESS DEVELOPMENT COMPANIES

PART A. General Information

Item A.1. Report for [mm/dd/yyyy].

Item A.2. Name of Registrant.

Item A.3. CIK Number of registrant.

Item A.4. Name of Series, if applicable.

Item A.3. EDGAR Series Identifier, if applicable.

Item A.4. Securities Act File Number, if applicable.

Item A.5. Provide the name, email address, and telephone number of the person authorized to receive information and respond to questions about this Form N–RN.

PART B. Above 15% Illiquid Investments

If more than 15 percent of the registrant's net assets are, or become, illiquid investments that are assets as defined in rule 22e–4, then report the following information:

Item B.1. Date(s) on which the registrant's illiquid investments that are assets exceeded 15 percent of its net assets.

Item B.2. The current percentage of the registrant's net assets that are illiquid investments that are assets.

Item B.3. Identification of illiquid investments. For each investment that is an asset that is held by the registrant that is considered illiquid, disclose (1) the name of the issuer, the title of the issue or description of the investment, the CUSIP (if any), and at least one other identifier, if available (*e.g.,* ISIN, Ticker, or other unique identifier (if ticker and ISIN are not available)) (indicate the

type of identifier used), and (2) the percentage of the fund's net assets attributable to that investment.

PART C. At or Below 15% Illiquid Investments

If a registrant that has filed Part B of Form N–RN determines that its holdings in illiquid investments that are assets have changed to be less than or equal to 15 percent of the registrant's net assets, then report the following information:

Item C.1. Date(s) on which the registrant's illiquid investments that are assets fell to or below 15 percent of net assets.

Item C.2. The current percentage of the registrant's net assets that are illiquid investments that are assets.

PART D. Assets That Are Highly Liquid Investments Below the Highly Liquid Investment Minimum

If a registrant's holdings in assets that are highly liquid investments fall below its highly liquid investment minimum for more than 7 consecutive calendar days, then report the following information:

Item D.1. Date(s) on which the registrant's holdings of assets that are highly liquid investments fell below the fund's highly liquid investment minimum.

PART E. Relative VaR Test Breaches

If a registrant is subject to the relative VaR test under rule 18f–4(c)(2)(i) [17 CFR 270.18f–4(c)(2)(i)], and the fund determines that it is not in compliance with the relative VaR test and has not come back into compliance within 5 business days after such determination, provide:

Item E.1. The dates on which the VaR of the registrant's portfolio exceeded 200% or 250% (as applicable under rule 18f–4 [17 CFR 270.18f–4]) of the VaR of its designated reference portfolio.

Item E.2. The VaR of the registrant's portfolio on the dates each exceedance occurred.

Item E.3. The VaR of the registrant's designated reference portfolio on the dates each exceedance occurred.

Item E.4. As applicable, either the name of the registrant's designated index, or a statement that the registrant's designated reference portfolio is the registrant's securities portfolio.

Item E.5. As applicable, the index identifier for the registrant's designated index.

PART F. Absolute VaR Test Breaches

If a registrant is subject to the absolute VaR test under rule 18f–4(c)(2)(i) [17 CFR 270.18f–4(c)(2)(i)], and the fund determines that it is not in compliance with the absolute VaR test and has not come back into compliance within 5 business days after such determination, provide:

Item F.1. The dates on which the VaR of the registrant's portfolio exceeded 20% or 25% (as applicable under rule 18f–4 [17 CFR 270.18f–4]) of the value of the registrant's net assets.

Item F.2. The VaR of the registrant's portfolio on the dates each exceedance occurred.

Item F.3. The value of the registrant's net assets on the dates each exceedance occurred.

PART G. Compliance With VaR Test

If a registrant that has filed Part E or Part F of Form N–RN has come back into compliance with either the relative VaR test or the absolute VaR test, as applicable, then report the following information:

Item G.1. Dates on which the VaR of the registrant's portfolio exceeded applicable VaR limit described in Item E.1 or Item F.1.

Item G.2. The current VaR of the registrant's portfolio.

PART H. Explanatory Notes (if any)

A registrant may provide any information it believes would be helpful in understanding the information reported in response to any Item of this Form.

Signatures

Pursuant to the requirements of the Investment Company Act of 1940, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

_____
(Registrant)
Date _____

_____
(Signature)*

* Print name and title of the signing officer under his/her signature.

By the Commission.

Dated: November 2, 2020.

Vanessa A. Countryman

Secretary.

[FR Doc. 2020–24781 Filed 12–18–20; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

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Part III

Department of Defense

Office of the Secretary

32 CFR Part 117

National Industrial Security Program Operating Manual (NISPOM); Final Rule

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 117

[Docket ID: DOD–2020–OS–0045]

RIN 0790–AK85

National Industrial Security Program Operating Manual (NISPOM)

AGENCY: Office of the Under Secretary of Defense for Intelligence & Security, Department of Defense (DoD).

ACTION: Final rule with request for comment.

SUMMARY: The Department of Defense (DoD) is codifying the National Industrial Security Program Operating Manual (NISPOM) in regulation. The NISPOM establishes requirements for the protection of classified information disclosed to or developed by contractors, licensees, grantees, or certificate holders (hereinafter referred to as contractors) to prevent unauthorized disclosure. In addition to adding the NISPOM to the Code of Federal Regulations (CFR), this rule incorporates the requirements of Security Executive Agent Directive (SEAD) 3, ''Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position.'' SEAD 3 requires reporting by all contractor cleared personnel who have been granted eligibility for access to classified information. This NISPOM rule provides for a single nation-wide implementation plan which will, with this rule, include SEAD 3 reporting by all contractor cleared personnel to report specific activities that may adversely impact their continued national security eligibility, such as reporting of foreign travel and foreign contacts. NISP Cognizant Security Agencies (CSAs) shall conduct an analysis of such reported activities to determine whether they pose a potential threat to national security and take appropriate action. Finally, the rule also implements the provisions of Section 842 of Public Law 115–232, which removes the requirement for a covered National Technology and Industrial Base (NTIB) entity operating under a special security agreement pursuant to the NISP to obtain a national interest determination as a condition for access to proscribed information.

DATES: *Effective date:* This rule is effective February 24, 2021. Comments must be received by February 19, 2021.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number or RIN for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Valerie Heil, 703–692–3754.

SUPPLEMENTARY INFORMATION:

I. Overview of the NISP and NISPOM

In April 1990, President George Bush directed the National Security Council to explore the creation of a single, integrated industrial security program to improve security protection and provide cost savings. Prior to this, contractors doing business with different U.S. Government (USG) agencies which required access to classified information had to meet different requirements to protect the same levels of classified information, *e.g.,* the type of safe to protect a specific classified item could vary across both contracts and agencies. The diversity of industrial security requirements levied on contractors by an estimated 21 USG agencies created a significant burden on both industry and government and increased the cost of the goods and services provided to the USG.

Representatives from government and industry participated in an initiative which led to the creation of Executive Order (E.O.) 12829 ''National Industrial Security Program (NISP)'' (available at *https://www.archives.gov/files/isoo/policy-documents/eo-12829-with-eo-13691-amendments.pdf*). With the National Security Council providing overall policy direction, this E.O. established the NISP as the single integrated program to protect classified information and preserve our Nation's economic and technological interests. Nothing in the E.O. shall supersede the authority of the Secretary of Energy or the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended, or the authority of the Director of National Intelligence (or any Intelligence Community element) under the Intelligence Reform and Terrorism Prevention Act of 2004, the National Security Act of 1947, as amended, or Executive Order No. 12333 of December 8, 1981, as amended, or the authority of the Secretary of Homeland Security, as the Executive Agent for the Classified National Security Information Program established under Executive Order 13549 of August 18, 2010 (Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities). The Information Security Oversight Office (ISOO), a component of the National Archives and Records Administration (NARA), was tasked with overseeing overall implementation of the NISP with the goal of:

- Holding classification activity to the minimum necessary to protect the national security;
- ensuring the safeguarding of classified national security information in both USG and industry in a cost-effective and efficient manner; and
- promoting declassification and public access to information as soon as national security considerations permit.

ISOO issues implementing directives and produces an annual report to the President on the NISP. E.O. 12829 also established the National Industrial Security Program Policy Advisory Committee (NISPPAC), a federal advisory committee comprised of both Government and industry representatives, which is responsible for recommending changes in industrial security policy. The NISPPAC, chaired by the Director of the ISOO, also advises ISOO on all issues concerning the policies of the NISP, including recommended changes to those policies, and serves as a forum to discuss policy issues in dispute. The NISPPAC industry members represent all types and sizes of NISP cleared entities, whose scope of operations range from a one person entity, having a single classified contract to some of the largest U.S. entities, having numerous classified contracts. All NISPPAC industry members have expertise comprising the primary functions of an industrial security program, to include information, personnel, physical, and information system security.

Five USG executive branch agencies—DoD, DOE, the Nuclear Regulatory Commission (NRC), the Office of the Director of National Intelligence (ODNI), and the Department of Homeland Security (DHS)—have been designated as Cognizant Security Agencies (CSAs) and have specific responsibilities within the NISP. For DoD, the Defense Counterintelligence and Security Agency (DCSA) is the Cognizant

Security Office (CSO) for DoD Components and non-DoD agencies where an industrial security agreement is in place. DCSA, as the DoD CSO, DOE, and NRC each has the following responsibilities:

- Administers the NISP.
- provides security oversight.
- conducts security review actions.
- provides security education and training.
- provides supplementary procedures for unique mission requirements (*e.g.* DoD publishes industrial security letters (ISLs), which provide DoD-specific guidance and clarification on NISP policies and supplementary procedures to its unique CSO mission requirements (available at: *https://www.dcsa.mil/mc/ctp/tools/*)).
- assesses, authorizes and oversees contractor information systems used to process classified information.
- makes temporary national security eligibility determinations pursuant to SEAD 8, Temporary Eligibility (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-8_Temporary_Eligibility_U.pdf*), for contractor personnel who require access to classified information.

DHS receives NISP industrial security services from DoD due to its industrial security services agreement and also has the following responsibilities:

- Prescribes procedures for the portions of this rule that pertain to the CCIPP.
- retains authority over access to information under the CCIPP.
- inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to CCIPP.

ODNI has the following responsibilities:

- Prescribes procedures for the portions of this rule pertaining to intelligence sources, methods, and activities, including, but not limited to, SCI.
- retains authority over access to intelligence sources, methods, and activities, including SCI.
- provides guidance on the security requirements for intelligence sources and methods of information, including, but not limited to, SCI.

DOE and NRC provide similar industrial security oversight actions, including national security eligibility determinations for contractor personnel, authorization of contractor information systems to process classified information, as well as monitoring and inspecting those contractors under DOE or NRC security cognizance, respectively. In 2004, the Intelligence Reform and Terrorism Prevention Act (IRTPA) (Pub. L. 108–458) created the position of the Director of National Intelligence (DNI) and recognized the ODNI as a CSA. E.O. 13691 ''Promoting Private Sector Cybersecurity Information Sharing,'' February 13, 2015 (available at *https://obamawhitehouse.archives.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-sharing*), amended E.O. 12829 to make DHS the fifth CSA in 2015.

II. NISP Implementation

DoD is the Executive Agent of the NISP and has the largest NISP contractor population of the five CSAs. DCSA inspects and monitors cleared entities, also referred to as contractors, who require access to classified information during all phases of the contracting, licensing, and grant (hereinafter referred to as contracting or contract) process to include the preparation and submission of bids and proposals, negotiation, award, performance, and termination. It also determines eligibility for access to classified information for contractors performing on classified contracts with DoD and with those USG agencies which have an industrial security agreement with DoD. The Department currently has industrial security agreements with 33 agencies (list available at: *https://www.dcsa.mil/mc/ctp/nisp/*). DCSA field elements provide oversight of contractor compliance, authorize contractor information systems to process classified information, and conduct security review actions for approximately 12,500 cleared contractor entities which includes headquarters, divisions, subsidiaries and branch offices of industrial, educational, commercial, or other non-USG entities which are performing on classified contracts.

Under the NISP, the USG establishes requirements for the protection of classified information to be safeguarded in a manner equivalent to its protection within the executive branch of USG, where practicable. When bound by contract, industry must comply with the NISPOM and any CSA-specific supplementary guidance for unique CSA mission requirements. Industry implements those requirements for the protection of classified information with advice, assistance, and oversight from the applicable CSA.

When a Government Contracting Activity (GCA), an element of an agency that has authority regarding acquisition or grant functions, awards a contract that has been determined to require access to classified information, the contract is considered to be a ''classified contract.'' The GCA checks with its applicable CSA to determine if the awarded legal entity already has an entity eligibility determination (also referred to as a facility security clearance (FCL)). GCAs will ordinarily include enough lead-time in the acquisition cycle to accomplish all required security actions. In many instances, advanced planning can ensure that access to classified information will not be required in the pre-award process. This would preclude processing an entire bidder list for FCLs. When access to classified information is not a factor in the pre-award phase, but will be required for contract performance, only the successful bidder or offeror will be processed for an FCL.

Before an entity can have access to classified information during its contract performance, it must have an FCL. If the legal entity does not already have an FCL when awarded a classified contract, a GCA must sponsor the entity for an FCL. Or, an entity already part of the NISP (*i.e.,* a prime contractor) may sponsor another entity in order to subcontract part of its classified business. To sponsor an entity, the GCA or prime contractor puts in a request, often referred to as a sponsorship letter, to the appropriate CSA for the entity to access classified information in connection with a legitimate government requirement, which may include a foreign government requirement.

With an approved FCL, an entity is then eligible for access to information classified at the level of the FCL (*i.e.,* TOP SECRET, SECRET or CONFIDENTIAL) when competing for a classified contract. Among other requirements, an entity must have sponsorship based on a valid government requirement for access to classified information. The USG agency sponsoring an entity for an FCL must include the applicable security requirements clause or equivalent in the contract (*e.g.*, for DoD this is the Federal Acquisition Regulation (FAR) 52.204–2 ''Security Requirements,'' or the terms and conditions of a grant award under 2 CFR part 200.210) to require compliance with the NISPOM.

A GCA provides the security requirements for a classified contract in a contract security classification specification as part of the contract. For DoD, the DD form 254, ''Department of Defense Contract Security Classification Specification,'' OMB Control number 0704–0567, is part of the classified contract and provides the contractor (or a subcontractor) with security requirements and the classification

guidance necessary to execute a specific classified contract. See *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0254.pdf* and available at *https://www.dcsa.mil/is/nccs/*) for the current version of this collection. A contract security classification specification with its attachments, supplements, and incorporated references, provides security classification guidance (lists the applicable security classification guides for a contractor to use) to a contractor in connection with a classified contract. It is designed to identify the classified areas of information involved in the classified effort and, particularly, to identify the specific items of information within these areas that require protection. This rule provides NISP contractors security requirements which align to 32 CFR part 2001, in a manner equivalent to the protection of classified information within the executive branch of the USG. If a GCA determines that additional safeguards are essential in specific contracts, the GCA can impose more operational security provisions above the requirements of this rule. The GCA can also determine that additional physical or technical security requirements are needed in a contract above the requirements of this rule. Even though the contract security classification is contract-specific, it is not always all-inclusive. Additional security requirements are sometimes included in other parts of a contract. All related materials for approved information collection are available at: *https://www.reginfo.gov/public/do/PRAMain.* In addition, specific locations for finalized collection instruments, to include the designated OMB Control Number is included where information collections are cited in this rule.

In addition, depending upon the CSA with security cognizance, an entity's legal headquarters may need to implement additional information collections, such as:

- DD Form 441, ''DoD Security Agreement'' for DoD is an agreement between DCSA and the cleared legal entity for the entity to comply with the NISPOM security requirements, to be subject to inspections and to allow for a 30 day notice by the entity or DCSA to terminate the agreement (*e.g.,* if there is no longer a valid USG requirement for access to classified information (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0441_2020.pdf*);
- NRC Form 441, ''Security Agreement'' for NRC, the provisions of the NRC Form 441 are similar to those included in the DD Form 441 (available at *https://www.nrc.gov/reading-rm/doc-collections/forms/nrc441info.html*).
- DOE does not have a separate Form 441, but instead, binds the contractor to the FCL (and security requirements) via the contract, along with meeting all other requirements in this rule.

As part of FCL processing, an entity must complete a Standard Form (SF) 328, ''Certificate Pertaining to Foreign Interest,'' OMB Control number 0704–0579, (available at *https://www.gsa.gov/forms-library/certificate-pertaining-foreign-interests,* for a CSA to review and make a determination whether the entity is under foreign ownership, control or influence (FOCI) to a degree that renders it ineligible for an FCL. The CSA will consider a U.S. entity to be under FOCI when a foreign interest has the power to direct or decide issues affecting the entity's management or operations in a manner that could either result in unauthorized access to classified information; or adversely affect performance of a classified contract or agreement. The U.S. entity may also be considered to be under FOCI when a foreign interest or government is currently exercising, or could exercise, that power, whether directly or indirectly, such as through ownership of the U.S. entity's securities, by contractual arrangements, or other means. Further, if a foreign interest or government has the ability to control or influence the election or appointment of members of the entity's governing board, the entity may be considered to be under FOCI. When a CSA has determined that an entity is under FOCI, the primary consideration will be the protection of classified information. The CSA will take whatever action is necessary to protect classified information, in coordination with other affected agencies as appropriate. A U.S. entity that is in process for an FCL for access to classified information and subsequently determined to be under FOCI, is ineligible for access to classified information unless and until effective security measures have been put in place to negate or mitigate FOCI to the satisfaction of the CSA.

Once an entity becomes a contractor in the NISP with an existing FCL, a GCA can select and award a classified contract to the entity as part of the acquisition process. The GCA attaches the ''Contract Security Classification Specification: (*e.g.,* for DoD, it is the DD Form 254, available at *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0254.pdf* and available at *https://www.dcsa.mil/is/nccs/*), to all such contracts requiring access to classified information.

II. SEAD 3 Requirements and the NISPOM

In 2008, with the publication of E.O. 13467, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information'' (available at *https://obamawhitehouse.archives.gov/the-press-office/2016/09/29/executive-order-amending-executive-order-13467-establish-roles-and*), the DNI was assigned the role of the Security Executive Agent (SecEA), for the development, implementation, and oversight of effective, efficient, and uniform policies and procedures governing the conduct of investigations and adjudications for eligibility for access to classified information and eligibility to hold a sensitive position.

In December 2016, the SecEA issued SEAD 3, ''Reporting Requirements for Personnel with Access to Classified Information or Who Hold a Sensitive Position'' (available at *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-3-Reporting-U.pdf*), to executive branch agencies or covered individuals with an effective date of June 12, 2017. SEAD 3 defines covered individuals as:

- A person who performs work for or on behalf of the executive branch who has been granted access to classified information or holds a sensitive positions, but does not include the President or the Vice President.
- a person who performs work for or on behalf of a state, local, tribal, or private sector entity, as defined in E.O. 13549, who has been granted access to classified information or holds a sensitive position, but does not include duly elected or appointed governors of a state or territory, or an official who has succeeded to that office under applicable law; and
- a person working in or for the legislative or judicial branches who has been granted access to classified information or holds a sensitive position and the investigation or determination was conducted by the executive branch, but does not include members of Congress, Justices of the Supreme Court, or Federal judges appointed by the President.
- covered individuals are not limited to government employees and include all persons, not excluded under paragraphs D.5(a), (b), or (c) of SEAD 3, who have access to classified information or who hold sensitive positions, including, but not limited to, contractors, subcontractors, licensees, certificate holders, grantees, experts,

consultants, and government employees.

SEAD 3 identifies required reporting of data elements that are contained in the Standard Form-86, ''Questionnaire for National Security Positions'' (available at *https://www.opm.gov/forms/pdf_fill/sf86.pdf*), which applicants and clearance holders complete during the initial and periodic reinvestigation processes, respectively. SEAD 3 requires these elements to be reported prior to participation in such activities or otherwise as soon as possible following the start of their involvement. Most notably, SEAD 3 requires covered individuals to obtain prior agency approval before conducting unofficial foreign travel.

For this rule, SEAD 3 applies only for those contractor personnel who have been granted eligibility for access to classified information through the NISP. In accordance with paragraph E.4 of SEAD 3, NISP CSAs, acting on behalf of Heads of agencies or designees, for the NISP contractors under their security cognizance may determine that operational and mission needs preclude strict adherence to these reporting requirements. In those instances, a NISP CSA may provide CSA guidance to supplement unique CSA mission requirements to the contractors under its security cognizance of equivalent notification, briefing and reporting to be accomplished.

III. Requirements From Section 842 of Public Law 115–232

Currently, the NISPOM and 32 CFR part 2004 require that GCAs, in coordination with the applicable CSAs and controlling agencies (ODNI for Sensitive Compartmented Information (SCI), DOE for Restricted Data (RD) or NSA for Communications Security (COMSEC)), complete a National Interest Determination (NID) before granting access to proscribed information to an entity that is owned or controlled by a foreign interest and cleared under a Special Security Agreement (SSA). The term ''proscribed information'' means information that is—

(A) classified at the level of top secret;

(B) communications security information (excluding controlled cryptographic items when un-keyed or utilized with unclassified keys);

(C) Restricted Data (as defined in section 11 of the Atomic Energy Act of 1954, as amended (42 United States Code (U.S.C.) 2014));

(D) special access program information under section 4.3 of E.O. 13526 (75 FR 707; 50 U.S.C. 3161 note) or successor order; or

(E) designated as sensitive compartmented information, as defined in Intelligence Community Directive 703, ''Protection of National Intelligence, Including Sensitive Compartmented Information'' (available at *https://www.dni.gov/files/documents/ICD/ICD%20703.pdf*).

An SSA is one of the mechanisms used by the USG to mitigate FOCI to an acceptable level as determined by the CSA. A company is considered to be operating under FOCI whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts. The following factors relating to a company, the foreign interest, and the government of the foreign interest are reviewed in the aggregate in determining whether a company is under FOCI:

- Record of economic and government espionage against U.S. targets
- Record of enforcement and/or engagement in unauthorized technology transfer
- The type and sensitivity of the information that shall be accessed
- The source, nature and extent of FOCI
- Record of compliance with pertinent U.S. laws, regulations and contracts
- The nature of any bilateral and multilateral security and information exchange agreements that may pertain
- Ownership or control, in whole or in part, by a foreign government.

Section 842 of Public Law 115–232 and this final rule provide that a covered NTIB entity operating under an SSA pursuant to the NISP, shall not be required to obtain a NID as a condition for access to proscribed information, effective October 1, 2020. DoD notified the DoD components and 33 non-DoD agencies with which DoD has industrial security agreements that NIDs pursuant to the provisions of Section 842 of Public Law 115–232 are no longer required as of October 1, 2020. DCSA is no longer submitting NID requests to ODNI for SCI, DOE for RD, or NSA for COMSEC, respectively that fall within the provisions of Section 842 of Public Law 115–232.

As provided for in the law, the Under Secretary of Defense for Intelligence and Security, on behalf of the Secretary, granted waivers of NIDs for those categories of proscribed information under the control of the Secretary of Defense, to 20 contractors that met the criteria in summer 2019 with the waivers expiring as of October 1, 2020, since the statute went into effect. Those contractors, pursuant to Section 842 of Public Law 115–232 had to meet the following criteria as part of the waiver determination:

(1) A demonstrated successful record of compliance with the NISP assessed by the CSA; and

(2) previously been approved for access to proscribed information as indicated in CSA FCL records.

The law is limited to ''a person that is a subsidiary located in the United States—

(A) for which the ultimate parent entity and any intermediate parent entities of such subsidiary are located in a country that is part of the national technology and industrial base (as defined in section 2500 of title 10, United States Code); and

(B) that is subject to the FOCI requirements of the NISP.''

Legal Authority for the NISP

In addition to E.O. 12829, which, establishes the NISP and requires the Secretary of Defense to issue and maintain the NISPOM, the following are other relevant authorities for the program.

- E.O. 10865 ''Safeguarding Classified Information within Industry,'' February 20, 1960, as amended (available at *https://www.archives.gov/federal-register/codification/executive-order/10865.html*), addresses the protection of classified information that is disclosed to, or developed by contractors.
- E.O. 12968, ''Access to Classified Information,'' August 2, 1995, as amended (available at *https://www.govinfo.gov/content/pkg/FR-1995-08-07/pdf/95-19654.pdf*), establishes a uniform personnel security program for individuals who will be considered for initial or continued access to classified information.
- E.O. 13526, ''Classified National Security Information,'' December 29, 2009 (available at *https://www.archives.gov/files/isoo/pdf/cnsi-eo.pdf*), prescribes a uniform system for classifying, safeguarding and declassifying national security information.
- E.O. 13587, ''Structural Reforms to Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information,'' October 7, 2011 (available at *https://www.govinfo.gov/app/details/CFR-2012-title3-vol1/CFR-2012-title3-vol1-eo13587*), directs structural reforms to ensure responsible sharing and safeguarding of classified information on computer networks consistent with

appropriate protection for privacy and civil liberties.

• E.O. 13691; Promoting Private Sector Cybersecurity Information Sharing,'' February 13, 2015 (available at *https://obamawhitehouse.archives.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-sharing*), encourages the voluntary formation of organizations engaged in the sharing of information related to cybersecurity risks and incidents to establish mechanisms to continually improve their capabilities and functions as well as to better allow them to partner with the Federal government on a voluntary basis.

• E.O. 12333; ''United States Intelligence Activities,'' December 4, 1981, as amended (available at *https://www.archives.gov/federal-register/codification/executive-order/12333.html,* provides general principles that in addition to and consistent with applicable laws are intended to achieve the proper balance between the acquisition of essential information and the protection of individual interests.

• Title 42 U.S.C. 2011 *et seq.* (also known as and referred to in this rule as ''The Atomic Energy Act of 1954,'' as amended (AEA));

• Title 50 U.S.C. chapter 44 (also known as ''The National Security Act of 1947, as amended);

• Title 50 U.S.C. 3501 *et seq.* (also known as ''The Central Intelligence Agency Act of 1949,'' as amended);

• Public Law 108–458 (also known as the ''Intelligence Reform and Terrorism Prevention Act of 2004''), which includes development of uniform and consistent policies and procedures to ensure effective, efficient and timely completion of security clearances.

• Finally, 32 CFR part 2004 ''National Industrial Security Program,'' May 7, 2018, establishes uniform standards for the NISP, and helps agencies implement requirements in E.O. 12829, and establishes agency responsibilities for implementing the insider threat provisions of E.O. 13587.

III. Changes Made by This Rule and Expected Impact

The NISPOM was first published in 1995 as DoD Manual 5220.22. Updates to the NISPOM have included Conforming Change 1, March 28, 2013 and NISPOM Change 2 in May 21, 2016. The most current version of the NISPOM (Change 2) is available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/522022M.pdf?ver=2019-06-06-145530-170.* In addition to codifying the NISPOM in the CFR and adding the requirements of SEAD 3 and Section 842 of Public Law 115–232, DoD is also removing 32 CFR part 117, subpart C, ''National Industrial Security Program'' because it is duplicative of 32 CFR part 2004, ''National Industrial Security Program'' and removing 32 CFR part 117, subpart B, because it is also duplicative of other industrial security provisions set forth in 32 CFR part 2004. These administrative removals support a recommendation from the DoD Regulatory Reform Task Force created under E.O. 13777, Enforcing the Regulatory Reform Agenda (available at *https://www.govinfo.gov/content/pkg/FR-2017-03-01/pdf/2017-04107.pdf*), and by themselves create no changes in current DoD policy. Upon the effective date of 32 CFR part 117, DoD will no longer publish the DoD Manual 5220.22, NISPOM as a DoD policy issuance.

Specific changes in this rule that are not in the current NISPOM, include the following.

• *§ 117.8: Reporting Requirements. § 117.8(a) General* includes that contractors must submit reports pursuant to this rule, SEAD 3 and CSA guidance to supplement unique CSA mission requirements. SEAD 3 reporting establishes a single nationwide implementation plan for covered individuals, which for this rule provides reporting by contractors and their employees eligible for access to classified information. SEAD 3 requirements will be implemented for all contractor cleared personnel to report specific activities that may adversely impact their continued national security eligibility. Contractor cleared personnel must be aware of risks associated with foreign intelligence operations and/or possible terrorist activities directed against them in the United States and abroad, and have a responsibility to recognize and avoid personal behaviors and activities that adversely affect their national security eligibility. NISP CSAs shall conduct an analysis of such reported activities, such as foreign travel or foreign contacts, to determine whether they pose a potential threat to national security and take appropriate action. Contractors will be responsible for collecting the foreign travel data from cleared employees, providing pre- and post-travel briefings to those cleared employees when necessary, and tracking and reporting those foreign travel activities of its cleared employees through the CSA designated system of record for personnel security clearance data.

• *§ 117.9(m) Limited entity eligibility determination (Non-FOCI)* and, *§ 117.11(e) Limited entity eligibility determination due to FOCI.* In accordance with 32 CFR part 2004, ''NISP Directive,'' provisions for granting two new types of limited entity facility clearance eligibility determinations (FCLs) to meet government requirements for narrowly scoped requirements for a companies to access classified information.

• *§ 117.11(d)(2)(iii)(A) Requirement for National Interest Determinations (NIDs):* This paragraph provides for the implementation of the provisions of Section 842 of Public Law 115–232, which was effective on October 1, 2020, and eliminates requirements for a covered NTIB entity operating under an SSA to obtain a NID for access to proscribed information: Top Secret, Special Access Program, Communications Security, Sensitive Compartmented Information, and Restricted Data. This provision will allow covered NTIB entities to begin performing on contracts that require access to proscribed information without having to wait on a NID, and thus removing costly contract performance delays.

• *§ 117.15(e)(2) TOP SECRET Information:* Permits specific determinations by a CSA with respect to requirements for TOP SECRET accountability (*e.g.,* the CSA can determine that TOP SECRET material stored in an electronic format on an authorized classified information system does not need to be individually numbered in series provided the contractor has in place controls in place to address accountability, need to know and retention). As stated in this paragraph: ''. . . Contractors will establish controls for TOP SECRET information and material to validate procedures are in place to address accountability, need to know and retention, *e.g.,* demonstrating that TOP SECRET material stored in an electronic format on an authorized classified information system does not need to be individually numbered in series. These controls are in addition to the information management system and must be applied, unless otherwise directed by the applicable CSA, regardless of the media of the TOP SECRET information, to include information processed and stored on authorized information systems. Unless otherwise directed by the applicable CSA, the contractor will establish the following additional controls . . .''

• *§ 117.15(d)(4) Installation:* Clarifies that an Intrusion Detection System (IDS) shall be installed by a Nationally Recognized Testing Laboratory (NRTL)-approved entity to make it clear that any NRTL-approved entity may do such

installations. ''The IDS will be installed by a NRTL-approved entity or by an entity approved in writing by the CSA . . .''

• *§ 117.7(b)(2) Senior Management Official:* Clarifies responsibilities of the Senior Management Official of each cleared entity to better reflect the critical role and accountability of this position for entity compliance with the NISPOM. This change further emphasizes the essential role of the Senior Management Official with the entity's security staff to ensure NISPOM compliance.

• *§ 117.13(d)(5)* Clarifies to the contractor that upon completion of a classified contract, the ''contractor must return all government provided or deliverable information to the custody of the government. Such clarification ensures the contractor is not retaining official government records without specific authorization from the government customer. ''(i) If the GCA does not advise to the contrary, the contractor may retain copies of the government material for a period of 2 years following the completion of the contract. The contract security classification specification, or equivalent, will continue in effect for this 2-year period. (ii) If the GCA determines the contractor has a continuing need for the copies of the government material beyond the 2-year period, the GCA will issue a final contract security classification specification, or equivalent, for the classified contract and will include disposition instructions for the copies.''

Costs

The DoD invites comment from the members of the public on the costs estimated to implement this rule.

A. Baseline

The Defense Counterintelligence and Security Agency (DCSA), as the DoD designated NISP cognizant security office, has collected information about baseline costs using an OMB-approved information collection process employing statistical methods for contractors' NISP implementation (OMB Control Number 0704–0458, ''Industry Cost Collection Report Survey.'' The most recent data collected by DCSA on contractors' NISP implementation costs are for fiscal year (FY) 2017 and reported in the ISOO 2017 annual report to the President. DCSA has used this survey collection methodology for contractors' NISP implementation under DoD security cognizance for over 11 years. A NISP government and industry working group developed the survey in 1995 and predecessor office to the OUSD(I&S) initially ran the annual survey. The Information Security Oversight Office (ISOO) placed a moratorium on conducting this survey after 2017 until a new NISP survey methodology is developed.

DCSA began the costs analysis for the baseline costs for fiscal year 2017 by randomly selecting active NISP contractor facilities that have existing DoD approval for classified storage at their own physical locations and having those facilities submit security costs. The randomly selected contractor facilities also have an active facility security clearance and a permanent Commercial and Government Entity (CAGE) Code. In addition to the randomly selected cleared facilities having approved classified storage, DCSA categorizes these contractor facilities for the survey based on the size, scope, and complexity of each contractor's security program.

The general methodology used to estimate security costs incurred by contractor cleared facilities with approved storage of classified information is based on the costs incurred by respondent contractors for the protection of classified information. The methodology captures the most significant portion of industry's costs, which is labor. Security labor in the survey is defined as personnel whose positions exist to support operations and staff in the implementation of government security requirements for the protection of classified information. Guards who are required as supplemental controls are included in security labor. The respondent contractors are requested to compile their cleared facility's current annual security labor cost in burdened, current year dollars with the most recent data being from the 2017 survey. The labor cost, when identified as an estimated percent of each contractor's total security costs, enables the respondent contractors to calculate their total security costs.

Information collected is compiled to create an aggregate estimated cost of NISP classification-related activities. Only the aggregate data is reported. There is a 95% confidence that the full enterprise industrial security total baseline cost does not exceed $1.486 billion for fiscal year 2017.

NISP cost estimates (2017)	Benefits of NISP rule
Number of Facilities with Approved Classified Storage (Of Over 12,000 NISP Cleared Facilities): 3658	A single, integrated, cohesive industrial security program to protect classified information and to preserve our Nation's economic and technological interests.
Facilities Randomly Selected and Responding to Data Collection: 1038	Maximum uniformity and consistency by contractors who support the Executive branch to effectively protect and safeguard classified information through all phases of the contracting process for any classified information an Agency releases to a contractor.
Estimated Total NISP Security Costs for Facilities with Approved Classified Storage (With 95% Margin of Error to give 95% Upper Confidence Limit): $1,413,150,249 + $72,968,977 = $1,486,119,226	Contractors must comply, when levied by the FAR security requirements clause or equivalent clauses in contracts involving access to classified information, with uniform procedures for the proper safeguarding of classified information to reduce the risk of unauthorized disclosure of classified information.

Based on the data collected from the survey, we can be 95% confident the true 2017 total NISP security cost for contractor facilities with approved classified storage is less than $1.486B.

Assumptions and Notes:

• Of over 12,000 NISP cleared facilities, 3,658 facilities are approved for classified storage and 1,038 responded to the survey.

- Companies were selected at random according to survey methodology.
- The applicable NISP CSA, based on a valid requirement for access to classified information (*e.g.,* contract or bid), funds the costs for evaluating and processing a contractor for an entity eligibility determination (facility clearance) and the costs of personnel security vetting requirements for required access to classified information by any contractor employees.
- The security cost profile for non-responding companies is assumed to be similar to that of responding companies.
- Outlying survey data points were removed from data analysis.
- Overall DoD contract spending for 2017 was $331 billion; but DoD does not have such data for these contractor cleared facilities in the NISP for performance on contracts requiring access to classified information.
- DoD has not collected security costs from those contractor cleared facilities that are not authorized to store classified information at their own contractor locations.

DoD noted that the largest contractor cleared facilities account for the highest security costs, and skew the average security costs for non-small businesses much higher. The average security cost for the largest contractor cleared facilities is approximately $4.8 million per facility. If the largest facilities are removed from the cost estimate, then the average security cost for a non-small business with approval for storage of classified information is reduced to $432,312 from $864,662. Of the approximately 1,000 facilities selected for the small entities analysis described in section 4 of this initial regulatory flexibility analysis, about 68% were contractor cleared facilities that were not included in the 2017 NISP cost estimate because they don't have approval to store classified information or process classified information on an information system or network at the contractors' own cleared facilities. DoD estimated the costs impacting small entities from the approximately 32% of the remaining small businesses, as those would have approval to store classified information or process classified information on an information system or network at one of the contractor's own cleared facilities. Those security costs are estimated to be approximately $316 million or 21% of the $1.486 billion of the estimated NISP costs to contractors in 2017. When contractor cleared facilities' responses to the ISOO cost collection survey were cross referenced with the DoD small business analysis (using the Small Business Administration (SBA) Dynamic Small Business Search), DoD estimated an average security cost for a small business with approved storage of classified information of $133,612. One of the requirements for a facility security clearance is a security agreement between the applicable NISP CSA and the contractor legal entity. Such a security agreement sets forth compliance, oversight and administration termination provisions. The agreement also indicates that it does not obligate USG funds and the USG shall not be liable for any costs or claims of the contractor arising out of the security agreement. It is recognized, however, the parties may provide in other written contracts with GCAs for security costs, which may be properly chargeable, if so determined by the applicable GCA. This rule provides that a contractor must implement changes no later than 6 months from the date of a published change to this rule to allow the contractor to discuss what impact, if any, the changes have on existing classified contracts with the applicable GCAs.

B. Public Cost Analysis of the Changes to the Baseline From This Rule

1. *Projected Public Costs.* In summary, the estimated public costs are present value costs of 150.26 million and annualized costs estimated to be $10.52 million.

2. *Cost Analysis.* Throughout, labor rates are adjusted upward by 100% to account for overhead and benefits.

a. *Regulatory Familiarization.* There will be an initial step to become familiar with the format of the rule, the changed requirements and what actions the cleared entities must take to comply with the changes in this rule. To become familiar with the rule format and the new requirements, cleared entities will review the **Federal Register** notice with the new 32 CFR part 117. It is estimated that 12,400 cleared entities will need to become familiar with the rule. Of those approximately 12,400 cleared entities, an estimated 8,036 are small business entities and 4,348 are large business entities. The FSO at each entity (small or large) must become familiar with the rule to be able to use it on a daily basis in the FSO role to supervise and direct security measures necessary for implementing the applicable security requirements to ensure the protection of classified information. Using the published Office of Personnel Management General Schedule (GS) salary schedule for fiscal year (FY) 2020, the estimated labor rate for an FSO of a small business entity firm is the equivalent of a GS11 step 5 and for an FSO of a large business entity as the equivalent of a GS13, step 5. It is estimated that it will take 10 hours in the first year, 5 hours in years 2 and 3, 3 hours in years 4 to 7, and then 2 hours annually up to year 20 for an FSO to become familiar with the rule, as this will be the first time that the NISPOM is in a rule format instead of as a DoD policy issuance, as well as familiarization with the changes. These assumptions imply costs of $9.89 million in year one; $4.95 million in years 2 and 3; $2.97 million in each year 4 through 7; and, $1.98 million in each year 8 through 20.

b. *Evaluation of Existing Classified Contracts To Implement Changes No Later than Six Months from Effective Date.*

Each of the legal U.S. cleared entities must comply no more than six months from the effective date of this NISPOM rule. During that six months, each legal cleared entity has the opportunity to review existing classified contracts to determine if there is any impact that they want to discuss with the applicable GCAs about possible equitable adjustment. Decisions on any requests for equitable adjustment will be made by the applicable contracting officer. Legal entities enter into contracts, licenses or grants; it is estimated that the average of 8,036 small business cleared entities are each a legal entity. It is estimated that each of those small business cleared legal entities will review an average of 3 existing classified contracts for possible equitable adjustment for a total of 24,108 contracts requiring 3 hours each for review in 2021. Using the published Office of Personnel Management GS salary schedule for FY20, the estimated labor rate for an FSO of a small business entity firm is the equivalent of a GS11 step 5 and for an FSO of a large business entity as the equivalent of a GS13, step 5. Of the large business entities, it is estimated that 2,100 large business cleared entities are legal entities, while the remaining large business entities are divisions or branch offices. It is estimated that each of those large business cleared legal entities will review an average of 30 existing classified contracts for possible equitable adjustment for a total of 63,000 contracts requiring 8 hours each for review in 2021. It is estimated that it will take more time for review by the

large business cleared entities due to more complicated contracts. These assumptions imply costs of $54.96 million in year one and no further costs as this action is taken only in the first year.

c. *Train SECRET cleared employees on requirements to submit foreign travel reports.* The FSO at each entity (small or large) must ensure that its SECRET cleared employees are trained on the requirements. Such training by the FSO is estimated to take 1 hour in 2021 and a half an hour in each of the following years up to year 20. Using the published Office of Personnel Management GS salary schedule for FY20, the estimated labor rate for an FSO of a small business entity firm is the equivalent of a GS11 step 5 and for an FSO of a large business entity as the equivalent of a GS13, step 5. These assumptions imply total costs of $0.99 million in 2021 as year one; and, $0.49 million in each year 2 through 20.

d. *Submit foreign travel reports and receive any pre-travel threat briefings or post travel briefings based on the threat.* All cleared employees must submit foreign travel reports and receive any pre-travel briefings or post travel briefings from the FSO-based on threat according to this rule, SEAD 3 and CSA-provided guidance for unique mission requirements. It is estimated that the number of foreign travel reports submitted annually will be 483,681 to comply with this rule. That estimate is based on analysis of calendar year 2019 unofficial foreign travel reported by DoD civilians and military in the DoD Aircraft and Personnel Automated Clearance System (APACS), a web-based tool for the creation, submission and approval of aircraft diplomatic clearances and personnel travel clearances (*i.e.* Country, Theater and Special Area, as applicable with individual DoD Foreign Clearance Guide (FCG), *https://www.fcg.pentagon.mil* country pages) designed to aid USG travelers on official government and unofficial (*i.e.,* leave) travel. For calendar year 2019, there were 126,131 travelers and 113,214 travel requests submitted into APACS. APACS requirements are published on the DoD Foreign Clearance Guide (FCG), *https://www.fcg.pentagon.mil.* Thus an annual estimate of .89 expected foreign travel trips by traveler (113,214 divided by 126,131). In the small business analysis, there were a total of 18,242 cleared employees in the 658 small entities sampled and 63,598 cleared employees in the remaining 356 non-small businesses. Of the total cleared employees in the small business analysis (as reported in the National Industrial Security System), approximately 22.3% were at small entities and 77.7% were at non-small businesses. Known number of new travelers expected to be effected by this rule is 543,462 SECRET cleared contractor personnel under DoD security cognizance and the estimated trips at .89 per traveler is (543,462 × .89 = 483,681 estimated trips). Assuming the ratio for those employees reporting foreign travel into APACS is the same as SECRET cleared employees would report, of the estimated 483,681 foreign trips by SECRET cleared employees, it can be estimated that approximately 107,812 (22.3% of 483,681) will be taken by contractors at small entities, and 375,869 (77.7% of 483,681) by contractors at non-small businesses. It is estimated that it will take a half an hour for a SECRET cleared employee to report foreign travel in 2021 and in each of the following years up to year 20 to report foreign travel and receive any pre-travel or post-travel briefings. The estimated average labor rate for a SECRET cleared employee to report foreign travel is the equivalent of a GS11 step 5. These assumptions imply costs of $16.81 million in each year one through 20.

e. *Fewer contract performance delays by the small number of U.S. contractors with NTIB ownership operating under an SSA.* Section 842 of Public Law 115–232, is limited to a small number of U.S. cleared legal entities in the NISP for which the ultimate parent entity and any intermediate parent entities of such subsidiary are located in a country that is part of the NTIB; and that is subject to the FOCI requirements of the NISP. There are currently 20 U.S. cleared legal entities with their associated cleared divisions, subsidiaries or branch (estimated to be another 100 cleared entities) to whom Section 842 of Public Law 115–232 applies. Section 881 of Public Law 114–328 expanded the legal definition of the NTIB to include the United Kingdom and Australia. The NTIB is comprised of the United States, the United Kingdom of Great Britain and Northern Ireland, Canada and Australia. NTIB is based on the principle that defense trade between the United States and its closest allies enables a host of benefits, including increased access to innovation, economies of scale, and interoperability (10 U.S.C. 2500).

Section 842 of Public Law 115–232 is deregulatory by statute and this rule. There are no estimated costs to the small number of entities impacted because they are required already to submit any new or change to FOCI information for their initial and continued FCL, respectively, via the SF 328, Certificate Pertaining to Foreign Interests in the NISP as do all other U.S. cleared legal entities. 32 CFR part 2004 provides a CSA up to 30 days to assess the submitted NID and then another 30 days for a controlling agency to make a NID for the type of proscribed information under the purview of each (ODNI for SCI, DOE for RD or NSA for COMSEC). Thus, with Section 842 of Public Law 115–232, there has been minimum 60 day delay for a NID involving an NTIB covered entity which has impacted the timeliness of contract performance. There are estimated costs savings as this small number of cleared entities and their entity cleared employees designated to work on specific classified contracts involving proscribed information will no longer have to wait at least 60 days for NIDs after contract award for access to proscribed information when all other requirements have been met for access to classified information and contract performance. Using the published Office of Personnel Management GS salary schedule for FY20, the labor rate for an FSO and an estimated 8 cleared employees in each of the 2 small business entities impacted is the equivalent of a GS11 step 5 with a time savings of 320 hours for each year 1 through 20. The labor rate for an FSO and an estimated 19 cleared employees in each of the 18 large business entities impacted is the equivalent of a GS13 step 5 with a time savings of 320 hours for each year 1 through 20. These assumptions imply cost savings of $11.81 million in each year.

C. USG Cost Analysis of the Changes to the Baseline From This Rule

1. *Projected USG Cost/Cost Savings.* In summary, the estimated USG cost/cost savings are present value costs of $10.82 million and annualized costs of $0.76 million. Throughout, labor rates are adjusted upward by 100% to account for overhead and benefits.

2. *Cost analysis.*

a. Regulatory Familiarization. There will be an initial step to become familiar with the clause requirements and what actions the USG executive branch agencies must take to comply with the changes in this rule. To become familiar with the new requirements, USG executive branch agencies may review the **Federal Register** notice with the new 32 CFR part 117. It is estimated that 38 USG executive branch agencies will become familiar with the rule (*i.e.,* the five Cognizant Security Agencies (DoD, DOE, NRC, ODNI, DHS) and the 33 USG agencies which currently have an industrial security services agreement

with DoD pursuant to 32 CFR part 2004). The estimated labor rate used for the cost calculation is the equivalent of a GS12 step 5 for the designated NISP lead at each of those 38 agencies. It is estimated that it will take 8 hours in the first year as well as in each of the following through year 20 to become familiar and remain familiar with the rule, as this will be the first time that the NISPOM is in a rule format instead of as a DoD policy issuance, as well as familiarization with the changes. These assumptions imply costs of approximately $25 thousand each year.

b. *Training the USG civilian employees of NISP CSAs who provide oversight of contractor compliance with this rule.* It is estimated that the NISP CSAs (*i.e.,* DoD, DOE, NRC, ODNI and DHS) must train a total of 800 personnel who provide oversight of contractor compliance with this rule in the first year with annual refresher training in subsequent years. The largest number of personnel would be trained by DoD. The initial training is estimated to take 24 hours in 2021 to ensure those government personnel conducting oversight are versed in the changed requirements to assess compliance by cleared entities. The second year refresher training will be 16 hours with 8 hours of refresher training in each of years 3 through 20. The average labor rate for these 800 government headquarters and field personnel is estimated to be a GS13 step 5. These assumptions imply costs of $1.90 million in year one; $1.27 million in year 2; and, $0.63 million in each year 3 through 20.

c. *Accepting submissions of foreign travel reports by SECRET cleared entity personnel.* DoD, with the largest population of cleared entity personnel, already has the data fields for foreign travel reporting in the Defense Information System for Security and will not have to make more changes to that automated system to accept submission of these reports. There are no expected costs or costs savings.

d. *No longer draft, coordinate and submit proposed national interest determinations (NIDs) for access to proscribed information for the small number of U.S. contractors with NTIB ownership operating under an SSA.* There will be a small cost savings because DoD Components (*i.e.,* Departments of the Army, Navy and Air Force, DARPA, DIA, NGA, NRO, NSA and assorted smaller organizations) will no longer have to take an estimated 40 hours a year to draft, coordinate and submit NIDs for the small number of U.S. contractors with NTIB ownership operating under an SSA. There will be minimal administrative changes to the DoD information system to remove the NID requirement for the small number of NTIB covered entities. DoD already must evaluate any changes submitted to FOCI information for U.S. cleared legal entities under its security cognizance which would include a determination if one of these cleared legal entities remains a covered NTIB entity. On average, DoD receives an estimated one FOCI changed condition report annually from an NTIB covered cleared legal entity. An estimated 10 government personnel with an estimated labor rate of a GS11 step 5 would save 40 hours in year 1 through year 20. These assumptions imply costs saving of approximately $28 thousand each year.

e. *Update training materials, job aids and associated tools for U.S. cleared legal entities and USG agencies on these changes to the NISPOM.* CSAs will have to update existing training materials and products used by U.S. cleared legal entities and USG agencies so that they have all needed information on the changes being implemented in this NISPOM rule. Examples of those training materials and products range from online or in person training, job aids and web tools. DoD provides NISP training materials to the largest population, to include USG agencies and U.S. cleared legal entities, and estimates the time impact in year one is 1,128 hours for each of six individuals to update all the training materials with 564 hours in year two and 282 hours each year for maintenance of those materials in year 3 through year 20. The labor rate for those 6 personnel is estimated to be a GS13 step 5. These assumptions imply costs of $0.67 million in year one; $0.34 million in year 2; and $0.17 million in each year 3 through 20.

C. Total Costs/Cost Savings

In summary the estimated public and USG costs/cost savings are (1) present value costs of $150.26 million and annualized costs of $10.52 million for the public; and, (2) present value cost of $10.82 million and annualized costs of $0.76 million for the USG. Throughout, labor rates are adjusted upward by 100% to account for overhead and benefits.

Benefits

Following the September 2013 Navy Yard shooting, the President directed the Office of Management and Budget (OMB) to lead a review of suitability and security clearance procedures for Federal employees and contractors (see *https://www.archives.gov/files/isoo/oversight-groups/nisp/2014-suitability-and-processes-report.pdf*). This review assessed USG policies, programs, processes, and procedures involving determinations of federal employee suitability, contractor fitness, and personnel security. The interagency working group also evaluated the collection, sharing, processing, and storage of information used to make suitability, credentialing, and security decisions. It found the need for

- better information sharing,
- increased oversight over background investigations, and
- consistent application of standards and policies for both Federal employees and contractors.

The report identified 13 recommendations to improve how the Government performed suitability determinations and security clearances and the creation of SEAD 3 is a partial response to recommendation A.2. SEAD–3 requires enhanced additional reporting of foreign travel, foreign contacts and conduct/behavior that might jeopardize an individual from maintaining access or eligibility to access classified information. Many of the requirements are a direct result of recent national security breaches by trusted insiders who have disclosed classified information to news media or foreign entities causing significant harm to the interests of the United States.

SEAD 3 was designed to strengthen the safeguarding of national security equities, such as national security information, personnel, facilities, and technologies. These reporting requirements are important because individuals who incur a continuing security obligation need to be aware of the risks associated with foreign intelligence operations and/or possible terrorist activities directed against them in the U.S. and abroad, and to be aware they possess or have access to information that is highly sought after by foreign adversaries and competitors, including, but not limited to:

- Classified or sensitive information vital to national and economic security
- Emerging technologies and pioneering research and development
- Information relating to critical infrastructure sectors
- Proprietary secrets
- Security or counterintelligence information

In particular, the risk of becoming an intelligence target increases greatly during foreign travel, be it for official or unofficial purposes. NISP Contractor cleared personnel can become the target of a foreign intelligence or security service at any time in any country.

Collecting additional information on travel will help ensure basic counterintelligence awareness is implemented to effectively protect both the individual and the USG against foreign attempts to collect sensitive, proprietary, or classified information. Such measures could include arranging a pre-travel briefing from the entity Facility Security Officer. Reminders include, but are not limited to the following, which can be provided to:

- Do not leave items that would be of value to a foreign intelligence service unattended in hotel rooms or stored in hotel safes.
- Limit sensitive discussions—hotel rooms or other public places are not suitable locations to discuss sensitive information.
- Not use computer or facsimile equipment at foreign hotels or business centers for sensitive matters.
- Not divulge information to anyone unauthorized to hear it.
- Ignore or deflect intrusive inquiries or conversation about business or personal matters.
- Keep a laptop computer as carry-on baggage—never check it with other luggage and, if possible, remove or control storage media. Confirm before the foreign travel whether it is necessary or even advisable to take a laptop computer.
- Report any suspicious contacts or incidents to the entity FSO to report to the applicable CSA.

Contractors in the NISP also have a responsibility for recognizing and avoiding personal behaviors and activities that may impact their continued eligibility for access to classified information. This includes, but is not limited to the following activities which may be of potential security, insider threat, or counterintelligence concern

- An unwillingness to comply with rules, regulations, or security requirements
- Unexplained affluence or excessive indebtedness
- Alcohol abuse
- Illegal use or misuse of drugs or drug activity
- Apparent or suspected mental health issues where there is reason to believe it may impact the individual's ability to protect classified information or other information prohibited by law from disclosure
- Criminal conduct
- Any activity that raises doubts as to whether the individual's continued national security eligibility is clearly consistent with national security interests
- Misuse of U.S. Government property or information systems

This rule will result in fewer contract performance delays by the small number of U.S. contractors with NTIB ownership operating under an SSA. With Section 842 of Public Law 115–232 implemented there will no longer be at least a 60 day minimum delay for USG contracting activities and NTIB covered entities to wait for NIDs after contract award for access to proscribed information when all other requirements have been met. When a GCA submits a NID to the applicable CSA, there is an initial 30 days to process the request, which includes verification of the NID requirement. If the NID also includes a requirement for controlling agency concurrence (*i.e.,* ODNI for SCI, DOE for RD or NSA for COMSEC), the CSA submits the request to the applicable controlling agencies who then have 30 more days for its analysis and decision. Section 842 of Public Law 115–232 is deregulatory by statute as reflected in this rule. Congress required that the NTIB policy framework foster a defense free-trade area among the defense-related research and development sectors of the United States, Canada, Australia and the United Kingdom. Section 881 of Public Law 114–328 (the National Defense Authorization Act for Fiscal Year 2017) expanded the legal definition of the NTIB to include the United Kingdom and Australia. Congress expanded the NTIB in 2017 based on the principle that defense trade between the United States and its closest allies enables a host of benefits, including increased access to innovation, economies of scale, interoperability, and to reduce the barriers to the seamless integration between the NTIB which supplies defense articles to the Armed Forces and enhances allied interoperability of forces. Section 842 of Public Law 115–232 also continues the congressional intent to remove barriers to the seamless integration of the transfer of knowledge, goods, and services among the persons and organizations of the NTIB for national security challenges across a variety of technology areas.

Alternatives

No action. If there were no action (*i.e.,* no NISPOM rule nor DoD Manual 5220.22), USG agencies would not have single set of requirements to be levied on contractors through a FAR security requirements clause or equivalent to protect classified information in contracts. Without that single set of requirements consistently levied for classified contracts by USG agencies, there would be a loss of classified information to adversaries. There would not be a streamlined process for clearing contractors to work on contracts involving classified information. This would leave each USG agency to clear its own contractors, which could take months or years. The ability for the USG to fill crucial mission gaps using contractors would be severely impacted. There would be no standardized way under which contractors would be required to physically store classified information. The USG would have no insight into insider threats from contractor personnel who have access to the USG's most sensitive and critical programs. There would be an adverse impact on national security. The results of this alternative are not preferred.

Next Best Alternative. Each USG agency would establish a rule for contractor protection of classified information disclosed or released to contractors. Differing standards will result in inconsistent standards, confusion, and higher costs for compliance if a contractor has contracts requiring access to classified information with multiple USG agencies and has to comply with different agency requirements. Further, such an alternative would result in additional time needed for contractors to put in place mechanisms to meet multiple and differing sets of requirements. This inconsistency and confusion due to differing standards also increases the likelihood of loss of classified information and insider threats going undetected. The results of this alternative are not preferred.

The Preferred Alternative. This final rule provides a single statement of requirements for contractors to comply with for maximum uniformity and consistency, for the protection of classified information, to include the reporting of foreign travel and foreign contacts by cleared contractor personnel in accordance with Security Executive Agent policies. This final rule provides for the proper protection of classified information disclosed or released by U.S. agencies in all phases of the contracting, license or grant processes. This rule will prevent the theft of classified national security assets and information by adversaries and insider threats. This is the preferred alternative.

IV. Exception to Notice and Comment

This rule directly involves matters relating to public grants or contracts, and is therefore expressly exempt from notice and comment procedures under 5 U.S.C. 553(a)(2). Compliance with this rule is levied by a Federal Acquisition Regulation security requirements clause

or equivalent. It establishes requirements for the protection of classified information disclosed to or developed by contractors, licensees, grantees, or certificate holders. Industry implements these requirements to protect national security interests, cleared persons, and the integrity of the classified information. Although DoD has determined that an exception to the notice and comment requirements of § 553 applies, it still seeks public comments on this rule. Thereafter, DoD will consider comments received on this rule in determining whether to make any changes in a subsequent rule.

V. Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and E.O. 13563, ''Improving Regulation and Regulatory Review''

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB) under the requirements of these E.O.s. This rule has been designated a significant regulatory action and determined to be economically significant, under section 3(f) of E.O. 12866 as it has an annual effect on the economy of $100 million or more or affects in a material way the economy or a sector of the economy. Security costs relate specifically to protection of classified information by cleared U.S. entities.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs''

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

The DoD certifies that this final rule would not, if promulgated, have a significant economic impact on a substantial number of small business entities in accordance with the Regulatory Flexibility Act (5 U.S.C. 601) requirements since a contractor cleared legal entity may, in entering into contracts requiring access to classified information, negotiate for security costs determined to be properly chargeable by a GCA. The DoD invites comment from members of the public who believe there will be a significant impact.

Small entities to which this rule will apply provide products and services to the executive branch, *e.g.,* in the areas of administration, consulting, information security and technology, cybersecurity, research and development, design, production and manufacturing, including circumstances where physical security measures cannot preclude aural or visual access to classified information. These small business entities, as well as non-small business entities, have entered into a contract, license or grant for which access to classified information is required. Compliance with this rule, also referred to as the NISPOM, is levied by a FAR security requirements clause or equivalent. The requirements for an entity eligibility determination do not include USG collection of applicable North American Industry Classification System (NAICS) codes. While this type of information is available in the Federal Procurement Data System (FPDS), entity eligibility determinations (often referred to as facility clearances) are not available in FPDS. DoD has no efficient mechanism to cross check NAICS codes from FPDS with facility clearance data. DoD assesses there are a wide variety of NAICS codes associated with contracts requiring access to classified information. For example, the following NAICS codes may be associated with contracts requiring access to classified information: 561720 janitorial services; 561210 facility support services; 541611 administrative management and general management services; 561110 office administrative services; 541690 other scientific and technical consulting services; 541330 engineering services; 561611 investigation services; and likely many others, since contracts that require a facility clearance for access to classified information are not industry specific.

Based on the number of small businesses registered within the SBA Dynamic Small Business Search, the overall industrial base of federal government small businesses is 313,651. Approximately 1,000 facilities were randomly selected from the NISP to determine if the selected facilities were registered within the SBA Dynamic Small Business Search. With 95% confidence, it can be estimated that there are between 7,672 and 8,400 small entities impacted by this rule. The general methodology to determine a random sample and the estimated number of small business entities impacted by this rule is outlined in the following table. The random selection is dependent on the contractor facility having an active facility security clearance and permanent CAGE Code.

NISP small entities estimate	
Total cleared contractor facilities enrolled in the DoD National Industrial Security System (NISS) as of May 14, 2020: 12,384.	
Randomly Selected facilities from the current cleared contractor population: 1,014.	
The proportion of cleared contractor facilities in the simple random sample enrolled in the SBA Database: 658/1,014 = 64.89%	Equates to 8,036 facilities as small business entities.
Margin of Error for proportion enrolled in SBA database (95% confidence): ±2.94%	Equates to ±364 facilities cleared contractor facilities.
The interval estimate for the number of small businesses in the NISP: 8,036 ±364 =	7,672 to 8,400 cleared contractor facilities.

Based on the simple random sample, we can be 95% confident that the true proportion of active cleared contractor facilities enrolled in the SBA database is between 62.0% and 67.8%. Based on cleared contractor enrollment as of May 14, 2020, the percentages equate to an interval estimate between 7,672 and 8,400 small business entities which are cleared contractor facilities and impacted by this rule.

Assumptions and Notes:

- Facilities self-enrolled in the SBA database are, in fact, small businesses. The following link was used to determine if a facility was a small business by searching CAGE codes showing all NAICS for which a business is a small business: *https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.*
- The SBA database is generally a self-certifying database. The SBA does not make any representation as to the accuracy of any of the data included, other than certifications relating to 8(a) Business Development, HUBZone or Small Disadvantaged Business status. The SBA strongly recommends that contracting officers diligently review a bidder's small business self-certification before awarding a contract.
- Facilities were selected from the active NISS population using a simple random sample (1,014 selected of 12,384 enrolled facilities).
- Selection of each facility is independent of all other facilities selected (N * .10 >n).
- The sample is large enough (n = 1014) that we can assume the sampling distribution of sample proportions is approximately normal (n * p>10 and n * (1 − p) >10).

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This final rule is a ''major rule'' as defined by 5 U.S.C. 804(2) because it is also economically significant under section 3(f) of E.O. 12866 with an annual effect on the economy of $100 million or more.

Sec. 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. This final rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 117 does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. DoD is not proposing changes to the DoD collections based on this final rule, nor have any of the other NISP CSAs indicated proposed changes based on this rule. The DOE and NRC have collections based on their respective authorities as a NISP CSA; but neither has a collection for a Contract Security Classification Specification because DOE and NRC each complete that specification for both prime contracts and subcontracts. By accepting the contract, the contractor obligates itself to fulfill the requirements specified in applicable DOE Acquisition Regulation (DEAR) clauses (available at *https://www.energy.gov/management/downloads/searchable-electronic-department-energy-acquisition-regulation*) and identified DOE Directives. The DOE Directives contain a contractor requirements document that conveys security obligations and the statutes for civil penalties for security violations. The Nuclear Regulatory Commission Acquisition Regulation part 2052.204–70 includes the security requirements levied on the contractor (available at *https://www.acquisition.gov/nrcar/nrcar-part-2052-solicitation-provisions-and-contract-clauses#P41_1774*). For ease of review of this rule, the collections are discussed below. Materials associated with all of the collections can reviewed at *www.reginfo.gov.*

- OMB Control Number 0704–0194, DD Form 441, *DoD Security Agreement.*
- OMB Control Number: 0704–0571, *National Industrial Security System,* is a DoD information collection used to conduct its monitoring and oversight of contractors.
- OMB Control Number 0704–0567, DoD *Contract Security Classification Specification,* this collection is used by both DoD and agencies which have an industrial security agreement with DoD.
- OMB Control Number 0704–0573, *Defense Information System for Security,* is a DoD automated system for personnel security, providing a common, comprehensive medium to record, document, and identify personal security actions within DoD including submitting adverse information, verification of security clearance status, requesting investigations, and supporting continuous evaluation activities. It requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability determinations for active duty military, civilian employees and contractors seeking such credentials.
- OMB Control Number 0704–0496, *Joint Personnel Adjudication System,* an information system which requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability determinations for active duty military, civilian employees and contractors seeking such credentials.
- OMB Control Number 0704–0579, *Certificate Pertaining to Foreign Interests SF (328)* which is a common form which can be used by all CSAs.
- OMB Control Number 3150–0047, *10 CFR part 95, Facility Security Clearance and Safeguarding of National Security Information and Restricted Data,* is an NRC information collection used to obtain an FCL and for safeguarding Secret and Confidential National Security Information and Restricted Data. Licensees under 10 CFR part 95 fall within two categories, those who possess, use or transmit classified matter at their site or a cleared contractor site, and those licensees and contractors who only need access to classified matter at a government or appropriately cleared non-government site.
- OMB Control Number 1910–1800, *Security Package,* is a DOE information collection used by DOE to conduct its monitoring and oversight of contractors under its security cognizance and to provide a platform for other CSAs, GCAs or prime contractors to verify whether a contractor has a DOE-granted FCL.

Executive Order 13132, ''Federalism''

E.O. 13132 establishes certain requirements that an agency must meet when it promulgates an final rule (and subsequent final rule) that imposes substantial direct requirement costs on

State and local governments, preempts State law, or otherwise has Federalism implications. This final rule will not have a substantial effect on State and local governments.

List of Subjects in 32 CFR Part 117

Classified information; Government contracts; USG contracts, National Industrial Program (NISP); Prime contractor, Subcontractor.

■ Accordingly, the Department of Defense amends chapter I of title 32 of the CFR by adding part 117 to read as follows:

PART 117—NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL (NISPOM)

Sec.

117.1 Purpose.
117.2 Applicability.
117.3 Definitions.
117.4 Policy.
117.5 Information collections.
117.6 Responsibilities.
117.7 Procedures.
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117.24 Cognizant Security Office information.

Authority: 32 CFR part 2004; E.O. 10865; E.O. 12333; E.O. 12829; E.O. 12866; E.O. 12968; E.O. 13526; E.O. 13563; E.O. 13587; E.O. 13691; Public Law 108–458; Title 42 U.S.C. 2011 *et seq.*; Title 50 U.S.C. Chapter 44; Title 50 U.S.C. 3501 *et seq.*

§ 117.1 Purpose.

(a) This rule implements policy, assigns responsibilities, establishes requirements, and provides procedures, consistent with E.O. 12829, ''National Industrial Security Program''; E.O. 10865, ''Safeguarding Classified Information within Industry''; 32 CFR part 2004; and DoD Instruction (DoDI) 5220.22, ''National Industrial Security Program (NISP)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/522022p.pdf?ver=2018-05-01-073158-710*) for the protection of classified information that is disclosed to, or developed by contractors of the U.S. Government (USG) (hereinafter referred to in this rule as contractors).

(b) This rule, also in accordance with E.O. 12829, E.O. 13587,''Structural Reforms To Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information''; E.O. 13691, ''Promoting Private Sector Cybersecurity Information Sharing''; E.O. 12333, ''United States Intelligence Activities''; 42 U.S.C. 2011 *et seq.* (also known as and referred to in this rule as the ''AEA of 1954,'' as amended); '' 50 U.S.C. Ch. 44 (also known as the ''National Security Act of 1947,'' as amended); 50 U.S.C. 3501 *et seq.* (also known as the ''Central Intelligence Agency Act of 1949,'' as amended); Public Law 108–458 (also known as the ''Intelligence Reform and Terrorism Prevention Act of 2004''); and 32 CFR part 2004:

(1) Prescribes industrial security procedures and practices, under E.O. 12829 or successor orders, to safeguard USG classified information that is developed by or disclosed to contractors of the USG.

(2) Prescribes requirements, restrictions, and other safeguards to prevent unauthorized disclosure of classified information and protect special classes of classified information.

(3) Prescribes that contractors will implement the provisions of this rule no later than 6 months from the effective date of this rule.

§ 117.2 Applicability.

(a) This rule applies to:

(1) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this rule as the ''DoD Components'').

(2) All executive branch departments and agencies.

(3) All industrial, educational, commercial, or other non-USG entities granted access to classified information by the USG executive branch departments and agencies or by foreign governments.

(4) The release of classified information by the USG to contractors, who are required to safeguard classified information released during all phases of the contracting, agreement (including cooperative research and development agreements), licensing, and grant processes, *i.e.,* the preparation and submission of bids and proposals, negotiation, award, performance, and termination. Also, it applies in situations involving a contract, agreement, license, or grant when actual knowledge of classified information is not required, but reasonable physical security measures cannot be employed to prevent aural or visual access to classified information, because there is the ability and opportunity to gain knowledge of classified information. It also applies to any other situation in which classified information or FGI that is furnished to a contractor requires protection in the interest of national security, but which is not released under a contract, license, certificate or grant.

(b) This rule does not:

(1) Limit in any manner the authority of USG executive branch departments and agencies to grant access to classified information under the cognizance of their department or agency to any individual designated by them. The granting of such access is outside the scope of the NISP and is accomplished pursuant to E.O. 12968, E.O. 13526, E.O. 13691, the AEA, and applicable disclosure policies.

(2) Apply to criminal proceedings in the courts or authorize contractors or their employees to disclose classified information in connection with any criminal proceedings. Defendants and their representative in criminal proceedings in U.S. District Courts, Courts of Appeal, and the U.S. Supreme Court may gain access to classified information in accordance with 18 U.S.C. Appendix 3, Section 1, also known as and referred to in this rule as the ''Classified Information Procedures Act,'' as amended.

§ 117.3 Acronyms and Definitions.

(a) Acronyms. Unless otherwise noted, these acronyms and their terms are for the purposes of this rule.

ACCM alternative compensatory control measures
AEA Atomic Energy Act of 1954, as amended
AUS Australia
CAGE commercial and government entity
CCIPP classified critical infrastructure protection program
CDC cleared defense contractor
CFIUS Committee on Foreign Investment in the United States
CFR Code of Federal Regulations

CI Counterintelligence
CIA Central Intelligence Agency
CNSS Committee on National Security Systems
CNWDI critical nuclear weapons design information
COMSEC communications security
COR central office of record
CSA cognizant security agency
CSO cognizant security office
CUSR Central United States Registry
DCSA Defense Counterintelligence and Security Agency
DD Department of Defense (forms only)
DDTC Directorate of Defense Trade Controls
DGR designated government representative
DHS Department of Homeland Security
DNI Director of National Intelligence
DoD Department of Defense
DoDD Department of Defense Directive
DoDI Department of Defense Instruction
DoDM Department of Defense Manual
DOE Department of Energy
ECP electronic communications plan
E.O. Executive order
FBI Federal Bureau of Investigation
FCL facility (security) clearance
FGI foreign government information
FOCI foreign ownership, control, or influence
FRD Formerly Restricted Data
FSCC Facility Security Clearance Certificate (NATO)
FSO facility security officer
GCA government contracting activity
GCMS government contractor monitoring station
GSA General Services Administration
GSC government security committee
IDE intrusion detection equipment
IDS intrusion detection system
IFB invitation for bid
ISOO Information Security Oversight Office
ISSM information system security manager
ISSO information systems security officer
ITAR International Traffic in Arms Regulations
ITPSO insider threat program senior official
KMP key management personnel
LAA limited access authorization
MFO multiple facility organization
NATO North Atlantic Treaty Organization
NDA nondisclosure agreement
NIAG NATO Industrial Advisory Group
NID national interest determination
NISP National Industrial Security Program
NISPOM National Industrial Security Program Operating Manual
NIST National Institute for Standards and Technology
NNPI Naval Nuclear Propulsion Information
NNSA National Nuclear Security Administration
NPLO NATO Production Logistics Organization
NRC Nuclear Regulatory Commission
NRTL nationally recognized testing laboratory
NSA National Security Agency
NSI national security information
NTIB National Technology and Industrial Base
OCA original classification authority
OMB Office of Management and Budget
PA proxy agreement
PCL personnel (security) clearance
RD Restricted Data
RFP request for proposal
RFQ request for quotation
SAP special access program
SCA security control agreement
SCI sensitive compartmented information
SD Secretary of Defense (forms only)
SEAD Security Executive Agent directive
SF standard form
SMO senior management official
SSA special security agreement
SSP systems security plan
TCP technology control plan
TFNI Transclassified Foreign Nuclear Information
TP transportation plan
UK United Kingdom
UL Underwriters' Laboratories
U.S.C. United States Code
USD (I&S) Under Secretary of Defense for Intelligence and Security
USG United States Government
USML United States Munitions List
VAL visit authorization letter
VT voting trust

(b) Definitions. Unless otherwise noted, these terms and their definitions are for the purposes of this rule.

Access means the ability and opportunity to gain knowledge of classified information.

Access Permittee means the holder of an Access Permit issued pursuant to the regulations set forth in 10 CFR part 725, ''Permits For Access to Restricted Data.''

ACCM are security measures used by USG agencies to safeguard classified intelligence or operations when normal measures are insufficient to achieve strict need-to-know controls and where SAP controls are not required.

Adverse information means any information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, that his or her access to classified information clearly may not be in the interest of national security, or that the individual constitutes an insider threat.

Affiliate means each entity that directly or indirectly controls, is directly or indirectly controlled by, or is under common control with, the ultimate parent entity.

Agency(ies) means any ''Executive agency'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that releases classified information to private sector entities. This includes component agencies under another agency or under a cross-agency oversight office (such as ODNI with CIA), which are also agencies for purposes of this rule.

Alarm service company means an entity or branch office from which all of the installation, service, and maintenance of alarm systems are provided, and the monitoring and investigation of such systems are either provided by its own personnel or with personnel assigned by this location.

Alarm system description form means a form describing an alarm system and monitoring information.

Approved security container means a GSA approved security container originally procured through the Federal Supply system. The security containers bear the GSA Approval label on the front face of the container, which identifies them as meeting the testing requirements of the assigned federal specification and having been maintained according to Federal Standard 809.

Approved vault means a vault built to Federal Standard 832 and approved by the CSA.

AUS community consists of the Government of Australia entities and Australian non-governmental facilities identified on the DDTC website (*https://pmddtc.state.gov/*) at the time of export or transfer.

Authorized person means a person who has a favorable determination of eligibility for access to classified information, has signed an approved nondisclosure agreement, and has a need-to-know.

Branch office means an office of an entity which is located somewhere other than the entity's main office location. A branch office is simply another location of the same legal business entity, and is still involved in the business activities of the entity.

CCIPP means security sharing of classified information under a designated critical infrastructure protection program with such authorized individuals and organizations as determined by the Secretary of Homeland Security.

CDC means a subset of contractors cleared under the NISP who have classified contracts with the DoD.

Certification means comprehensive evaluation of an information system component that establishes the extent to which a particular design and implementation meets a set of specified security requirements.

Classification guide means a document issued by an authorized original classifier that identifies the elements of information regarding a specific subject that must be classified and prescribes the level and duration of classification and appropriate declassification instructions.

Classified contract means any contract, license, agreement, or grant requiring access to classified information by a contractor and its

employees for performance. A contract is referred to in this rule as a ''classified contract'' even when the contract document and the contract provisions are not classified. The requirements prescribed for a ''classified contract'' also are applicable to all phases of precontract, license or grant activity, including solicitations (bids, quotations, and proposals), precontract negotiations, post-contract activity, or other government contracting activity (GCA) programs or projects which require access to classified information by a contractor.

Classified covered information system means an information system that is owned or operated by or for a cleared defense contractor and that processes, stores, or transmits information created by or for the DoD with respect to which such contractor is required to apply enhanced protection (*e.g.,* classified information). A classified covered information system is a type of covered network consistent with the requirements of Section 941 of Public Law 112–239 and 10 U.S.C. 391.

Classified information means information that has been determined, pursuant to E.O. 13526, or any predecessor or successor order, and the AEA of 1954, as amended, to require protection against unauthorized disclosure in the interest of national security and which has been so designated. The term includes NSI, RD, and FRD.

Classified meetings means a conference, seminar, symposium, exhibit, convention, training course, or other such gathering during which classified information is disclosed.

Classified visit means a visit during which a visitor will require, or is expected to require, access to classified information.

Classifier means any person who makes a classification determination and applies a classification category to information or material. The determination may be an original classification action or it may be a derivative classification action. Contractors make derivative classification determinations based on classified source material, a security classification guide, or a contract security classification specification, or equivalent.

Cleared commercial carrier means a carrier that is authorized by law, regulatory body, or regulation to transport SECRET and CONFIDENTIAL material and has been granted a SECRET facility clearance in accordance with the NISP.

Cleared employees means all employees of industrial or commercial contractors, licensees, certificate holders, or grantees of an agency, as well as all employees of subcontractors and personal services contractor personnel, and who are granted favorable eligibility determinations for access to classified information by a CSA or are being processed for eligibility determinations for access to classified information by a CSA. A contractor may give an employee access to classified information in accordance with the provisions of § 117.10(a)(1)(iii).

Closed area means an area that meets the requirements of this rule for safeguarding classified material that, because of its size, nature, or operational necessity, cannot be adequately protected by the normal safeguards or stored during nonworking hours in approved containers.

CNWDI means a DoD category of TOP SECRET RD or SECRET RD information that reveals the theory of operation or design of the components of a thermonuclear or fission bomb, warhead, demolition munition, or test device. Specifically excluded is information concerning arming, fusing, and firing systems; limited life components; and total contained quantities of fissionable, fusionable, and high explosive materials by type. Among these excluded items are the components that DoD personnel set, maintain, operate, test or replace.

Compromise means an unauthorized disclosure of classified information.

COMSEC means the protective measures taken to deny unauthorized persons information derived from USG telecommunications relating to national security and to ensure the authenticity of such communications.

CONFIDENTIAL means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority (OCA) is able to identify or describe.

Consignee means a person, firm, or Government (*i.e.,* USG or foreign government) activity named as the receiver of a shipment; one to whom a shipment is consigned.

Consignor means a person, firm, or Government (*i.e.,* USG or foreign government) activity by which articles are shipped. The consignor is usually the shipper.

Constant surveillance service means a transportation protective service provided by a commercial carrier qualified by the Surface Deployment and Distribution Command to transport CONFIDENTIAL shipments. The service requires constant surveillance of the shipment at all times by a qualified carrier representative; however, an FCL is not required for the carrier. The carrier providing the service must maintain a signature and tally record for the shipment.

Consultant means an individual under contract, and compensated directly, to provide professional or technical assistance to a contractor in a capacity requiring access to classified information.

Continuous evaluation as defined in SEAD 6 is a personnel security investigative process to review the background of a covered individual who has been determined to be eligible for access to classified information or to hold a sensitive position at any time during the period of eligibility. Continuous evaluation leverages a set of automated records checks and business rules, to assist in the ongoing assessment of an individual's continued eligibility. It supplements, but does not replace, the established personnel security program for scheduled periodic reinvestigations of individuals for continuing eligibility.

Continuous monitoring program means a system that facilitates ongoing awareness of threats, vulnerabilities, and information security to support organizational risk management decisions.

Contracting officer means a USG official who, in accordance with departmental or agency procedures, has the authority to enter into and administer contracts, licenses or grants and make determinations and findings with respect thereto, or any part of such authority. The term also includes the designated representative of the contracting officer acting within the limits of his or her authority.

Contractor means any industrial, educational, commercial, or other entity that has been granted an entity eligibility determination by a CSA. This term also includes licensees, grantees, or certificate holders of the USG with an entity eligibility determination granted by a CSA. As used in this rule, ''contractor'' does not refer to contractor employees or other personnel.

Cooperative agreement means a legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant'' in this subpart), except that substantial involvement is expected between USG and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

Cooperative research and development agreement means any agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government, through its laboratories, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory; except that such term does not include a procurement contract or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of title 31.

Corporate family means an entity, its parents, subsidiaries, divisions, and branch offices.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

Courier means a cleared employee, designated by the contractor, whose principal duty is to transmit classified material to its destination, ensuring that the classified material remains under their constant and continuous protection and that they make direct point-to-point delivery.

CRYPTO means the marking or designator that identifies unencrypted COMSEC keying material used to secure or authenticate telecommunications carrying classified or sensitive USG or USG-derived information. This includes non-split keying material used to encrypt or decrypt COMSEC critical software and software based algorithms.

CSA means an agency designated as having NISP implementation and security responsibilities for its own agencies (including component agencies) and any entities and non-CSA agencies under its cognizance. The CSAs are: DoD; DOE; NRC; ODNI; and DHS.

CSO means an organizational unit to which the head of a CSA delegates authority to administer industrial security services on behalf of the CSA.

CUI means information the USG creates or possesses, or that an entity creates or possesses for or on behalf of the USG, that a law, regulation, or USG-wide policy requires or permits an agency to handle using safeguarding or dissemination controls. However, CUI does not include classified information or information a non-executive branch entity possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or an entity acting for an agency.

Custodian means an individual who has possession of, or is otherwise charged with, the responsibility for safeguarding classified information.

Cybersecurity means prevention of damage to, protection of, and restoration of computers, electronic communications systems, electronic communications services, wire communication, and electronic communication, including information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation.

Cyber incident means actions taken through the use of computer networks that result in an actual or potentially adverse effect on an information system or the information residing therein.

Declassification means a date or event which coincides with the lapse of the information's national security sensitivity, as determined by the OCA. Declassification occurs when the OCA has determined that the classified information no longer requires, in the interest of national security, any degree of protection against unauthorized disclosure, and the information has had its classification designation removed or cancelled.

Defense articles means those articles, services, and related technical data, including software, in tangible or intangible form, which are listed on the United States Munitions List (USML) of the International Traffic in Arms Regulations (ITAR), as modified or amended. Defense articles exempt from the scope of ITAR section 126.17 are identified in Supplement No. 1 to Part 126 of the ITAR.

Defense services means:

(1) Furnishing assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) Furnishing to foreign persons any controlled technical data, whether in the United States or abroad; or

(3) Providing military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.

Derivative classification means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes classifying information based on classification guidance. Duplicating or reproducing existing classified information is not derivative classification.

Document means any recorded information, regardless of the nature of the medium, or the method or circumstances of recording.

Downgrade means a determination by a declassification authority that information classified and safeguarded at a specified level will be classified and safeguarded at a lower level.

Embedded system means an information system that performs or controls a function, either in whole or in part, as an integral element of a larger system or subsystem, such as, ground support equipment, flight simulators, engine test stands, or fire control systems.

Empowered official is defined in 22 CFR part 120.

Entity is a generic and comprehensive term which may include sole proprietorships, partnerships, corporations, limited liability companies, societies, associations, institutions, contractors, licensees, grantees, certificate holders, and other organizations usually established and operating to carry out a commercial, industrial, educational, or other legitimate business, enterprise, or undertaking, or parts of these organizations. It may reference an entire organization, a prime contractor, parent organization, a branch or division, another type of sub-element, a sub-contractor, subsidiary, or other subordinate or connected entity (referred to as ''sub-entities'' when necessary to distinguish such entities from prime or parent entities). It may also reference a specific location or facility, or the headquarters or official business location of the organization, depending upon the organization's business structure, the access needs involved, and the responsible CSA's procedures. The term ''entity'' as used in this rule refers to the particular entity to which an agency might release, or is releasing, classified information, whether that entity is a parent or

subordinate organization. The term ''entity'' in this rule includes contractors.

Entity eligibility determination means an assessment by the CSA as to whether an entity is eligible for access to classified information of a certain level (and all lower levels). Entity eligibility determinations may be broad or limited to specific contracts, sponsoring agencies, or circumstances. A favorable entity eligibility determination results in eligibility to access classified information under the cognizance of the responsible CSA to the level approved. When the entity would be accessing categories of information such as RD or SCI for which the CSA for that information has set additional requirements, CSAs must also assess whether the entity is eligible for access to that category of information. Some CSAs refer to their favorable entity eligibility determinations as FCLs. However, a favorable entity eligibility determination for the DHS CCIPP is not equivalent to an FCL and does not meet the requirements for FCL reciprocity. A favorable entity eligibility determination does not convey authority to store classified information.

Escort means a cleared person, designated by the contractor, who accompanies a shipment of classified material to its destination. The classified material does not remain in the personal possession of the escort but the conveyance in which the material is transported remains under the constant observation and control of the escort.

Extent of protection means the designation (such as ''Complete'') used to describe the degree of alarm protection installed in an alarmed area.

Facility means a plant, laboratory, office, college, university, or commercial structure with associated warehouses, storage areas, utilities, and components, that, when related by function and location, form an operating entity.

FCL means an administrative determination that, from a security viewpoint, an entity is eligible for access to classified information of a certain level (and all lower levels) (*e.g.,* a type of favorable entity eligibility determination used by some CSAs). An entity eligibility determination for the DHS CCIPP is not the equivalent of an FCL and does not meet the requirements for FCL reciprocity.

FGI means information that is:

(1) Provided to the United States by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or

(2) Produced by the United States pursuant to, or as a result of, a joint arrangement with a foreign government or governments, an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both are to be held in confidence.

Foreign interest means any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its territories, and any person who is not a citizen or national of the United States.

Foreign national means any person who is not a citizen or national of the United States.

Foreign person is defined in 31 CFR 800.224 for CFIUS purposes.

FRD means classified information removed from the Restricted Data category upon a joint determination by the DOE and DoD that such information relates primarily to the military utilization of atomic weapons and that such information can be adequately safeguarded as classified defense information.

Freight forwarder (transportation agent) means any agent or facility designated to receive, process, and transship U.S. material to foreign recipients. In the context of this rule, it means an agent or facility cleared specifically to perform these functions for the transfer of U.S. classified material to foreign recipients.

GCA means an element of an agency that the agency head has designated and delegated broad authority regarding acquisition functions. A foreign government may also be a GCA.

Governing board means an entity's board of directors, board of managers, board of trustees, or equivalent governing body.

Grant means a legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship: (a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the USG's direct benefit or use; or, (b) In which substantial involvement is not expected between DoD and the recipient when carrying out the activity contemplated by the award. Throughout this rule, the term grant will include both the grant and cooperative agreement.

Grantee means the entity that receives a grant or cooperative agreement.

Hand carrier means a cleared employee, designated by the contractor, who occasionally hand carries classified material to its destination in connection with a classified visit or meeting. The classified material remains in the personal possession of the hand carrier except for authorized overnight storage.

Home office means the headquarters of a multiple facility entity.

Industrial security means that portion of information security concerned with the protection of classified information in the custody of U.S. industry.

Information means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics.

Information security means the system of policies, procedures, and requirements established pursuant to executive order, statute, or regulation to protect information that, if subjected to unauthorized disclosure, could reasonably be expected to cause damage to national security. The term also applies to policies, procedures, and requirements established to protect unclassified information that may be withheld from release to the public.

Information system means an assembly of computer hardware, software, and firmware configured for the purpose of automating the functions of calculating, computing, sequencing, storing, retrieving, displaying, communicating, or otherwise manipulating data, information and textual material.

Insider means cleared contractor personnel with authorized access to any USG or contractor resource, including personnel, facilities, information, equipment, networks, and systems.

Insider threat means the likelihood, risk, or potential that an insider will use his or her authorized access, wittingly or unwittingly, to do harm to the national security of the United States. Insider threats may include harm to contractor or program information, to the extent that the information impacts the contractor or agency's obligations to protect classified NSI.

Joint venture means an association of two or more persons or entities engaged in a single defined project with all parties contributing assets and efforts, and sharing in the management, profits and losses, in accordance with the terms of an agreement among the parties.

KMP means an entity's senior management official (SMO), facility security officer (FSO), insider threat program senior official (ITPSO), and all other entity officials who either hold majority interest or stock in, or have

direct or indirect authority to influence or decide issues affecting the management or operations of, the entity or classified contract performance.

L access authorization means an access determination that is granted by DOE or NRC based on a Tier 3 or successor background investigation as set forth in applicable national-level requirements and DOE directives. Within DOE and NRC, an ''L'' access authorization permits an individual who has an official ''need to know'' to access Confidential Restricted Data, Secret and Confidential Formerly Restricted Data, Secret and Confidential Transclassified Foreign Nuclear Information, or Secret and Confidential National Security Information, required in the performance of official duties. An ''L'' access authorization determination is required for individuals with a need to know outside of DOE, NRC, DoD, and in limited cases NASA, to access Confidential Restricted Data.

LAA means security access authorization to CONFIDENTIAL or SECRET information granted to non-U.S. citizens requiring only limited access in the course of their regular duties.

Material means any product or substance on or in which information is embodied.

Matter means anything in physical form that contains or reveals classified information.

Media means physical devices or writing surfaces including but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts (but not including display media) onto which information is recorded, stored, or printed within an information system.

MFO means a legal entity (single proprietorship, partnership, association, trust, or corporation) composed of two or more entities (facilities).

National of the United States means a person who owes permanent allegiance to the United States. All U.S. citizens are U.S. nationals; however, not all U.S. nationals are U.S. citizens (for example, persons born in American Samoa or Swains Island).

NATO information means information bearing NATO markings, indicating the information is the property of NATO, access to which is limited to representatives of NATO and its member nations unless NATO authority has been obtained to release outside of NATO.

NATO visits means visits by personnel representing a NATO entity and relating to NATO contracts and programs.

Need-to-know means a determination made by an authorized holder of classified information that a prospective recipient has a requirement for access to, knowledge of, or possession of the classified information to perform tasks or services essential to the fulfillment of a classified contract or program.

Network means a system of two or more information systems that can exchange data or information.

NNPI is classified or unclassified information concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of naval nuclear-powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities.

Non-DoD executive branch agencies means the non-DoD agencies that have entered into agreements with DoD to receive NISP industrial security services from DoD. A list of these agencies is on the Defense Counterintelligence and Security Agency website at *https://www.dcsa.mil.*

Non-Federal information system is defined in 32 CFR part 2002.

NRTL means a private sector organizations recognized by the Occupational Safety and Health Administration to perform certification for certain products to ensure that they meet the requirements of both the construction and general industry Occupational Safety and Health Administration electrical standards. Each NRTL is recognized for a specific scope of test standards.

NSI means information that has been determined pursuant to E.O. 13526 or predecessor order to require protection against unauthorized disclosure and marked to indicate its classified status.

NTIB means the industrial bases of the United States and Australia, Canada, and the United Kingdom.

NTIB entity means a person that is a subsidiary located in the United States for which the ultimate parent entity and any intermediate parent entities of such subsidiary are located in a country that is part of the national technology and industrial base (as defined in section 2500 of title 10, United States Code); and that is subject to the foreign ownership, control, or influence requirements of the National Industrial Security Program.

Nuclear weapon data means Restricted Data or Formerly Restricted Data concerning the design, manufacture, or utilization (including theory, development, storage, characteristics, performance and effects) of nuclear explosives, nuclear weapons or nuclear weapon components, including information incorporated in or related to nuclear explosive devices. Nuclear weapon data is matter in any combination of documents or material, regardless of physical form or characteristics.

OCA means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

Original classification means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure. Only USG officials who have been designated in writing may apply an original classification to information.

Parent means an entity that owns at least a majority of another entity's voting securities.

PCL means an administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted.

Prime contract means a contract awarded by a GCA to a contractor for a legitimate USG purpose.

Prime contractor means the contractor who receives a prime contract from a GCA.

Privileged user means a user that is authorized (and, therefore, trusted) to perform security-relevant functions that ordinary users are not authorized to perform.

Proscribed information means:

(1) TOP SECRET information;

(2) COMSEC information or material, excluding controlled cryptographic items when unkeyed or utilized with unclassified keys.

(3) RD;

(4) SAP information; or.

(5) SCI.

Protective security service means a transportation protective service provided by a cleared commercial carrier qualified by DoD's Surface Deployment and Distribution Command to transport SECRET shipments.

Q access authorization means an access determination that is granted by DOE or NRC based on a Tier 5 or successor background investigation as set forth in applicable national-level requirements and DOE directives. Within DOE and the NRC, a ''Q'' access authorization permits an individual with an official ''need to know'' to access Top Secret, Secret and Confidential Restricted Data, Formerly Restricted Data, Transclassified Foreign

Nuclear Information, National Security Information, or special nuclear material in Category I or II quantities, as required in the performance of official duties. A ''Q'' access authorization is required for individuals with a need to know outside of DOE, NRC, DoD, and in a limited case NASA, to access Top Secret and Secret Restricted Data.

Remote terminal means a device communicating with an automated information system from a location that is not within the central computer facility.

Restricted area means a controlled access area established to safeguard classified material that, because of its size or nature, cannot be adequately protected during working hours by the usual safeguards, but is capable of being stored during non-working hours in an approved repository or secured by other methods approved by the CSA.

RD means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but does not include data declassified or removed from the RD category pursuant to section 142 of the AEA.

SAP means any program that is established to control access and distribution and to provide protection for particularly sensitive classified information beyond that normally required for TOP SECRET, SECRET, or CONFIDENTIAL information. A SAP can be created or continued only as authorized by a senior agency official delegated such authority pursuant to E.O. 13526.

Schedule 13D means a form required by the Securities and Exchange Commission when a person or group of persons acquires beneficial ownership of more than 5% of a voting class of a company's equity securities registered under Section 12 of the ''Securities Exchange Act of 1934'' (available at: *https://www.sec.gov/fast-answers/answersshed13htm.html*).

SCI means a subset of classified national intelligence concerning or derived from intelligence sources, methods or analytical processes that is required to be protected within formal access control systems established by the DNI.

SECRET means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the OCA is able to identify or describe.

Security in depth means a determination made by the CSA that a contractor's security program consists of layered and complementary security controls sufficient to deter and detect unauthorized entry and movement within the facility. Examples include, but are not limited to, use of perimeter fences, employee and visitor access controls, use of an Intrusion Detection System (IDS), random guard patrols throughout the facility during nonworking hours, closed circuit video monitoring, or other safeguards that mitigate the vulnerability of open storage areas without alarms and security storage cabinets during nonworking hours.

Security violation means failure to comply with the policy and procedures established by this part that reasonably could result in the loss or compromise of classified information.

Shipper means one who releases custody of material to a carrier for transportation to a consignee. (See also ''Consignor.'')

SMO is the contractor's official responsible for the entity policy and strategy. The SMO is an entity employee occupying a position in the entity with ultimate authority over the facility's operations and the authority to direct actions necessary for the safeguarding of classified information in the facility. This includes the authority to direct actions necessary to safeguard classified information when the access to classified information by the facility's employees is solely at other contractor facilities or USG locations.

Source document means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

Standard practice procedures means a document prepared by a contractor that implements the applicable requirements of this rule for the contractor's operations and involvement with classified information at the contractor's facility.

Subcontract means any contract entered into by a contractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes a contract, subcontract, purchase order, lease agreement, service agreement, request for quotation (RFQ), request for proposal (RFP), invitation for bid (IFB), or other agreement or procurement action between contractors that requires or will require access to classified information to fulfill the performance requirements of a prime contract.

Subcontractor means a supplier, distributor, vendor, or firm that enters into a contract with a prime contractor to furnish supplies or services to or for the prime contractor or another subcontractor. For the purposes of this rule, each subcontractor will be considered as a prime contractor in relation to its subcontractors.

Subsidiary means an entity in which another entity owns at least a majority of its voting securities.

System software means computer programs that control, monitor, or facilitate use of the information system; for example, operating systems, programming languages, communication, input-output controls, sorts, security packages, and other utility-type programs. Also includes off-the-shelf application packages obtained from manufacturers and commercial vendors, such as for word processing, spreadsheets, data base management, graphics, and computer-aided design.

Technical data means:

(1) Information, other than software, which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List.

(3) Information covered by an invention secrecy order.

(4) Software directly related to defense articles.

TFNI means classified information concerning the nuclear energy programs of other nations (including subnational entities) removed from the RD category under section 142(e) of the AEA after the DOE and the Director of National Intelligence jointly determine that it is necessary to carry out intelligence-related activities under the provisions of the National Security Act of 1947, as amended, and that it can be adequately safeguarded as NSI instead. This includes information removed from the RD category by past joint determinations between DOE and the CIA. TFNI does not include information transferred to the United States under an Agreement for Cooperation under the Atomic Energy Act or any other agreement or treaty in which the United States agrees to protect classified information.

TOP SECRET means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the OCA is able to identify or describe.

Transmission means sending information from one place to another by radio, microwave, laser, or other non-connective methods, as well as by cable, wire, or other connective medium. Transmission also includes movement involving the actual transfer of custody and responsibility for a document or other classified material from one authorized addressee to another.

Transshipping activity means a government activity to which a carrier transfers custody of freight for reshipment by another carrier to the consignee.

UK community consists of the UK Government entities with facilities and UK non-governmental facilities identified on the DDTC website (*https://www.pmddtc.state.gov/*) at the time of export.

Unauthorized person means a person not authorized to have access to specific classified information in accordance with the requirements of this rule.

United States means the 50 states and the District of Columbia.

United States and its territorial areas means the 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, Wake Island, Johnston Atoll, Kingman Reef, Palmyra Atoll, Baker Island, Howland Island, Jarvis Island, Midway Islands, Navassa Island, and Northern Mariana Islands.

Upgrade means a determination that certain classified information, in the interest of national security, requires a higher degree of protection against unauthorized disclosure than currently provided, coupled with a change to the classification designation to reflect the higher degree.

U.S. classified cryptographic information means a cryptographic key and authenticators that are classified and are designated as TOP SECRET CRYPTO or SECRET CRYPTO. This means all cryptographic media that embody, describe, or implement classified cryptographic logic, to include, but not limited to, full maintenance manuals, cryptographic descriptions, drawings of cryptographic logic, specifications describing a cryptographic logic, and cryptographic software, firmware, or repositories of such software such as magnetic media or optical disks.

U.S. person means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.

Voting securities means any securities that presently entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated entities, individuals exercising similar functions.

Working hours means the period of time when:

(1) There is present in the specific area where classified material is located, a work force on a regularly scheduled shift, as contrasted with employees working within an area on an overtime basis outside of the scheduled work shift; and

(2) The number of employees in the scheduled work force is sufficient in number and so positioned to be able to detect and challenge the presence of unauthorized personnel. This would, therefore, exclude janitors, maintenance personnel, and other individuals whose duties require movement throughout the facility.

Working papers means documents or materials, regardless of the media, which are expected to be revised prior to the preparation of a finished product for dissemination or retention.

§ 117.4 Policy.

E.O. 12829 established the NISP to serve as a single, integrated, cohesive industrial security program to protect classified information and preserve our Nation's economic and technological interests.

(a) When contracts, licenses, agreements, and grants to contractors require access to classified information, national security requires that this information be safeguarded in a manner equivalent to its protection within the executive branch of the USG.

(b) National security requires that the industrial security program promote the economic and technological interests of the United States. Redundant, overlapping, or unnecessary requirements impede those interests.

§ 117.5 Information collections.

The information collection requirements are:

(a) *Standard Form (SF) 328* ''Certificate Pertaining to Foreign Interest'' (available at: *https://www.gsa.gov/forms-library/certificate-pertaining-foreign-interests*) in § 117.8 and § 117.11, is assigned Office of Management and Budget (OMB) Control Number 0704–0579. The expiration date of this information collection is listed in the DoD Information Collections System at *https://apps.sp.pentagon.mil/sites/dodiic/Pages/default.aspx.*

(b) *NRC collection.* ''Facility Security Clearance and Safeguarding of National Security Information and Restricted Data,'' is assigned OMB Control Number: 3150–0047. Under this collection, NRC-regulated facilities and other organizations are required to provide information and maintain records to ensure that an adequate level of protection is provided to NRC-classified information and material.

(c) *DOE collection.* ''Security,'' a NISP CSA information collection, is assigned OMB Control Number: 1910–1800. This information collection, which includes facility security clearance information, is used by the DOE to exercise management, oversight, and control over its contractors' management and operation of DOE's Government-owned contractor-operated facilities, and over its offsite contractors. The contractor management, oversight, and control functions relate to the ways in which DOE contractors provide goods and services for DOE organizations and activities in accordance with the terms of their contracts and the applicable statutory, regulatory, and mission support requirements of the Department. Information collected from private industry and private individuals is used to protect national security and critical assets entrusted to the Department.

(d) *DoD collection.* ''DoD Security Agreement,'' is assigned OMB Control Number: 0704–0194. ''National Industrial Security System,'' a CSA information collection, is assigned OMB Control Number: 0704–0571, and is a DoD information collection used to conduct its monitoring and oversight of contractors. Department of Defense ''Contract Security Classification Specification,'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0254.pdf* and available at: *https://www.dcsa.mil/is/nccs/*), is assigned OMB Control Number 0704–0567 and used by both DoD and agencies which have an industrial security agreement with DoD. ''Defense Information System for Security,'' is assigned OMB Control Number: 0704–0573. Defense Information System for Security is a DoD automated system for personnel security, providing a common, comprehensive medium to record, document, and identify personal security actions within DoD including submitting adverse information, verification of security clearance status, requesting investigations, and supporting continuous evaluation activities. It requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability

determinations for active duty military, civilian employees and contractors seeking such credentials. Joint Personnel Adjudicative System is assigned OMB Control Number: 0704–0496. Joint Personnel Adjudicative System is an information system which requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability determinations for active duty military, civilian employees and contractors seeking such credentials.

§ 117.6 Responsibilities.

(a) *Under Secretary of Defense for Intelligence & Security (USD(I&S)).* The USD(I&S), on behalf of the Secretary of Defense, and in accordance with E.O. 12829, 32 CFR part 2004, and DoDI 5220.22:

(1) Carries out the direction in section 201 of E.O. 12829 that the Secretary of Defense issue and maintain this rule and changes to it. The USD(I&S) does so in consultation with all affected agencies (E.O. 12829 section 201), with the concurrence of the Secretary of Energy, the Chairman of the NRC, the DNI, and the Secretary of Homeland Security (E.O.12829 section 201), and in consultation with the ISOO Director (E.O. 12829 section 102).

(2) Acts as the CSA for DoD.

(3) Provides policy and management of the NISP for non-DoD executive branch agencies who enter into inter-agency security agreements with DoD to provide industrial security services required when classified information is disclosed to contractors in accordance with E.O. 12829, as amended.

(b) *Director, DCSA.* Under the authority, direction, and control of the USD(I&S), and in accordance with DoDI 5220.22 and DoD Directive (DoDD) 5105.42, ''Defense Security Service (DSS)'' [1] (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510542p.pdf?ver=2019-01-14-090012-283*) the Director, DCSA:

(1) Oversees and manages DCSA, which serves as the DoD CSO.

(2) Administers the NISP as a separate program element on behalf of DoD GCAs and those agencies with agreements with DoD for security services.

(3) Provides security oversight of the NISP as the DoD CSO on behalf of DoD components and those non-DoD executive branch agencies who enter into agreements with DoD as noted in paragraph (a)(3) of this section. The Director, DCSA, will be relieved of this oversight function for DoD special access programs (SAPs) when the Secretary of Defense or the Deputy Secretary of Defense approves a carve-out provision in accordance with DoDD 5205.07, ''DoD SAP Policy'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/520507p.pdf?ver=2020-02-04-142942-827*).

(c) *Secretary of Energy.* In addition to the responsibilities in paragraph (h) of this section, the Secretary of Energy:

(1) Prescribes procedures for the portions of this rule pertaining to information classified under the AEA (*i.e.,* RD, FRD, and TFNI), as nothing in the rule shall be construed to supersede the authority of the Secretary of Energy under the AEA.

(2) Retains authority over access to information classified under the AEA.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to information classified under the AEA, as necessary.

(d) *Chairman of the NRC.* In addition to the responsibilities in paragraph (h) of this section, the Chairman of the NRC:

(1) Prescribes procedures for the portions of this rule that pertain to information under NRC programs classified under the AEA, other federal statutes, and executive orders.

(2) Retains authority over access to information under NRC programs classified under the AEA, other federal statutes, and executive orders.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to information under NRC programs classified pursuant to the AEA, other federal statutes, and executive orders where appropriate.

(e) *DNI.* In addition to the responsibilities in paragraph (h) of this section, the DNI:

(1) Prescribes procedures for the portions of this rule pertaining to intelligence sources, methods, and activities, including, but not limited to, SCI.

(2) Retains authority over access to intelligence sources, methods, and activities, including SCI.

(3) Provides guidance on the security requirements for intelligence sources and methods of information, including, but not limited to, SCI.

(f) *Secretary of Homeland Security.* In accordance with E.O. 12829, E.O. 13691, and in addition to the responsibilities in paragraph (h) of this section, the Secretary of Homeland Security:

(1) Prescribes procedures for the portions of this rule that pertain to the CCIPP.

(2) Retains authority over access to information under the CCIPP.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to CCIPP.

(g) *All the CSA heads.* The CSA heads:

(1) Oversee the security of classified contracts and activities under their purview.

(2) Provide oversight of contractors under their security cognizance.

(3) Minimize redundant and duplicative security review and audit activities of contractors, including such activities conducted at contractor locations where multiple CSAs have equities.

(4) Execute appropriate intra-agency and inter-agency agreements to avoid redundant and duplicate reviews.

(5) Designate one or more CSOs for security administration.

(6) Designate subordinate officials, in accordance with governing policies, to act as the authorizing official. Authorizing officials will:

(i) Assess and authorize contractors to process classified information on information systems.

(ii) Conduct oversight of such information system processing and provide information system security guidelines in accordance with Federal information system security control policies, standards, and procedures. Minimize redundant and duplicative security review and audit activity of contractors, including such activity conducted at contractor locations where multiple CSAs have equities.

(h) *Heads of component agencies.* In accordance with applicable CSA direction, the component agency heads:

(1) Oversee compliance with procedures identified by the applicable CSA or designated CSO.

(2) Provide oversight of contractor personnel visiting or working on USG installations.

(3) Promptly apprise the CSO of information received or developed that could adversely affect a cleared contractor, licensee, or grantee, and their employees, to hold an FCL or PCL, or that otherwise raises substantive doubt about their ability to safeguard classified information entrusted to them.

(4) Propose changes to this rule as deemed appropriate and provide them

[1] On June 20, 2020, the Secretary of Defense renamed the Defense Security Service (DSS) as the Defense Counterintelligence and Security Agency (DCSA), as required by Executive Oder 13467, section 2.6(b)(i) (as amended by Executive Order 13968, Apr. 24, 2019, 84 FR 18125). Pursuant to Section 4 of E.O. 13968, references to DSS in DoD issuances should be deemed or construed to refer to DCSA.

to the applicable CSA for submission to the OUSD(I&S) Counterintelligence, Law Enforcement and Security Directorate.

(i) *Director, ISOO.* The Director, ISOO:

(1) Oversees the NSIP and agency compliance with it, in accordance with E.O. 12829.

(2) Issues and maintains the NISP implementing directive (32 CFR part 2004), in accordance with E.O. 12829, to provide guidance to the CSAs and USG agencies under the NISP.

(3) Chairs the NISP Policy Advisory Committee. Addresses complaints and suggestions from contractors, as detailed in the NISP Policy Advisory Committee bylaws.

§ 117.7 Procedures.

(a) *General.* Contractors will protect all classified information that they are provided access to or that they possess. This responsibility applies at both contractor and USG locations.

(b) *Contractor Security Officials.* Contractors will appoint security officials who are U.S. citizens, except in exceptional circumstances (see § 117.9(m) and § 117.11(e)).

(1) Appointed security officials listed in paragraphs (b)(2), (b)(3), and (b)(4) of this section must:

(i) Oversee the implementation of the requirements of this rule. Depending upon the size and complexity of the contractor's security operations, a single contractor employee may serve in more than one position.

(ii) Undergo the same security training that is required for all other contractor employees pursuant to § 117.12, in addition to their position specific training.

(iii) Be designated in writing with their designation documented in accordance with CSA guidance.

(iv) Undergo a personnel security investigation and national security eligibility determination for access to classified information at the level of the entity's eligibility determination for access to classified information (*e.g.,* FCL level) and be on the KMP list for the cleared entity.

(2) *SMO.* The SMO will:

(i) Ensure the contractor maintains a system of security controls in accordance with the requirements of this rule.

(ii) Appoint a contractor employee or employees, in writing, as the FSO and appoint the same employee or a different employee as the ITPSO. The SMO may appoint a single employee for both roles or may appoint one employee as the FSO and a different employee as the ITPSO.

(iii) Remain fully informed of the facility's classified operations.

(iv) Make decisions based on classified threat reporting and their thorough knowledge, understanding, and appreciation of the threat information and the potential impacts caused by a loss of classified information.

(v) Retain accountability for the management and operations of the facility without delegating that accountability to a subordinate manager.

(3) *FSO.* The FSO will:

(i) Supervise and direct security measures necessary for implementing the applicable requirements of this rule and the related USG security requirements to ensure the protection of classified information.

(ii) Complete security training pursuant to § 117.12 and as deemed appropriate by the CSA.

(4) *ITPSO.* The ITPSO will establish and execute an insider threat program.

(i) If the appointed ITPSO is not also the FSO, the ITPSO will ensure that the FSO is an integral member of the contractor's insider threat program.

(ii) The ITPSO will complete training pursuant to § 117.12.

(iii) An entity family may choose to establish an entity family-wide insider threat program with one senior official appointed, in writing, to establish, and execute the program as the ITPSO. Each cleared entity using the entity-wide ITPSO must separately appoint that person as its ITPSO for that facility. The ITPSO will provide an implementation plan to the CSA for executing the insider threat program across the entity family.

(5) *ISSM.* Contractors who are, or will be, processing classified information on an information system located at the contractor facility will appoint an employee to serve as the ISSM. The ISSM must be eligible for access to classified information to the highest level of the information processed on the system(s) under their responsibility. The contractor will ensure that the ISSM is adequately trained and possesses technical competence commensurate with the complexity of the contractor's classified information system. The contractor will notify the applicable CSA if there is a change in the ISSM. The ISSM will oversee development, implementation, and evaluation of the contractor's classified information system program. ISSM responsibilities are in § 117.18.

(6) *Employees performing security duties.* Those employees whose official duties include performance of NISP-related security functions will complete security training tailored to the security functions performed. This training requirement also applies to consultants whose official duties include security functions.

(c) *Other KMP.* In addition to the SMO, the FSO, and the ITPSO, the contractor will include on the KMP list, subject to CSA concurrence, any other officials who either hold majority interest or stock in the entity, or who have direct or indirect authority to influence or decide issues affecting the management or operations of the contractor or issues affecting classified contract performance. The CSA may either:

(1) Require these KMP to be determined to be eligible for access to classified information as a requirement for the entity's eligibility determination or;

(2) Allow the entity to formally exclude these KMP from access to classified information. The entity's governing board will affirm the exclusion by issuing a formal action (see table), and provide a copy of the exclusion action to the CSA. The entity's governing board will document this exclusion action.

TABLE 1 TO PARAGRAPH (c)(2)—EXCLUSION RESOLUTIONS

Type of affirmation	Language to be used in exclusion action
Affirmation for Exclusion from Access to Classified Information.	[Insert name and address of entity or name and position of officer, director, partner, or similar entity official or officials] will not require, will not have, and can be effectively and formally excluded from, access to all classified information disclosed to the entity and does not occupy a position that would enable them to adversely affect the organization's policies or practices in the performance of classified contracts.

TABLE 1 TO PARAGRAPH (c)(2)—EXCLUSION RESOLUTIONS—Continued

Type of affirmation	Language to be used in exclusion action
Affirmation for Exclusion from Higher-level Classified Information.	[Insert name and address of entity or name and position of officer, director, partner, or similar entity official or officials] will not require, will not have, and can be effectively and formally excluded from access to [insert SECRET or TOP SECRET] classified information and does not occupy a position that would enable them to adversely affect the organization's policies or practices in the performance of [insert SECRET or TOP SECRET] classified contracts.

(d) *Insider Threat Program.* Pursuant to this rule and CSA provided guidance to supplement unique CSA mission requirements, the contractor will establish and maintain an insider threat program to gather, integrate, and report relevant and available information indicative of a potential or actual insider threat, consistent with E.O. 13587 and Presidential Memorandum ''National Insider Threat Policy and Minimum Standards for Executive Branch Insider Threat Programs.''

(e) *Standard practice procedures.* The contractor will implement all applicable provisions of this rule at each of its cleared facility locations. The contractor will prepare written procedures when the CSA determines them to be necessary to reasonably exclude the possibility of loss or compromise of classified information, and in accordance with additional CSA-provided guidance, as applicable.

(f) *Cooperation with Federal agencies.* Contractors will cooperate with Federal agencies and their officially credentialed USG or contractor representatives during official reviews, investigations concerning the protection of classified information, or personnel security investigations of present or former employees and others (*e.g.,* consultants or visitors). At a minimum, cooperation includes:

(1) Providing suitable arrangements within the facility for conducting private interviews with employees during normal working hours;

(2) Providing, when requested, relevant employment or personnel files, security records, supervisory files, records pertinent to insider threat (*e.g.,* security, cybersecurity, and human resources) and any other records pertaining to an individual under investigation that are, in the possession or control of the contractor or the contractor's representatives or located in the contractor's offices;

(3) Providing access to employment and security records that are located at an offsite location; and

(4) Rendering other necessary assistance.

(g) *Security training and briefings.* Contractors will advise all cleared employees, including those assigned to USG locations or operations outside the United States, of their individual responsibility for classification management and for safeguarding classified information. Contractors will provide security training to cleared employees consisting of initial briefings, refresher briefings, and debriefings in accordance with § 117.12.

(h) *Security reviews*—(1) *USG reviews.* The applicable CSA will conduct recurring oversight reviews of contractors' NISP security programs to verify that the contractor is protecting classified information and implementing the provisions of this rule. The contractor's participation in the security review is required for maintaining the entity's eligibility for access to classified information.

(i) *Review cycle.* The CSA will determine the scope and frequency of security reviews, which may be increased or decreased consistent with risk management principles.

(ii) *Procedures.* (A) The CSA will generally provide notice to the contractor of a forthcoming review, but may also conduct unannounced reviews at its discretion. The CSA security review may subject contractor employees and all areas and receptacles under the control of the contractor to examination.

(B) The CSA will make every effort to avoid unnecessary intrusion into the personal effects of contractor personnel.

(C) The CSA may conduct physical examinations of the interior space of containers not authorized to secure classified material. Such examinations will always be accomplished in the presence of a representative of the contractor.

(iii) *Controlled unclassified information (CUI).* 32 CFR part 2002 requires agencies to implement CUI requirements, but compliance with CUI requirements is outside the scope of the NISP and this rule. However, CSAs may conduct CUI assessments in conjunction with NISP USG reviews when:

(A) The contractor is a participant in the NISP based on a requirement to access classified information;

(B) A classified contract under the CSA's cognizance includes provisions for access to, or protection or handling of, CUI; and

(C) The CSA has provided the contractor with specific guidance regarding the assessment criteria and methodology it will use for overseeing protection of the CUI being accessed, stored or transmitted by the contractor as part of the classified contract.

(2) *Contractor reviews.* Contractors will review their security programs on a continuing basis and conduct a formal self-inspection at least annually and at intervals consistent with risk management principles.

(i) Self-inspections will include the review of the classified activity, classified information, classified information systems, conditions of the overall security program, and the insider threat program. They will have sufficient scope, depth, and frequency, and will have management support during the self-inspection and during remedial actions taken as a result of the self-inspection. Self-inspections will include the review of samples representing the contractor's derivative classification actions, as applicable.

(ii) The contractor will prepare a formal report describing the self-inspection, its findings, and its resolution of issues discovered during the self-inspection. The contractor will retain the formal report for CSA review until after the next CSA security review is completed.

(iii) The SMO at the cleared facility will annually certify to the CSA, in writing, that a self-inspection has been conducted, that other KMP have been briefed on the results of the self-inspection, that appropriate corrective actions have been taken, and that management fully supports the security program at the cleared facility in the manner as described in the certification.

(i) *Contractors working at USG locations.* Contractor employees performing work within the confines of a USG facility will safeguard classified information according to the procedures of the host installation or agency.

(j) *Hotlines.* Federal agencies maintain hotlines to provide an unconstrained avenue for USG and contractor employees to report, without fear of reprisal, known or suspected instances

of security irregularities and infractions concerning contracts, programs, or projects. These hotlines do not supplant the contractor's responsibility to facilitate reporting and timely investigations of security issues concerning its operations or personnel. Contractor personnel are encouraged to report information through established contractor channels. The hotline may be used as an alternate means to report this type of information. Contractors will inform all personnel that hotlines may be used for reporting issues of national security significance. Each CSA will post hotline information and telephone numbers on their websites for contractor access.

(k) *Agency agreements.* 32 CFR part 2004 and E.O. 12829 require non-CSA agency heads to enter into agreements with the Secretary of Defense as the Executive Agent for the NISP to provide industrial security services. The Secretary of Defense may also enter into agreements to provide services for other CSA's in accordance with 32 CFR part 2004 and E.O. 12829. Agency agreements establish the terms of the Secretary of Defense's (or the Secretary of Defense's designee's) responsibilities when acting as the CSA on behalf of these agency heads. The list of agencies for which the Secretary of Defense has agreed to render industrial security services is on the DCSA website at *https://www.dcsa.mil.*

(l) *Security cognizance.* The CSA will inform contractors if oversight has been delegated to a CSO.

(m) *Rule interpretations.* Contractors will forward requests for interpretations of this rule to their CSA in accordance with their CSA-provided guidance to supplement unique CSA mission requirements.

(n) *Waivers to this rule.* Contractors will submit any requests to waive provisions of this rule in accordance with CSA procedures, which may include periodic review of approved waivers. When submitting a request for a waiver, the contractor will, in writing, explain why it is impractical or unreasonable for the contractor to comply with the requirement it is asking to waive, identify alternative measures as prescribed by this rule, and include a proposed duration for the waiver. The contractor cannot implement a waiver unless the waiver is approved by the applicable CSA.

(o) *Complaints and suggestions.* Contractors may forward NISP administration complaints and suggestions to the Director of ISOO. However, contractors are encouraged to forward NISP administration complaints and suggestions to their respective CSA prior to forwarding to the ISOO.

TABLE 2 TO PARAGRAPH (o) NISP ADMINISTRATION COMPLAINTS AND SUGGESTIONS

Addressee	Mailing address	Telephone No.	Facsimile	Email address
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§ 117.8 Reporting requirements.

(a) *General.* Pursuant to this rule, Security Executive Agent Directive (SEAD) 3, (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-3-Reporting-U.pdf*) and CSA-provided guidance to supplement unique CSA mission requirements, contractors and their cleared employees are required to:

(1) Report certain events that may have an effect on the status of the entity's or an employee's eligibility for access to classified information; report events that indicate an insider threat to classified information or to employees with access to classified information; report events that affect proper safeguarding of classified information; and report events that indicate classified information has been, or is suspected to be, lost or compromised.

(2) Establish internal procedures to ensure employees with eligibility for access to classified information are aware of their responsibilities for reporting pertinent information to the FSO. The contractor will:

(i) Provide reports to the FBI, or other Federal authorities as required by this rule, the terms of a classified contract or other agreement, and by U.S. law.

(ii) Provide complete information to enable the CSA to ascertain whether classified information is adequately protected.

(iii) Submit reports to the FBI, the CSA, or the ISOO as specified in paragraphs (b), (c), and (g) of this section.

(3) Appropriately mark reports containing classified information in accordance with § 117.14.

(4) Clearly mark a report containing information submitted in confidence as containing that information. When reports contain information pertaining to an individual, 5 U.S.C. 552a (also known as and referred to in this rule as ''The Privacy Act of 1974, as amended,'') permits the withholding of certain information from the individual in accordance with specific exemptions, which include authority to withhold release of information to the extent that the disclosure of the information would reveal the identity of a source who furnished the information to the USG under an express promise that the identity of the source would be held in confidence.

(b) *Reports to be submitted to the FBI.* The contractor will promptly submit a written report to the nearest field office of the FBI regarding information coming to the contractor's attention concerning actual, probable, or possible espionage, sabotage, terrorism, or subversive activities at any of its locations.

(1) An initial report may be made by phone, but it must be followed up in writing (*e.g.,* email or formal correspondence), regardless of the FBI's disposition of the report.

(2) The contractor will promptly notify the CSA when they make a report to the FBI and provide the CSA a copy of the written report.

(c) *Reports to be submitted to the CSA.*—(1) *Adverse information.* Contractors are required to report adverse information coming to their attention concerning any of their employees determined to be eligible for access to classified information, in accordance with this rule, SEAD 3, and CSA-provided guidance. Contractors will not make reports based on rumor or innuendo.

(i) The termination of employment of an employee does not negate the requirement to submit this report. If a contractor employee is assigned to a USG location, the contractor will furnish a copy of the report and its final disposition to the USG security point of contact for that location.

(ii) Pursuant to *Becker* v. *Philco,* 372 F.2d 771 (4th Cir. 1967), cert. denied 389 U.S. 979 (1967), and subsequent cases, a contractor may not be liable for defamation of an employee because of communications that are required of and made by a contractor to an agency of the United States under the requirements of this rule or under the terms of applicable contracts.

(2) *Suspicious contacts.* Contractors will report information pertaining to suspicious contacts with employees determined to be eligible for access to classified information, and pertaining to efforts to obtain illegal or unauthorized access to the contractor's cleared facility by any means, including:

(i) Efforts by any individual, regardless of nationality, to obtain illegal or unauthorized access to classified information.

(ii) Efforts by any individual, regardless of nationality, to elicit information from an employee determined eligible for access to classified information, and any contact which suggests the employee may be the target of an attempted exploitation by an intelligence service of another country. See SEAD 3 for specific information to be reported.

(3) *Change in status of employees determined eligible for access to classified information.* Contractors will report by means of the CSA-designated reporting mechanism information pertaining to changes in status of employees determined eligible for access to classified information such as:

(i) Death.

(ii) Change in name.

(iii) Termination of employment.

(iv) Change in citizenship.

(4) *Citizenship by naturalization.* Contractors will report if a non-U.S. citizen employee granted an LAA becomes a citizen through naturalization. The report will include:

(i) City, county, and state where naturalized.

(ii) Date naturalized.

(iii) Court.

(iv) Certificate number.

(5) *Employees desiring not to be processed for a national security eligibility determination or not to perform classified work.* Contractors will report instances when an employee no longer wishes to be processed for a determination of eligibility for access to classified information or to continue having access to classified information, and the reason for that request.

(6) *Classified information nondisclosure agreement (NDA).* Contractors will report the refusal by an employee to sign the SF 312, ''Classified Information Nondisclosure Agreement,'' (available at: *https://www.gsa.gov/cdnstatic/SF312-13.pdf?forceDownload=1*) or other approved NDA.

(7) *Changed conditions affecting the contractor's eligibility for access to classified information.* Contractors are required to report certain events that affect the status of the entity eligibility determination (*e.g.,* FCL), affect the status of an employee's PCL, may indicate an employee poses an insider threat, affect the proper safeguarding of classified information, or indicate classified information has been lost or compromised, including:

(i) Change of ownership or control of the contractor, including stock transfers that affect control of the entity.

(ii) Change of operating name or address of the entity or any of its locations determined eligible for access to classified information.

(iii) Any change to the information previously submitted for KMP including, as appropriate, the names of the individuals the contractor is replacing. A new complete KMP listing need be submitted only at the discretion of the contractor or when requested by the CSA. The contractor will provide a statement indicating:

(A) Whether the new KMP are cleared for access to classified information, and if cleared, to what level they are cleared and when they were cleared, their dates and places of birth, social security numbers, and citizenship.

(B) Whether they have been excluded from access to classified information in accordance with § 117.7(b)(5)(ii).

(C) Whether they have been temporarily excluded from access to classified information pending the determination of eligibility for access to classified information in accordance with § 117.9(g).

(iv) Any action to terminate business or operations for any reason, imminent adjudication or reorganization in bankruptcy, or any change that might affect the validity of the contractor's eligibility for access to classified information.

(v) Any material change concerning the information previously reported concerning foreign ownership, control, or influence (FOCI). This report will be made by the submission of an updated SF 328, ''Certificate Pertaining to Foreign Interests,'' in accordance with CSA-provided guidance. When submitting this information, it is not necessary to repeat answers that have not changed. When entering into discussion, consultations, or agreements that may reasonably lead to effective ownership or control by a foreign interest, the contractor will report the details to the CSA in writing. If the contractor has received a Schedule 13D from the investor, the contractor will forward a copy with the report.

(8) *Changes in storage capability.* The contractor will report any changes in their storage requirement or capability to safeguard classified material.

(9) *Inability to safeguard classified material.* The contractor will report any emergency situation that renders their location incapable of safeguarding classified material as soon as possible.

(10) *Unsatisfactory conditions of a prime or subcontractors.* (i) Prime contractors, including subcontractors who have in turn subcontracted work, will report any information coming to their attention that may indicate that classified information cannot be adequately protected by a subcontractor, or other circumstances that may impact the validity of the eligibility for access to classified information of any subcontractors.

(ii) Subcontractors will report any information coming to their attention that may indicate that classified information cannot be adequately protected or other circumstances that may impact the validity of the eligibility for access to classified information of their prime contractor.

(11) *Dispositioned material previously terminated.* The contractor will make a report when the location or disposition of material previously terminated from accountability is subsequently discovered and brought back into accountability.

(12) *Foreign classified contracts.* Contractors will report any pre-contract negotiation or award not placed through a CSA or U.S. GCA that involves, or may involve:

(i) The release or disclosure of U.S. classified information to a foreign interest.

(ii) Access to classified information furnished by a foreign interest.

(13) *Reporting of improper receipt of foreign government material.* The contractor will report to the CSA the receipt of classified material from foreign interests that is not received through USG channels.

(14) *Reporting by subcontractor.* Subcontractors will also notify their prime contractors if they make any reports to their CSA in accordance with the provisions of paragraphs (c)(7) through (c)(10) of this section.

(d) *Reports of loss, compromise, or suspected compromise.* The contractor will report any loss, compromise, or suspected compromise of classified information, U.S. or foreign, to the CSA in accordance with paragraph (d)(1) through (d)(3) of this section. Each CSA may provide additional guidance concerning the reporting time period. If the contractor is located on a USG facility, the contractor will submit the report to the CSA and to the head of the USG facility.

(1) *Preliminary inquiry.* Immediately upon receipt of a security violation report involving classified information, the contractor will initiate a preliminary

inquiry to ascertain all of the circumstances surrounding the presumed loss, compromise, or suspected compromise, including validation of the classification of the information.

(2) *Initial report.* If the contractor's preliminary inquiry confirms that a loss, compromise, or suspected compromise of any classified information occurred, the contractor will promptly submit an initial report of the incident unless otherwise notified by the CSA.

(3) *Final report.* When the investigation has been completed, the contractor will submit a final report to the CSA which, in turn, will follow CSA procedures to notify the applicable GCA. The report will include:

(i) Material and relevant information that was not included in the initial report.

(ii) The full name and social security number of the individual or individuals primarily responsible for the incident, including a record of prior loss, compromise, or suspected compromise for which the individual had been determined responsible.

(iii) A statement of the corrective action taken to preclude a recurrence.

(iv) Disciplinary action taken against the responsible individual or individuals, if any.

(v) Specific reasons for reaching the conclusion that loss, compromise, or suspected compromise occurred or did not occur.

(4) *Employee information in compromise cases.* When requested by the CSA, the contractor will report information concerning an employee or other individual, determined to be responsible for the incident, when the information is needed by the CSA for the loss, compromise, or suspected compromise of classified information.

(e) *Individual culpability reports.* Contractors will establish and enforce policies that provide for appropriate administrative or disciplinary actions taken against employees who violate the requirements of this rule.

(1) Contractors will establish a system to manage and track information regarding employees with eligibility for access to classified information who violate the requirements of this rule in order to be able to identify patterns of negligence or carelessness, or to identify a potential insider threat.

(2) Contractors will establish and apply a graduated scale of administrative and disciplinary actions in the event of employee security violations or negligence in the handling of classified information. CSAs may provide guidance to contractors with examples of administrative or disciplinary actions that the contractor may consider implementing in the event of employee violations or negligence. Contractors are required to submit a final report to the CSA with the findings of an employee's culpability and what corrective actions were taken.

(3) Contractors will include a statement of the administrative or disciplinary actions taken against an employee in a final report to the CSA. A statement must be included when the individual responsible for a security violation can be determined. Contractors' final reports will indicate whether one or more of the following factors are evident:

(i) Involved a deliberate disregard of security requirements.

(ii) Involved negligence in the handling of classified material.

(iii) Was not deliberate in nature but reflects a recent or recurring pattern of questionable judgment, irresponsibility, negligence, or carelessness.

(f) *CDC cyber incident reports.* This paragraph applies only to CDCs and sets forth reporting requirements pursuant to 10 U.S.C. 391 and 393 and Defense Federal Acquisition Regulation Supplement Clause 252.204–7012. The reporting requirements of paragraph (f) of this section are in addition to the requirements in paragraphs (b) and (d) of this section, which can include certain activities occurring on unclassified information systems. DoD will provide detailed reporting instructions for contractors affected by these references via industrial security letter in accordance with DoDI 5220.22.

(1) *Reports to be submitted to the designated DoD CSO.* CDCs will immediately report to the DoD CSO, any cyber incident on a classified covered information system that has been approved by that CSO to process classified information.

(i) At a minimum, the report will include:

(A) A description of the technique or method used in the cyber incident.

(B) A sample of the malicious software involved in the cyber incident, if discovered and isolated by the CDC,

(C) A summary of information in connection with any DoD program that has been potentially compromised due to the cyber incident.

(ii) Information that is reported by the CDC (or derived from information reported by the CDC) will be safeguarded, used, and disseminated in a manner consistent with DoD procedures governing the handling of such information pursuant to Public Law 112–239 and 10 U.S.C. 391.

(iii) Reports involving classified foreign government information will be reported to the Director, Defense Technology Security Administration (DoD).

(2) *Reports on non-Federal information systems not authorized to process classified information.* CDCs will report cyber incidents on non-Federal, unclassified information systems in accordance with contract requirements.

(3) *Access to equipment and information by DoD personnel.* (i) The CDC will allow, upon request by DoD personnel, access by DoD personnel to additional equipment or information of the CDC that is necessary to conduct forensic analysis of reportable cyber incidents in addition to any analysis conducted by the CDC.

(ii) The CDC is only required to provide DoD access to equipment or information to determine whether information created by or for DoD in connection with any DoD program was successfully exfiltrated from a CDC's network or information system, and what information was exfiltrated from the CDC's network or information system.

(g) *Reports to ISOO.* (1) Contractors will report instances of redundant or duplicative security review and audit activity by the CSAs to the Director, ISOO, for resolution.

(2) Contractors will report instances of CSAs duplicating processing to determine an entity's eligibility for access to classified information when there is an existing determination of an entity's eligibility for access to classified information by another CSA.

§ 117.9 Entity eligibility determination for access to classified information.

(a) *General.* This section applies to all contractors with entity eligibility determinations, except as provided in § 117.22 for entity eligibility determinations for participation in the CCIPP under the cognizance of DHS.

(1) Prior to the entity being granted an entity eligibility determination for access to classified information, the responsible CSA must have determined that:

(i) The entity is eligible for access to classified information to meet a legitimate USG or foreign government need.

(ii) Access is consistent with national security interests.

(2) The CSA will provide guidance on processing entity eligibility determinations for entity access to classified information.

(3) The determination of entity eligibility for access is separate from the determination of a classified

information safeguarding capability (see § 117.15).

(4) Neither the contractor nor its employees will be permitted access to classified information until the CSA has made an entity eligibility determination (*e.g.,* issued an FCL).

(5) The requirement for a favorable entity eligibility determination (also referred to in some instances as an FCL) for a prime contractor includes instances where all access to classified information will be limited to subcontractors. A prime contractor must have a favorable entity eligibility determination at the same or higher classification level as its subcontractors.

(6) Contractors are eligible for storage of classified material in connection with a legitimate USG or foreign government requirement if they have a favorable entity eligibility determination and a classified information safeguarding capability approved by the CSA.

(7) An entity eligibility determination is valid for access to classified information at the same or lower classification level.

(8) Each CSA will maintain a record of entity eligibility determinations made by that CSA.

(9) A contractor will not use its favorable entity eligibility determination for advertising or promotional purposes. This does not prohibit the contractor from advertising employee positions that require a PCL in connection with the position.

(10) A contractor or prospective contractor cannot apply for its own entity eligibility determination. A GCA or a currently cleared contractor may sponsor an entity for an entity eligibility determination at any point during the contracting or agreement life cycle at which the entity must have access to classified information to participate (including the solicitation or competition phase).

(b) *Reciprocity.* If an entity has an appropriate, final entity eligibility determination, a CSA will not duplicate the entity eligibility determination processes performed by another CSA. If a CSA cannot acknowledge an entity eligibility determination to another CSA, the involved entity may be subject to duplicate processing in accordance with 32 CFR part 2004.

(c) *Eligibility requirements.* To be eligible for an initial entity eligibility determination or to maintain an existing entity eligibility determination, the entity must:

(1) Need access to classified information in connection with a legitimate USG or foreign government requirement, and access must be consistent with U.S. national security interests as determined by the CSA.

(2) Be organized and existing:

(i) Under the laws of the United States, one of the fifty States, the District of Columbia, or an organized U.S. territory (Guam, Commonwealth of the Northern Marianas Islands, Commonwealth of Puerto Rico, and the U.S. Virgin Islands); or

(ii) Under the laws of an American Indian/Alaska Native tribal entity if:

(A) The American Indian or Alaska Native tribe under whose laws the entity is chartered has been formally acknowledged by the Assistant Secretary—Indian Affairs, of the U.S. Department of the Interior.

(B) The contractor is organized and continues to exist, during the period of the eligibility under a tribal statue or code, or pursuant to a resolution of an authorized tribal legislative body.

(C) The contractor has submitted or will submit records such as a charter, certificate of organization, or other applicable tribal documents and statute or code provisions governing the formation and continuation of the entity, for CSA determination that the entity is tribally chartered.

(3) Be located in the United States or its territorial areas.

(4) Have a record of integrity and lawful conduct in its business dealings.

(5) Have a SMO, FSO, and ITPSO who have and who maintain eligibility for access to classified information and are not excluded from participating in USG contracts or agreements in accordance with § 117.7(b)(1) through § 117.7(b)(3).

(6) Not be under FOCI to such a degree that a favorable entity eligibility determination for access to classified information would be inconsistent with the national interest, in the judgment of the CSA.

(7) Maintain sufficient authorized and cleared employees to manage and implement the requirements of this rule in accordance with CSA guidance.

(8) Not pose an unacceptable risk to national security interests, in the judgment of the CSA.

(9) Meet all requirements governing access to classified information established by the CSA or the relevant authorizing law, regulation, or government-wide policy.

(d) *Processing the entity eligibility determination.* The CSA will assess the entity's eligibility for access to classified information based on its business structure.

(1) At a minimum, the entity will:

(i) Provide CSA-requested documentation within timelines established by the CSA.

(ii) Have and identify the SMO.

(iii) Appoint a U.S. citizen employee as the FSO.

(iv) Appoint a U.S. citizen employee as the ITPSO.

(v) Submit requests for personnel security investigations for the SMO, FSO, ITPSO, and those other KMP identified by the CSA as requiring eligibility for access to classified information in connection with the entity eligibility.

(2) If the entity is under FOCI with a special security agreement (SSA) as the proposed method of FOCI mitigation, and the GCA requires the entity to have access to proscribed information, the CSA must consider the measures listed in § 117.11(d) as part of the entity eligibility determination.

(e) *Other personnel eligibility determinations concurrent with the entity eligibility determination.* (1) Contractors may designate employees who require access to classified information during the negotiation of a contract or the preparation of a bid or quotation pertaining to a prime contract or a subcontract. These designated employees will be processed for a determination of eligibility for access to classified information (*i.e.,* PCL eligibility) concurrent with entity's entity eligibility determination.

(2) The entity eligibility determination is not dependent on the PCL eligibility for access to classified information by such employees, provided none of these employees are among those listed in paragraph (c)(5) of this section. Even so, the employees will not be granted access to classified information until both a favorable entity eligibility determination and PCL eligibility has been granted.

(f) *Exclusion procedures.* If a CSA determines that certain KMP can be excluded from access to classified information, the contractor will follow the procedures in accordance with § 117.7(b)(5)(ii).

(g) *Temporary exclusions.* As a result of a changed condition, the SMO or other KMP who require eligibility for access to classified information in connection with the facility entity eligibility determination may be temporarily excluded from access to classified information while in the process of a PCL eligibility determination provided:

(1) The SMO or other KMP are not appointed as the FSO or ITPSO. FSOs and ITPSOs may not be temporarily excluded. A cleared employee must always be appointed to fulfill the requirements of these positions in accordance with this rule.

(2) An employee, cleared to the level of the entity eligibility determination,

must be able to fulfill the NISP responsibilities of the temporarily excluded KMP in accordance with this rule while the temporary exclusion is in effect.

(3) The applicable CSA may provide additional guidance on the duration of a temporary exclusion from access to classified information based on circumstances, business structure, and other relevant security information.

(4) The contractor's governing board affirms the exclusion action, and provides a copy of the exclusion action to the CSA. The organization's governing body will document this action.

TABLE 1 TO PARAGRAPH (g)(4) TEMPORARY EXCLUSION RESOLUTIONS

Type of affirmation	Language to be used in exclusion action
Affirmation for Temporary Exclusion from Access to Classified Information.	Pending a final determination of eligibility for access to classified information by the U.S. Government, [insert name and position] will not require, will not have, and can be effectively and formally excluded from access to all classified information disclosed to the entity.
Affirmation for Temporary Exclusion from Higher Level Classified Information.	Pending a final determination of eligibility for access to classified information at the [insert SECRET or TOP SECRET] level, [insert name and position] will not have, and can be effectively and formally excluded from access to higher-level classified information [specify which higher level of information].

(h) *Interim entity eligibility determinations.* The CSA may make an interim entity eligibility determination for access to classified information, in the sole discretion of the CSA. See § 117.10(l) for access limitations that also apply to interim entity eligibility determinations.

(i) An interim entity eligibility determination is made on a temporary basis pending completion of the full investigative requirements.

(ii) If the contractor with an interim entity eligibility determination is unable or unwilling to comply with the requirements of this rule and CSA-provided guidance regarding the process to obtain a final entity eligibility determination, the CSA will withdraw the interim entity eligibility.

(i) *Multiple facility organizations.* The home office must have an entity eligibility determination at the same level as the highest entity eligibility determination of an entity within the MFO. The CSA will determine whether branch offices are eligible for access to classified information if the branch offices need access and meet all other requirements.

(j) *Parent-subsidiary relationships.* When a parent-subsidiary relationship exists, the CSA will process the parent and the subsidiary separately for entity eligibility determinations.

(1) If the CSA determines the parent must be processed for an entity eligibility determination, then the parent must have an entity eligibility determination at the same or higher level as the subsidiary.

(2) When a parent and subsidiary or multiple cleared subsidiaries are collocated, a formal written agreement to use common security services may be executed by the entities, subject to the approval of the CSA.

(k) *Joint ventures.* A joint venture may be granted eligibility for access to classified information if it meets the eligibility requirements in paragraph (c) of this section, including:

(1) The joint venture must be established as a legal business entity (*e.g.* limited liability company, corporation, or partnership). A joint venture established by contract that is not also established as a legal business entity is not eligible for an entity eligibility determination.

(2) The business entity operating as a joint venture must have been awarded a classified contract or sponsored by a GCA or prime contractor for an entity eligibility determination in advance of a potential award for which the business entity has bid pursuant to paragraph (c) of this section.

(3) The business entity operating as a joint venture must have an employee or employees appointed as security officials or KMP pursuant to § 117.7(b).

(l) *Consultants.* The responsible CSA will determine when there is a need for self-employed consultants requiring access to classified information to be considered for an entity eligibility determination.

(m) *Limited entity eligibility determination (Non-FOCI).* (1) The applicable CSA may choose to allow a GCA to request limited entity eligibility determinations for a single, narrowly defined contract, agreement, or circumstance and specific to the requesting GCA's classified information. This is not the same as a limited entity eligibility determination in situations involving FOCI, when the FOCI is not mitigated or negated.

(i) Limited entity eligibility determinations (or FCLs) involving FOCI will be processed in accordance with § 117.11(e).

(ii) This paragraph (paragraph (m) of this section) applies to limited entity eligibility determinations for purposes other than FOCI mitigation in accordance with 32 CFR part 2004. Additional guidance may be provided by the responsible CSA.

(2) An entity must be sponsored for a limited entity eligibility determination by a GCA in accordance with the sponsorship requirements contained in paragraph (c) of this section. The contractor should be aware that the sponsorship request from the GCA to the CSA must also include:

(i) Description of the compelling need for the limited entity eligibility determination that is in accordance with U.S. national security interests.

(ii) Specific reason(s) or rationale for limiting the entity eligibility determination.

(iii) The GCA's formal acknowledgement and acceptance of the risk associated with this rationale.

(3) The entity must otherwise meet the entity eligibility determination requirements set out in this rule.

(4) Access limitations are inherent with the limited entity eligibility determination and are imposed upon all of the entity's employees regardless of citizenship.

(5) Contractors should be aware that the CSA will document the requirements of each limited entity eligibility determination it makes, including the scope of, and any limitations on, access to classified information.

(6) Contractors should be aware that the CSA will verify limited entity eligibility determinations only to the requesting GCA. In the case of multiple limited entity eligibility determinations for a single entity, the CSA verifies each one separately only to its requestor.

(7) The applicable CSA administratively terminates the limited entity eligibility determination when there is no longer a need for access to the classified information for which the CSA approved the limited entity eligibility determination.

(n) *Termination of the entity eligibility determination.* Once granted, a favorable entity eligibility determination remains in effect until terminated or revoked. If the entity eligibility determination is terminated or revoked, the contractor will return all classified material in its possession to the appropriate GCA or dispose of the material as instructed by the CSA. The contractor should be aware that it may request an administrative termination or the CSA may:

(1) After coordination with applicable GCAs, administratively terminate the entity eligibility determination because the contractor no longer has a need for access to classified information.

(2) Revoke an entity eligibility determination if the contractor is unable or unwilling to protect classified information or is unable to comply with the security requirements of this rule.

(o) *Invalidation of the entity eligibility determination.* The CSA may invalidate an existing entity eligibility determination. While the entity eligibility determination is in an invalidated status, the contractor may not bid on or be awarded new classified contracts or solicitations. The contractor may continue to work on existing classified contracts if the GCA agrees.

(p) *Records maintenance.* Contractors will maintain the original CSA designated forms for the duration of the entity eligibility determination in accordance with CSA-provided guidance.

§ 117.10 Determination of eligibility for access to classified information for contractor employees.

(a) *General.* (1) The CSA is responsible for determining an employee's eligibility for access to classified information.

(i) The contractor must determine that access to classified information is essential in the performance of tasks or services related to the fulfillment of a classified contract.

(ii) Access must be clearly consistent with U.S. national security interests as determined by the CSA.

(iii) A contractor may give an employee access to classified information at the same or lower level of classification as the level of the contractor's entity eligibility determination if the employee has:

(A) A valid need-to-know for the classified information.

(B) A USG favorable eligibility determination for access to classified information at the appropriate level; and

(C) Signed a non-disclosure agreement.

(2) The CSA will determine eligibility for access to classified information in accordance with SEAD 4 (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-4-Adjudicative-Guidelines-U.pdf*) and notify the contractor when eligibility has been granted.

(i) The CSA will notify the contractor when an employee's eligibility has been denied, suspended, or revoked.

(ii) The contractor will immediately deny access to classified information to any employee when notified of a denial, revocation, or suspension of eligibility regardless of the contractor employee's location.

(iii) If the employee's performance is at a USG facility, the contractor will provide notification to the appropriate GCA of any denial, revocation, or suspension of eligibility for access to classified information.

(3) Contractors will annotate and maintain the accuracy of their employees' records in the system of record for contractor eligibility and access to classified information, when one has been designated by the CSA.

(4) Within an MFO or within the same business organization, contractors may centrally manage eligibility for access to classified information and access to classified information records.

(5) The contractor will limit requests for determinations of eligibility for access to classified information to the minimum number of employees and consultants necessary for operational efficiency in accordance with contractual obligations and other requirements of this rule. Requests for determinations of eligibility for access to classified information will not be used to establish a cache of cleared employees.

(6) The contractor will not submit a request for an eligibility determination to one CSA if the employee applicant is known to be cleared or in process for eligibility for access to classified information by another CSA. In such cases, reciprocity of eligibility determination in accordance with SEAD 7 (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-7_BI_ReciprocityU.pdf*) shall be used. The contractor will provide the new CSA with the full name, date, and place of birth, social security number, clearing agency, and type of investigation for verification.

(7) Contractors will not submit requests for determination of eligibility for access to classified information for individuals who are not their employees or consultants; nor will they submit requests for employees of subcontractors.

(8) Access to SCI, SAP, FRD, and RD information is a determination made by the granting authority by the applicable USG granting authority for each category of information.

(b) *Investigative requirements.* E.O. 13467, as amended, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information,'' designates the Security and Suitability Executive Agents responsible for establishing the standards for investigative requirements that apply to contractors.

(1) *Investigative tiers.* The standards established in accordance with E.O. 13467, as amended, designate specific investigative tiers that are acceptable for access to classified information. An investigative tier is for positions designated as moderate risk, non-critical sensitive, and allow access to information classified at the L, CONFIDENTIAL, and SECRET levels. Another investigative tier is for positions designated as high risk, critical sensitive, special sensitive, and allow access to information classified at the Q, TOP SECRET, and SCI levels.

(2) *Investigative coverage.* (i) *Automated sources.* Investigative providers will use automation whenever possible to collect, verify, corroborate, or discover information about an individual, as documented on the request for investigation or developed from other sources, *i.e.,* automated record checks and inquiries.

(ii) *Interviews.* Interviews, if required, will cover areas of adjudicative concern.

(iii) *Information Covered in Previous Investigations.* Information validated in a prior investigation, the results of which are not expected to change (*e.g.,* verification of education degree), will not be repeated as part of subsequent investigations.

(3) *Polygraph.* Agencies with policies authorizing the use of the polygraph for purposes of determining eligibility for access to classified information may require polygraph examinations when necessary. If adjudicatively relevant information arises during the investigation or the polygraph examination, the investigation may be expanded to resolve the adjudicative concerns.

(4) *Financial disclosure.* When a GCA requires that a contractor employee complete a financial disclosure form, the contractor will ensure that the employee has the opportunity to complete and submit the form in accordance with the Privacy Act of 1974, as amended, and other applicable provisions of law.

(5) *Reinvestigation and Continuous Evaluation.* Contractor employees

determined eligible for access to classified information will follow CSA guidance to complete reinvestigation and continuous evaluation or continuous vetting requirements. The contractor will validate that the employee requires continued eligibility for access to classified information before initiating the reinvestigation.

(c) *Verification of U.S. citizenship.* A contractor will require each applicant for determination of eligibility for access to classified information who claims U.S. citizenship to provide evidence of citizenship to the FSO or other authorized representative of the contractor. All documentation must be the original or certified copies of the original documents.

(1) Any document, or its successor, listed in this paragraph is an acceptable document to corroborate U.S. citizenship by birth, including by birth abroad to a U.S. citizen.

(i) A birth certificate certified with the registrar's signature, which bears the raised, embossed, impressed, or multicolored seal of the registrar's office.

(ii) A current or expired U.S. passport or passport card that is unaltered and undamaged and was originally issued to the individual.

(iii) A Department of State Form FS–240, ''Consular Report of Birth Abroad of a Citizen of the United States of America.''

(iv) A Department of State Form FS–545 or DS–1350, ''Certification of Report of Birth.''

(2) Any document, or its successor, listed in this paragraph is an acceptable document to corroborate U.S. citizenship by certification, naturalization, or birth abroad to a U.S. citizen.

(i) A U.S. Citizenship and Immigration Services Form N–560 or N–561, ''Certification of U.S. Citizenship.''

(ii) A U.S. Citizenship and Immigration Services Form 550, 551, or 570, ''Naturalization Certificate.''

(iii) A valid or expired U.S. passport or passport card that is unaltered and undamaged and was originally issued to the individual.

(d) *Procedures for completing the electronic version of the SF 86,* ''*Questionnaire for National Security Positions.*'' The electronic version of the SF 86 (available at: *https://www.opm.gov/forms/pdf_fill/sf86.pdf*) must be completed in e-QIP or its successor system by the contractor employee and reviewed by the FSO or other contractor employee(s) who has (have) been specifically designated by the contractor to review an employee's SF 86. The FSO or designee will:

(1) Provide the employee with written notification that review of the SF 86 by the FSO or other contractor employee is for adequacy and completeness and information will be used for no other purpose within the entity. The use and disclosure by the U.S. Government, and by U.S. Government contractors operating systems of records on behalf of a U.S. Government agency to accomplish an agency function, of the information provided by the employee on the SF–86 is governed by the Privacy Act of 1974, as amended, and by the routine uses published by the USG in the applicable System of Records Notice.

(2) Not share information from the employee's SF 86 within the entity and will not use the information for any purpose other than determining the adequacy and completeness of the SF 86.

(e) *Fingerprint collection.* The contractor will submit fingerprints in accordance with CSA guidance. Contractors will use digital fingerprints whenever possible.

(f) *Pre-employment eligibility determination action.* (1) If a potential employee requires access to classified information immediately upon commencement of employment, the contractor may submit a request for investigation prior to the date of employment, provided:

(i) A written commitment for employment has been made by the contractor.

(ii) The candidate has accepted the offer in writing.

(2) The commitment for employment must indicate employment will commence within 45 days of the employee being granted eligibility for access to classified information at a level that allows them to perform the tasks or services associated with the contract or USG requirement for which they were hired.

(3) Contractors will comply with the requirements pursuant to paragraph (a)(5) of this section.

(g) *Classified information NDA.* The NDA designated by the CSA (*e.g.,* SF 312), is an agreement between the USG and an individual who is determined eligible for access to classified information.

(1) An employee determined eligible for access to classified information must execute an NDA prior to being granted access to classified information.

(2) The employee must sign and date the NDA in the presence of a witness. The employee's and witness' signatures must bear the same date.

(3) The contractor will forward the executed NDA to the CSA for retention. The CSA may authorize the contractor to retain a copy of the form for administrative purposes, if appropriate.

(4) If the employee refuses to execute the NDA, the contractor will deny the employee access to classified information and submit a report to the CSA in accordance with § 117.8(c)(6).

(h) *Reciprocity.* The applicable CSA is responsible for determining whether contractor employees have been previously determined eligible for access to classified information or investigated by an authorized investigative activity in accordance with SEAD 7 (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-7_BI_ReciprocityU.pdf*).

(1) Any current eligibility determination for access to classified information that is based on an investigation of a scope that meets or exceeds that necessary for the required level of access will provide the basis for a new eligibility determination.

(2) The prior investigation will be used without further investigation or adjudication unless the CSA becomes aware of significant derogatory information that was not previously adjudicated.

(i) *Break in access.* There are circumstances when a contractor administratively terminates an employee's access to classified information solely because of no current requirement for such access. If the employee again requires access to classified information and has been in the contractor's continuous employment, and the employee again requires access to classified information, the contractor may provide access to classified information without further investigation, based on CSA guidance, so long as the employee remains eligible for access to classified information and has a current investigation of a scope that meets or exceeds that necessary for the access required and no new derogatory information is known. Any adverse information from or about the employee must continue to be reported while the employee maintains eligibility for access to classified information, even when access to classified information has been administratively terminated.

(j) *Break in employment.* (1) When an employee had a break in employment and now requires access to classified information, the contractor may provide access to classified information based on CSA guidance provided the employee remains eligible for access to classified information and has a current investigation of a scope that meets or exceeds that necessary for the access required.

(2) The contractor may not provide access to classified information to an employee who previously was eligible for access to classified information, but has had a break in employment that resulted in a loss of eligibility without a new eligibility determination by the CSA.

(k) *Non-U.S. citizens.* (1) Contractors must make every effort to ensure that non-U.S. citizens are not employed in duties that may require access to classified information. However, compelling reasons may exist to grant access to classified information to a non-U.S. citizen. The CSA may grant such individuals a LAA in those rare circumstances where a non-U.S. citizen possesses unique or unusual skills or expertise that is urgently needed to support a specific USG contract involving access to specified classified information, and a cleared or clearable U.S. citizen is not readily available. The CSA will provide specific procedures for requesting an LAA, to include the need for approval by a GCA senior official.

(2) An LAA granted under the provisions of this rule is not valid for access to:

(i) TOP SECRET information.

(ii) RD or FRD.

(iii) Information that has not been determined releasable by a USG designated disclosure authority to the country of which the individual is a citizen.

(iv) Communications security (COMSEC) information.

(v) Intelligence information.

(vi) NATO information. Foreign nationals of a NATO member nation may be authorized access to NATO information provided:

(A) The CSA obtains a NATO security clearance certificate from the individual's country of citizenship.

(B) NATO access is limited to performance on a specific NATO contract.

(vii) Information for which foreign disclosure has been prohibited in whole or in part.

(viii) Information provided to the USG in confidence by a third-party government.

(ix) Classified information furnished by a third-party government.

(l) *Temporary eligibility for access to classified information.* In accordance with SEAD 8 (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-8_Temporary_Eligibility_U.pdf*), the CSA may grant temporary (previously called interim) eligibility for access to classified information, as appropriate, to applicants for access to TOP SECRET, SECRET, and CONFIDENTIAL information. This eligibility may only be granted if there is no evidence of adverse information that calls into question an individual's eligibility for access to classified information. If results are favorable following completion of full investigative requirements, the CSA will update the temporary eligibility determination for access to classified information to be final. In any case, a temporary eligibility determination shall not exceed one year unless approved by the applicable CSA in the system of record. Non-U.S. citizens are not eligible for access to classified information on a temporary basis.

(1) A temporary SECRET or CONFIDENTIAL eligibility determination is valid for access to classified information at the level of the eligibility granted. Access to RD, COMSEC information, and NATO information requires a final SECRET eligibility determination.

(2) A temporary TOP SECRET eligibility determination is valid for access to TOP SECRET information. If an individual has a temporary TOP SECRET eligibility determination and has a final SECRET eligibility determination based on a previously completed investigation, the temporary TOP SECRET eligibility determination is valid for access to RD, NATO, and COMSEC information at the SECRET or CONFIDENTIAL level.

(3) Access to SCI and SAP information based on a temporary eligibility determination is a determination made by the granting authority.

(4) When a temporary eligibility determination has been made and derogatory information is subsequently developed, the CSA may withdraw the temporary eligibility pending completion of the processing that is a prerequisite to the final eligibility determination.

(5) When a temporary eligibility determination is withdrawn for an individual who is required to be eligible for access to classified information in connection with the entity eligibility determination for access to classified information, the contractor must remove the individual from access to classified information and any KMP position requiring PCL eligibility or the temporary entity eligibility determination will also be withdrawn.

(6) Withdrawal of a temporary eligibility determination is not a denial, termination, or revocation of eligibility under this rule and may not be appealed.

(m) *Consultants.* (1) A consultant will not access classified information off the premises of the using (hiring) contractor except in connection with authorized classified visits.

(2) A contractor may only assign a consultant outside the United States with responsibilities requiring access to classified information when:

(i) The consultant agreement between the contractor and consultant includes:

(A) Identification of the contract, license, or agreement that requires access to classified information, the level of classified information that is required, and access to FGI by the consultant while assigned outside the United States.

(B) A formal agreement that prohibits the consultant from disclosing any classified information related to the contract, license, or agreement as required in paragraph (m)(i)(A) of this section to any party other than the USG or foreign government with which the consultant is meeting, and who possesses the requisite clearance and need to know.

(ii) The consultant and the using contractor will jointly execute the consultant agreement setting forth respective security responsibilities. The contractor will retain an original signed copy of the agreement and will ensure its availability if requested by the CSA.

(iii) The contractor, in consultation with the applicable CSA as appropriate, will determine what threat briefing(s) the consultant should receive before the assignment, and conduct those briefings as part of the consultant's pre-assignment and recurring security training.

(iv) The contractor provides notice of any changes to the consultant agreement to the applicable CSA during assessments or upon CSA request.

(3) The using contractor will be the consumer of the consultant services as set forth in the consultant agreement.

(4) For security administration purposes, a consultant will be considered an employee of the using contractor for compliance with this rule.

(5) Consultants to GCAs are not under the purview of the NISP and will be processed for determination of eligibility by the GCA in accordance with GCA procedures.

§ 117.11 Foreign Ownership, Control, or Influence (FOCI).

(a) *General.* Foreign investment can play an important role in maintaining the vitality of the U.S. industrial base. Therefore, it is the intent of the USG to allow foreign investment consistent with the national security interests of the United States. The following FOCI

procedures for cleared U.S. entities are intended to mitigate the risks associated with FOCI by ensuring that foreign firms cannot undermine U.S. security to gain unauthorized access to classified information.

(1) The CSA will consider a U.S. entity to be under FOCI when:

(i) A foreign interest has the power to direct or decide issues affecting the entity's management or operations in a manner that could either:

(A) Result in unauthorized access to classified information; or

(B) Adversely affect performance of a classified contract or agreement.

(ii) The foreign government is currently exercising, or could prospectively exercise, that power, whether directly or indirectly, such as:

(A) Through ownership of the U.S. entity's securities, by contractual arrangements, or other means, or;

(B) By the ability to control or influence the election or appointment of one or more members to the entity's governing board.

(2) When the CSA has determined that an entity is under FOCI, the primary consideration will be the protection of classified information. The CSA will take whatever action is necessary to protect classified information, in coordination with other affected agencies as appropriate.

(3) A U.S. entity that is in process for an entity eligibility determination for access to classified information and subsequently determined to be under FOCI is ineligible for access to classified information unless and until effective security measures have been put in place to negate or mitigate FOCI to the satisfaction of the CSA.

(4) When a contractor determined to be under FOCI is negotiating an acceptable FOCI mitigation or negation measure in good faith, an existing entity eligibility determination may continue in effect so long as there is no indication that classified information is at risk of compromise in consultation with the applicable GCA. The applicable CSA may decide that circumstances involving the FOCI are such that the entity eligibility determination will be invalidated until implementation of an acceptable FOCI mitigation plan.

(5) An existing entity eligibility determination will be invalidated if the contractor is unable or unwilling to negotiate and implement an acceptable FOCI mitigation or negation measure. An existing entity eligibility determination will be revoked if security measures cannot be taken to remove the possibility of unauthorized access to classified information or adverse effect on performance of classified contracts.

(6) Changed conditions, such as a change in ownership, indebtedness, or a foreign intelligence threat, may justify certain adjustments to the security terms under which an entity is operating or, alternatively, that a different FOCI mitigation or negation method be employed. If a changed condition is of sufficient significance, it might also result in a determination that a contractor is no longer considered to be under FOCI, or, conversely, that a contractor is no longer eligible for access to classified information.

(7) The USG reserves the right, and has the obligation, to impose any security method, safeguard, or restriction (including denial, termination or revocation of an entity eligibility determination) it believes necessary to ensure that unauthorized access to classified information is effectively precluded and performance of classified contracts is not adversely affected.

(8) Nothing contained in this section affects the authority of a Federal agency head to limit, deny, or revoke access to classified information under its statutory, regulatory, or contract jurisdiction.

(b) *Factors.* Factors relating to the entity, relevant foreign interests, and the government of such foreign interests, as appropriate, will be considered in the aggregate to determine whether an applicant entity is under FOCI, its eligibility for access to classified information, and the protective measures required. These factors include:

(1) Record of espionage against U.S. targets, either economic or government.

(2) Record of enforcement actions against the entity for transferring technology without authorization.

(3) Record of compliance with pertinent U.S. laws, regulations, and contracts or agreements.

(4) Type and sensitivity of the information the entity would access.

(5) Source, nature, and extent of FOCI, including whether foreign interests hold a majority or minority position in the entity, taking into consideration the immediate, intermediate, and ultimate parent entities.

(6) Nature of any relevant bilateral and multilateral security and information exchange agreements.

(7) Ownership or control, directly or indirectly, in whole or in part, by a foreign government.

(8) Any other factor that indicates or demonstrates capability of foreign interests to control or influence the entity's operations or management.

(c) *Procedures.* An entity is required to complete an SF 328 during the process for an entity eligibility determination or when significant changes occur to information previously submitted. In the case of a corporate family, the form may be a consolidated response rather than separate submissions from individual members of the corporate family based on CSA guidance.

(1) If an entity provides any affirmative answers on the SF 328, or the CSA receives other information which indicates that the applicant entity may be under FOCI, the CSA will make a risk-based determination regarding the relative significance of the information in regard to:

(i) Whether the applicant is under FOCI.

(ii) The extent and manner to which the FOCI represents a risk to the national security or may adversely impact classified contract performance.

(iii) The type of actions, if any, that would be necessary to mitigate or negate the effects of FOCI to a level deemed acceptable to the USG. The CSA will advise entities on the CSA's appeal channels for disputing CSA FOCI determinations.

(2) When an entity with a favorable eligibility determination enters into negotiations for the proposed merger, acquisition, or takeover by a foreign interest, the entity will submit notification to the CSA of the commencement of such negotiations.

(i) The submission will include the type of transaction under negotiation (*e.g.,* stock purchase, asset purchase), the identity of the potential foreign interest investor, and a plan to negate or mitigate the FOCI by a method outlined in paragraph (d) of this section.

(ii) The entity will submit copies of loan, purchase, and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements, other organizational documents, and reports filed with other Federal agencies to the CSA.

(d) *FOCI action plans.* (1) When FOCI factors not related to ownership are present, the CSA will determine if positive measures will assure the CSA that the foreign interest can be effectively mitigated and cannot otherwise adversely affect performance on classified contracts. Examples of such measures include:

(i) Modification or termination of loan agreements, contracts, and other understandings with foreign interests.

(ii) Diversification or reduction of foreign-source income.

(iii) Demonstration of financial viability independent of foreign interests.

(iv) Elimination or resolution of problem debt.

(v) Assignment of specific oversight duties and responsibilities to board members.

(vi) Formulation of special executive-level security committees to consider and oversee issues that affect the performance of classified contracts.

(vii) Physical or organizational separation of the contractor component performing on classified contracts.

(viii) Adoption of special board resolutions.

(ix) Other actions that negate or mitigate foreign control or influence.

(x) A combination of these methods, as determined by the CSA.

(2) When FOCI factors related to ownership are present, methods the CSA may apply to negate or mitigate the risk of foreign ownership include, but are not limited to:

(i) *Board resolution.* (A) When a foreign interest does not possess voting interests sufficient to elect, or otherwise is not entitled to representation on the entity's governing board, a resolution(s) by the governing board may be adequate. In the resolution, the governing board will:

(*1*) Identify the foreign shareholder.

(*2*) Describe the type and number of foreign-owned shares.

(*3*) Acknowledge the entity's obligation to comply with all industrial security program requirements.

(*4*) Certify that the foreign owner does not require, will not have, and can be effectively precluded from unauthorized access to all classified information entrusted to or held by the entity.

(B) The governing board will provide for annual certifications to the CSA acknowledging the continued effectiveness of the resolution.

(C) The entity will distribute to members of its governing board and to its KMP copies of such resolutions, and report in the entity's corporate records the completion of such distribution.

(ii) *Security control agreement (SCA).* When a foreign interest does not effectively own or control an entity (*i.e.,* the entity is under U.S. control), but the foreign interest is entitled to representation on the entity's governing board, an SCA may be adequate. At least one cleared U.S. citizen must serve as an outside director on the entity's governing board. There are no access limitations under an SCA.

(iii) *SSA.* When a foreign interest effectively owns or controls an entity, an SSA may be adequate. An SSA is an arrangement that, based upon an assessment of the source and nature of FOCI and FOCI factors, imposes various industrial security measures within an institutionalized set of entity practices and procedures. The SSA preserves the foreign owner's right to be represented on the entity's board or governing body with a direct voice in the entity's business management, while denying the foreign owner majority representation and unauthorized access to classified information.

(A) *Requirement for a National Interest Determination (NID).* Unless otherwise prohibited by law or regulation (*e.g.,* Section 842 of Pub. L. 115–232), the applicable CSA must determine whether allowing an entity access to proscribed information under an SSA is consistent with national security interests of the U.S. with concurrence from controlling agencies, as applicable. Such NIDs will be made as part of an entity eligibility determination or because of a changed condition when a GCA requires an entity to have access to proscribed information and the CSA proposes an SSA as the mitigation measure. The NID can be program, project, or contract specific.

(B) *NID process:* (*1*) The CSA makes a NID for TOP SECRET or SAP information to which the entity requires access. Contractors should be aware that DOE Order 470.4B provides additional information and requirements for processing NID requests for access to RD.

(*2*) In cases in which any category of the proscribed information is controlled by another agency (ODNI for SCI, DOE for RD, the National Security Agency (NSA) for COMSEC), the CSA asks that controlling agency to concur or non-concur on the NID for that category of information.

(*3*) The CSA informs the GCA and the entity when the NID is complete. In cases involving SCI, RD, or COMSEC, the CSA also informs the GCA and the entity when a controlling agency concurs or non-concurs on that agency's category of proscribed information. The entity may begin accessing a category of proscribed information once the CSA informs the GCA and the entity that the controlling agency concurs, even if other categories of proscribed information are pending concurrence.

(*4*) An entity's access to SCI, RD, or COMSEC remains in effect so long as the entity remains eligible for access to classified information and the contract or agreement (or program or project) which imposes the requirement for access to those categories of proscribed information remains in effect, except under any of the following circumstances:

(*i*) The CSA, GCA, or controlling agency becomes aware of adverse information that impacts the entity eligibility determination.

(*ii*) The CSA's threat assessment pertaining to the entity indicates a risk to one of the categories of proscribed information.

(*iii*) The CSA becomes aware of any material change regarding the source, nature, and extent of FOCI.

(*iv*) The entity's record of NISP compliance, based on CSA reviews, becomes less than satisfactory. Consult DOE Order 470.4B for additional information and requirements for processing NID requests for access to RD.

(*5*) Under any of the circumstances in paragraphs (d)(2)(iii)(B)(*4*)(*i*) through (d)(2)(iii)(B)(*4*)(*iv*) in this section, the CSA determines whether the entity remains eligible for access to classified information, it must change the FOCI mitigation measure in order to remain eligible for access to classified information, or the CSA must terminate or revoke the access to classified information.

(*6*) When an entity is eligible for access to classified information that includes a favorable NID for SCI, RD, or COMSEC, the CSA does not have to request a new NID concurrence for the same entity if the access to classified information requirements for the relevant category of proscribed information and terms remain unchanged for:

(*i*) Renewing the contract or agreement.

(*ii*) New task orders issued under the contract or agreement.

(*iii*) A new contract or agreement that contains the same provisions as the previous one (this usually applies when the contract or agreement is for a program or project.)

(*iv*) Renewing the SSA.

(*7*) Under certain conditions, entities under an SSA may not require a NID for one or more categories of proscribed information in accordance with CSA-provided guidance. Categories of proscribed information for entities under SSAs not requiring a NID will be recorded in the CSA's system of record for entity eligibility determinations.

(iv) *Voting Trust (VT) or Proxy Agreement (PA).* The VT and the PA are arrangements that vest the voting rights of the foreign-owned stock in cleared U.S. citizens approved by the USG. Under a VT, the foreign owner transfers legal title its ownership interests in the entity to the trustees. Under a PA, the foreign owner's voting rights are

conveyed to the proxy holders. Neither arrangement imposes any restrictions on the entity's eligibility to have access to classified information or to compete for classified contracts.

(A) Establishment of a VT or PA involves the selection of trustees or proxy holders, all of whom must become members of the entity's governing board. Both arrangements must provide for the exercise of all prerogatives of ownership by the trustees or proxy holders with complete freedom to act independently from the foreign owners, except as provided in the VT or PA. The arrangements may limit the authority of the trustees or proxy holders by requiring approval be obtained from the foreign owner with respect to issues such as:

(*1*) The sale or disposal of the entity's assets or a substantial part thereof.

(*2*) Pledges, mortgages, or other encumbrances on the entity's assets, capital stock, or ownership interests.

(*3*) Mergers, consolidations, or reorganizations.

(*4*) Dissolution.

(*5*) Filing of a bankruptcy petition.

(B) The trustees or proxy holders may consult with the foreign owner, or vice versa, where otherwise consistent with U.S. laws, regulations, and the terms of the VT or PA.

(C) The trustees or proxy holders assume full responsibility for the foreign owner's voting interests and for exercising all governance and management prerogatives relating thereto to ensure the foreign owner will be insulated from the entity, thereby solely retaining the status of a beneficiary. The entity must be organized, structured, and financed to be capable of operating as a viable business entity and independent from the foreign owners' interests that required FOCI mitigation or negation.

(v) *Combination measures.* The CSA may apply combinations of the measures in paragraphs (d)(2)(i) through (d)(2)(iv) in this section or other similar measures that effectively mitigate or negate the risks involved with foreign ownership.

(e) *Limited entity eligibility determination due to FOCI.* In accordance with the provisions of this section and CSA-provided guidance, a limited entity eligibility determination may be an option for a single, narrowly defined contract, agreement, or circumstance for entities under FOCI without mitigation or negation. Limitations on access to classified information are inherent with the granting of limited entity eligibility determinations and are imposed upon all of the entity's employees regardless of citizenship.

(1) In exceptional circumstances, when an entity is under FOCI, the CSA may decide that a limited entity eligibility determination is appropriate when the entity is unable or unwilling to implement FOCI mitigation or negation measures, and the conditions in paragraphs (e)(1)(i) through (iii) of this section are met. This is not the same as a limited entity eligibility determination for purposes not related to FOCI. Information on limited entity eligibility determinations for purposes other than FOCI can be found in § 117.9(m). A CSA may decide that a limited entity eligibility is appropriate for an entity under FOCI if:

(i) The limited entity eligibility determination is in accordance with national security interests and a GCA has informed the CSA that access to classified information by the contractor is essential to contract or agreement performance.

(ii) There is an industrial security agreement with the foreign government of the country from which the FOCI is derived.

(iii) The contractor meets all other entity eligibility requirements outlined in § 117.9(c) except that KMP, other than the FSO, may be citizens of the country from which the FOCI derives and the United States has obtained security assurances at the appropriate level from that country.

(2) A U.S. subsidiary of a foreign entity may be sponsored for a limited entity eligibility determination by a foreign government when the foreign government desires to award a contract or agreement to the U.S. subsidiary that involves access to only that classified information for which the foreign government is the OCA.

(3) Limited entity eligibility determinations are specific to the classified information for the requesting GCA or foreign government and the single narrowly defined contract, agreement, or circumstance the request was based on. The limited entity eligibility determination will only be verified to that GCA or foreign government for the authorized level of access to classified information and any limitations to that access to classified information.

(4) A limited entity eligibility determination is not an option for contractors that require access to proscribed information when a foreign government has ownership or control over the entity.

(5) Release of classified information must be in conformity with the U.S. National Disclosure Policy-1 (provided to designated disclosure authorities on a need-to-know basis from the Office of the Under Secretary of Defense for Policy, Defense Technology Security Administration).

(6) A limited entity eligibility determination will be administratively terminated when there is no longer a need for the contractor to access the classified information for which it was sponsored. Administrative termination of one limited entity eligibility determination does not impact a contractor's other limited entity eligibility determinations.

(7) If there is no industrial security agreement with the foreign government of the country from which the FOCI is derived, in extraordinary circumstances, a limited entity eligibility determination may also be granted if there is a compelling need to do so consistent with U.S. national security interests and the GCA has informed the applicable CSA that access to classified information by the contractor is essential to contract or agreement performance. Under this circumstance, the entity must follow all provisions of this rule.

(f) *Qualifications of trustees, proxy holders, and outside directors.* Individuals who serve as trustees, proxy holders, or outside directors must meet the following criteria:

(1) Trustees and proxy holders must be resident U.S. citizens who can exercise governance and management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the entity.

(2) Outside directors must be resident U.S. citizens who can exercise governance and management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively separated from the entity's classified work.

(3) New trustees, proxy holders, and outside directors must be completely disinterested individuals with no prior involvement with the entity, the entities with which it is affiliated, or the foreign owner.

(4) The CSA may consider other circumstances that may affect an individual's eligibility to serve effectively including the number of boards on which the individual serves, the length of time serving on any other governance boards, and other factors in accordance with CSA-provided guidance.

(5) Trustees, proxy holders, and outside directors must be determined eligible for access to classified information at the level of the entity eligibility determination for access to

classified information. Individuals who are serving as trustees, proxy holders, or outside directors as part of a mitigation measure for the entity are not considered to have prior involvement solely by performing that role for purposes of paragraph (f)(3) of this section.

(g) *Government security committee (GSC).* Under a VT, PA, SSA, or SCA, the contractor is required to establish a permanent committee of its board of directors, known as the GSC.

(1) Unless otherwise approved by the CSA, the GSC consists of trustees, proxy holders, or outside directors and those officer directors who have been determined to be eligible for access to classified information.

(2) The members of the GSC are required to ensure that the contractor adheres to laws and regulations and maintains internal entity policies and procedures to safeguard classified information entrusted to it. The GSC ensures that violations of those policies and procedures are promptly investigated and reported to the appropriate authority when it has been determined that a violation has occurred.

(3) The contractor's FSO will be the principal advisor to the GSC and attend GSC meetings. The chairman of the GSC must concur with the appointment and replacement of FSOs selected by management. The FSO functions will be carried out under the authority of the GSC.

(h) *Additional procedures for FOCI mitigation or negation measures.* In addition to the basic requirements of the FOCI mitigation or negation agreement, the entity may be required to document and implement additional procedures based upon the circumstances of an entity's operations. Those additional procedures will be established in supplements to the FOCI mitigation agreement to allow for flexibility as circumstances change without having to renegotiate the entire agreement. When making use of supplements, the CSA does not consider the FOCI mitigation measure final until the CSA has approved the required supplements. These supplements may include:

(1) *Technology control plan (TCP).* A TCP approved by the CSA will be developed and implemented by those entities cleared under a VT, PA, SSA and SCA and when otherwise deemed appropriate by the CSA. The TCP will prescribe all security measures determined necessary to reasonably prevent the possibility of access by non-U.S. citizen employees and visitors to information for which they are not authorized. The TCP will also prescribe measures designed to assure that access by non-U.S. citizens is strictly limited to only that specific information for which appropriate USG disclosure authorization has been obtained, *e.g.,* an approved export license or technical assistance agreement. Unique badging, escort, segregated work area, security indoctrination schemes, and other measures will be included, as appropriate.

(2) *Electronic communications plan (ECP).* The contractor will develop and implement an ECP, subject to CSA approval, tailored to the contractor's operations to verify that electronic controls are in place for clear technical and logical separation of electronic communications and networks between the contractor, the foreign interest, and its affiliates. The purpose is to prevent the unauthorized disclosure of classified information to the foreign parent or its affiliates. The contractor will include in the ECP a detailed network description and configuration diagram that clearly delineates which networks will be shared and which will be protected from access by the foreign parent or its affiliates. The network description will address firewalls, remote administration, monitoring, maintenance, and separate email servers, as appropriate.

(3) *Affiliated operations plan.* There may be circumstances when the parties to a transaction propose in the FOCI action plan that the U.S. contractor provides certain services for the foreign interest or enters into arrangements with the foreign interest, or the foreign interest provides services for or enters into arrangements with the U.S. contractor. In such circumstances, the contractor will document a plan, subject to CSA approval, outlining the entity's consolidated policies and procedures regarding the control of affiliated operations, regardless of whether such endeavors are administrative, operational, or commercial, performed directly or through third-party service providers, within the entity, or among any of the entity's controlled entities, or the foreign interest and its affiliates.

(4) *Facilities location plan.* When a contractor is potentially collocated with or in close proximity to its foreign parent or an affiliate, the contractor will prepare a facilities location plan to assist the CSA in determining if the contractor is collocated or if the close proximity can be allowed under the FOCI mitigation plan. A U.S. entity generally cannot be collocated with the foreign parent or affiliate, *i.e.,* at the same address or in the same location.

(i) *Annual review and certification.*—(1) *Annual review.* The CSA will meet at least annually, and otherwise as required by circumstances, with the GSCs of contractors operating under a VT, PA, SSA, or SCA to review the purpose and effectiveness of the clearance arrangement and to establish a common understanding of the operating requirements and their implementation. These reviews will include an examination of:

(i) Acts of compliance or noncompliance with the approved security arrangement, standard rules, and applicable laws and regulations.

(ii) Problems or impediments associated with the practical application or utility of the security arrangement.

(iii) Whether security controls, practices, or procedures warrant adjustment.

(2) *Annual certification.* For contractors operating under a VT, PA, SSA, or SCA, the chairman of the GSC will submit to the CSA one year from the effective date of the agreement and annually thereafter, an implementation and compliance report. Such reports will include:

(i) A detailed description of the manner in which the contractor is carrying out its obligations under the agreement.

(ii) Changes to security procedures, implemented or proposed, and the reasons for those changes.

(iii) A detailed description of any acts of noncompliance, whether inadvertent or intentional, with a discussion of remedial measures, including steps taken to prevent such acts from recurring.

(iv) Any changes, or impending changes, of KMP or key board members, including the reasons therefore.

(v) Any changes or impending changes in the organizational structure or ownership, including any reorganizations, acquisitions, mergers, or divestitures.

(vi) Any other issues that could have a bearing on the effectiveness of the applicable agreement.

(j) *Transactions involving foreign persons, and the Committee on Foreign Investment in the United States (CFIUS).*

(1) The CFIUS is a USG interagency committee chaired by the Treasury Department that conducts assessments, reviews and investigations of transactions that could result in foreign control of a U.S. business, and certain non-controlling investments and certain real estate transactions involving foreign persons under 50 U.S.C. 4565.

(2) In CFIUS cases where the acquired U.S. business requires access to classified information, the CFIUS assessment, review or investigation, as applicable, and the CSA industrial

security FOCI review are carried out in parallel, but are separate processes with different time constraints and considerations.

(3) The CSA will promptly advise the parties in a transaction under CFIUS review that would require FOCI negation or mitigation measures if consummated, to submit to the CSA a plan to negate or mitigate FOCI. If it appears that an agreement cannot be reached on material terms of a FOCI action plan, or if the U.S. person that is a party, or in applicable cases, a subject of the proposed transaction fails to comply with the FOCI reporting requirements of this rule, the CSA may recommend a full investigation of the transaction by the CFIUS to determine the effects on national security.

§ 117.12 Security training and briefings.

(a) *General.* Contractors will provide all cleared employees with security training and briefings commensurate with their involvement with classified information.

(b) *Training materials.* Contractors may obtain security, threat awareness, and other education and training information and material from their CSA or other sources.

(c) *Government provided briefings.* The CSA is responsible for providing initial security briefings to the FSO and for ensuring other briefings required for special categories of information are provided to the FSO.

(d) *FSO training.* Contractors will ensure the FSO and others performing security duties complete training considered appropriate by the CSA. Training requirements will be based on the contractor's involvement with classified information. Training may include an FSO orientation course, and for FSOs at contractor locations with a classified information safeguarding capability, an FSO program management course. Contractor FSOs will complete training within six months of appointment to the position of FSO. When determined by the applicable CSA, contractor FSOs must complete an FSO program management course within six months of the CSA approval to store classified information at the contractor.

(e) *Initial security briefings.* Prior to being granted access to classified information, contractors will provide employees with an initial security briefing that includes:

(1) Threat awareness, including insider threat awareness in accordance with paragraph (g) in this section.

(2) Counterintelligence (CI) awareness.

(3) Overview of the information security classification system.

(4) Reporting obligations and requirements, including insider threat.

(5) Cybersecurity training for all authorized information system users in accordance with CSA-provided guidance pursuant to § 117.18(a)(1) and (a)(2).

(6) Security procedures and duties applicable to the employee's position requirements (*e.g.* marking and safeguarding of classified information) and criminal, civil, or administrative consequences that may result from the unauthorized disclosure of classified information, even though the individual has not yet signed an NDA.

(f) *CUI training.* While outside the requirements of the NISPOM, when a classified contract includes provisions for CUI training, contractors will comply with those contract requirements.

(g) *Insider threat training.* The designated ITPSO will ensure that contractor program personnel assigned insider threat program responsibilities and all other cleared employees complete training consistent with applicable CSA provided guidance.

(1) The contractor will provide training to insider threat program personnel, including the contractor's designated ITPSO, on:

(i) CI and security fundamentals.

(ii) Procedures for conducting insider threat response actions.

(iii) Applicable laws and regulations regarding the gathering, integration, retention, safeguarding, and use of records and data, including the consequences of misuse of such information.

(iv) Applicable legal, civil liberties, and privacy policies and requirements applicable to insider threat programs.

(2) The contractor will provide insider threat awareness training to all cleared employees on an annual basis. Depending upon CSA specific guidance, a CSA may instead conduct such training. The contractor must provide all newly cleared employees with insider threat awareness training before granting access to classified information. Training will address current and potential threats in the work and personal environment and will include at a minimum:

(i) The importance of detecting potential insider threats by cleared employees and reporting suspected activity to the insider threat program designee.

(ii) Methodologies of adversaries to recruit trusted insiders and collect classified information, in particular within information systems.

(iii) Indicators of insider threat behavior and procedures to report such behavior.

(iv) CI and security reporting requirements, as applicable.

(3) The contractor will establish procedures to validate all cleared employees who have completed the initial and annual insider threat training.

(h) *Derivative classification.*—(1) *Initial training.* The contractor will ensure all employees authorized to make derivative classification decisions are trained in the proper application of the derivative classification principles, in accordance with CSA direction. Employees are not authorized to conduct derivative classification until they receive such training.

(2) *Refresher training.* In addition to the initial training, contractors will ensure all employees who conduct derivative classification receive training at least once every two years. Contractors will suspend an employee's derivative classification authority for any employee who does not receive such training at least once every two years. Training will emphasize the avoidance of over-classification and address:

(i) Classification levels.

(ii) Duration of classification.

(iii) Identification and markings.

(iv) Classification prohibitions and limitations.

(v) Sanctions and classification challenges.

(vi) Security classification guides.

(vii) Information sharing.

(3) *Record of training.* Contractors will retain records of the date of the most recent training (initial or refresher) and type of training provided to employees.

(i) *Information systems security.* All information system authorized users will receive training on the security risks associated with their user activities and responsibilities under the NISP. The contractor will determine the appropriate content of the training, taking into consideration assigned roles and responsibilities, specific security requirements, and the information system to which personnel are authorized access.

(j) *Temporary help suppliers.* A cleared temporary help supplier, or other contractor who employs cleared individuals solely for dispatch elsewhere, will be responsible for ensuring that required briefings (both initial and refresher training) are provided to their cleared personnel. The temporary help supplier or the using contractor may conduct these briefings.

(k) *Refresher training.* The contractor will provide all cleared employees with security education and training every 12 months. Refresher training will reinforce the information provided during the initial security briefing and will keep cleared employees informed of changes in security regulations and should also address issues or concerns identified during contractor self-reviews. Training methods may include group briefings, interactive videos, dissemination of instructional materials, or other media and methods. Contractors will maintain records about the programs offered and employee participation in them.

(l) *Debriefings.* Contractors will debrief cleared employees and annotate the debriefing in the appropriate contractor records when access to classified information is no longer needed; at the time of termination of employment (discharge, resignation, or retirement); when an employee's eligibility for access to classified information is terminated, suspended, or revoked; and upon termination of the entity eligibility determination.

§ 117.13 Classification.

(a) *Original classification.* Only a USG official designated or delegated the authority in writing can make an original classification decision.

(1) An OCA classifies information pursuant to E.O. 13526 and 32 CFR part 2001, designates and marks it as TOP SECRET, SECRET, or CONFIDENTIAL, and, except as provided by statute, may use no other terms to identify classified information.

(2) The designation UNCLASSIFIED is used to identify information that does not meet the criteria for classification in accordance with E.O. 13526. In accordance with 32 CFR 2002, CUI implementing guidance (including the Marking Handbook) and any GCA-provided guidance, CUI commingled with classified information must be marked as CUI to alert users to its presence and sensitivity. The CUI regulation, guidance, and handbook are available at: *https://www.archives.gov/cui.*

(b) *Derivative classification.* (1) Contractor personnel make derivative classification decisions when they incorporate, paraphrase, restate, or generate in new form, information that is already classified. They must mark the newly developed material consistently with the classification markings that apply to the source information.

(2) Derivative classification is the classification of information based on guidance from an OCA, which may be either a properly marked source document or a current security classification guide provided by a GCA in accordance with E.O. 13526. The duplication or reproduction of existing classified information is not derivative classification.

(3) A source document that does not contain portion markings, due to an ISOO-approved waiver, must contain a warning statement that it may not be used as a source for derivative classification in accordance with 32 CFR 2001.24(k)(4).

(4) Classified information in email messages is marked pursuant to E.O. 13526 and 32 CFR part 2001. If an email is transmitted on a classified system, includes a classified attachment, and contains no classified information within the body of the email itself, the email serves as a transmittal document and is not a derivatively classified document. The email's overall classification must reflect the highest classification level present in the attachment.

(c) *Derivative classification responsibilities.* Contractors will provide employees with pertinent classification guidance to fulfill their derivative classification responsibilities. All contractor employees authorized to make derivative classification decisions will:

(1) Mark the face of each derivatively classified document with a classification authority block that includes the employee's name and position or personal identifier, the entity name, and when applicable, the division or the branch.

FIGURE 1 TO PARAGRAPH (c)(1) EXAMPLE OF INDUSTRY CLASSIFICATION AUTHORITY BLOCK

UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Classified by: John Doe, Security Specialist, Entity ABC Security Division
Derived From: SecDef Memo, dtd 20101024, Subj: _____
Declassify On: 20201024

(2) Observe and respect original classification decisions.

(3) Carry forward the pertinent classification markings to any newly created documents. For information derivatively classified based on multiple sources, the derivative classifier will carry forward:

(i) The date or event for declassification that corresponds to the longest period of classification among the sources.

(ii) A listing of the source materials.

(4) Be trained, in accordance with § 117.12(h), in the proper application of the derivative classification principles at least once every two years.

(5) Whenever possible, use a classified addendum if classified information constitutes a small portion of an otherwise unclassified document.

(d) *Security classification guidance.* (1) Contractors should be aware the GCA will:

(i) Incorporate appropriate security requirement clauses in a classified contract, IFB, RFP, RFQ, or all solicitations leading to a classified contract.

(ii) Provide the contractor with the security classification guidance needed during performance of the contract.

(iii) Provide this guidance to the contractor in the contract security classification specification, or equivalent.

(2) The contract security classification specification, or equivalent, must identify the specific elements of classified information involved in the contract that require security protection.

(3) At the discretion of the CSA, contractors may, to the extent possible, advise and assist in the development and any updates to or any revisions to the contract security classification specification, or equivalent.

(4) The contractor will comply with all aspects of the classification guidance.

(i) Users of classification guides are encouraged to notify the originator of the guide when they acquire information that suggests the need for change in the instructions contained in the guide.

(ii) Classification guidance is the exclusive responsibility of the GCA, and the final determination of the appropriate classification for the information rests with that activity. The contract security classification specification, or equivalent, is a contractual specification necessary for the performance of a classified contract. Challenges to classification status are in paragraph (e) in this section.

(iii) If the contractor receives a classified contract without a contract security classification specification, or equivalent, the contractor will notify the GCA. If the GCA does not respond with the appropriate contract security classification specification, or equivalent, the contractor will notify the CSA.

(5) Upon completion of a classified contract, the contractor must return all USG provided or deliverable information to the custody of the USG.

(i) If the GCA does not advise to the contrary, the contractor may retain

copies of the USG material for a period of two years following the completion of the contract. The contract security classification specification, or equivalent, will continue in effect for this two-year period.

(ii) If the GCA determines the contractor has a continuing need for the copies of the USG material beyond the two-year period, the GCA will issue a final contract security classification specification, or equivalent, for the classified contract and will include disposition instructions for the copies.

(e) *Challenges to classification status.* (1) The contractor will address challenges to classification status with the GCA and request remedy when:

(i) Information is classified improperly or unnecessarily.

(ii) Current security considerations justify downgrading to a lower classification level or upgrading to a higher classification level.

(iii) Security classification guidance is not provided, improper or inadequate.

(2) If the GCA does not provide a remedy, and the contractor still believes that corrective action is required, the contractor will make a formal written challenge to the GCA. The challenge will include:

(i) A description sufficient to identify the issue.

(ii) The reasons why the contractor thinks that corrective action is required.

(iii) Recommendations for appropriate corrective action.

(3) The contractor will safeguard the information as required for its assigned or proposed level of classification, whichever is higher, until action is completed.

(4) If the contractor does not receive a written answer from the GCA within 60 days, the contractor will request assistance from the CSA. If the contractor does not receive a response from the GCA within 120 days, the contractor may appeal the challenge to the Interagency Security Classification Appeals Panel through ISOO.

(5) The fact that a contractor has initiated such a challenge will not, in any way, serve as a basis for adverse action against the contractor by the USG. If a contractor believes that adverse action did result from a classification challenge, the contractor will promptly furnish full details to ISOO for resolution.

(f) *Contractor developed information.* Whenever a contractor develops an unsolicited proposal or originates information not in the performance of a classified contract, the provisions of this paragraph apply.

(1) If the information was previously identified as classified, it will be classified according to an appropriate classification guide, or source document, and appropriately marked.

(2) If the information was not previously classified, but the contractor believes the information may or should be classified, the contractor will:

(i) Protect the information as though classified at the appropriate level.

(ii) Submit the information to the agency that has an interest for a classification determination. In such cases, clearly mark the material ''CLASSIFICATION DETERMINATION PENDING; Protect as either TOP SECRET, SECRET, or CONFIDENTIAL.'' This marking will appear conspicuously at least once on the material but no further markings are necessary until a classification determination is received.

(iii) Not be precluded from marking such material as entity-private or entity-proprietary information, unless the material was based upon information obtained from prior deliverables to the USG or was developed from USG material.

(iv) Protect the information pending a final classification determination. The information may be CUI, if it is not classified. Only information that is owned by, produced by, produced for, or is under the control of the USG can be classified in accordance with E.O. 13526.

(3) To be eligible for classification:

(i) The information must incorporate classified information to which the contractor was given prior access.

(ii) The information must be partially or wholly owned by, produced by or for, or under the control of the USG.

(4) 10 CFR 1045.21 includes provisions for the DOE with regard to privately generated RD, whereby the DOE may classify such information in accordance with the AEA.

(g) *Improperly released classified information appearing in public media.* Improperly released classified information is not automatically declassified. When classified information has been improperly released, and even when that classified information has become publicly available, contractors will:

(1) Continue to protect the information at the appropriate classification level until formally advised to the contrary by the GCA.

(2) Bring any questions about the propriety of continued classification in these cases to the immediate attention of the GCA.

(3) Notify the applicable CSA if an employee downloads the improperly released classified information to determine how to resolve a data spill.

(h) *Downgrading or declassifying classified information.* Information is downgraded or declassified based on the loss of sensitivity of the information due to the passage of time or on occurrence of a specific event. Downgrading or declassifying actions constitute implementation of a directed action based on a review by either the OCA or the USG-designated classification authority. Declassification is not an approval for public disclosure.

(1) *Downgrading.* Contractors will refer information for classification or downgrade to the GCA based on the guidance provided in a contract security classification specification, or equivalent, or upon formal notification.

(2) *Declassification.* Contractors are not authorized to implement downgrading or declassification instructions even when the material is marked for automatic downgrading or declassification. If the material is marked for automatic declassification and the contractor notes that the date or event for the automatic declassification has occurred, the contractor will seek guidance from the GCA.

(i) *RD, FRD, and TFNI.* Protection requirements for RD, FRD, and TFNI are pursuant to § 117.23(e). Information about classification and declassification of RD, FRD, or TFNI documents is in § 117.23(e)(5).

§ 117.14 Marking requirements.

(a) *Purpose for marking.* (1) Physically marking classified information with appropriate classification markings serves to warn and inform holders of the information of the degree of protection required. Other notations facilitate downgrading and declassification, and aid in derivative classification actions.

(2) Contractors will clearly mark all classified information and material to convey to the holder the level of classification assigned, the portions that contain or reveal classified information, the period of time protection is required, the identity (by name and position or personal identifier) of the classifier, the source(s) for derivative classification, and any other notations required for protection of the information.

(b) *Marking guidance for classified information and material.* Contractors will use the marking guidance conveyed in 32 CFR 2001.22 through 2001.26, and its companion document, ISOO booklet ''Marking Classified National Security Information,'' (available at: *https://www.archives.gov/isoo/training/training-aids*) or CSA specific provided guidance for marking derivatively classified information and material and as required by applicable security

classification guide. The special requirements for marking documents containing RD, FRD, and TFNI are addressed in § 117.23.

(c) *Marking guidance for CUI.* Contractors will use marking guidance conveyed in 32 CFR 2002.20, the CUI Marking Handbook (available at: *https://www.archives.gov/files/cui/documents/20161206-cui-marking-handbook-v1-1-20190524.pdf*), and agency policy to mark CUI in accordance with contract requirements.

(d) *Working papers.* Working papers will be marked, destroyed, and retained in accordance with § 117.15(e)(3).

(e) *Translations.* The contractor will mark translations of U.S. classified information into a language other than English with the appropriate U.S. markings and the foreign language equivalent to show the United States as the country of origin.

(f) *Marking wholly unclassified material.* The contractor will not mark or stamp wholly UNCLASSIFIED material as UNCLASSIFIED unless it is essential to convey to a recipient of such material that:

(1) The material has been examined specifically with a view to impose a security classification and has been determined not to require classification by the GCA.

(2) The material has been reviewed and has been determined to no longer require classification and it has been declassified by the applicable GCA.

(g) *Marking miscellaneous material.* The contractor will:

(1) Handle miscellaneous material developed in connection with the handling, processing, production, storage, and utilization of classified information in a manner that ensures adequate protection of the classified information involved.

(2) Destroy the miscellaneous material at the earliest practical time, unless a requirement exists to retain such material. Notwithstanding the provisions of paragraph (a) of this section, there is no requirement for the contractor to mark such material, but disposition and retention requirements in § 117.15(i) and (j) apply.

(h) *Marking training material.* The contractor will clearly mark unclassified documents or materials that are created to simulate or demonstrate classified documents or material to indicate the actual UNCLASSIFIED status of the information. For example, the contractor may use: MARKINGS ARE FOR TRAINING PURPOSES ONLY, OTHERWISE UNCLASSIFIED or UNCLASSIFIED SAMPLE, or other similar marking.

(i) *Downgrading or declassification actions.* When a contractor removes documents or material that have been downgraded or declassified from storage for use or for transmittal outside the contractor location:

(1) The documents or material must be re-marked pursuant to paragraph (i)(1)(i) or (i)(1)(ii) in this section.

(i) Prior to taking any action to downgrade or declassify information, the contractor will seek guidance from the GCA. If the GCA approves such action, the contractor will cancel all old classification markings with the new markings substituted, whenever practical. For documents, at a minimum the outside of the front cover, the title page, the first page, and the outside of the back will reflect the new classification markings, or include the designation UNCLASSIFIED. The contractor will re-mark other material by the most practical method for the type of material involved to ensure that it is clear to the holder what level of classification is assigned to the material.

(ii) When the GCA notifies contractors of downgrading or declassification actions that are contrary to the markings shown on the material, the contractor will re-mark material to indicate the change and notify other holders if further dissemination was made. The contractor will mark the material to indicate the:

(A) Authority for the action.

(B) Date of the action.

(C) Identity and position of the individual taking the action.

(2) If the volume of material is such that prompt re-marking of each classified item cannot be accomplished without unduly interfering with operations, the contractor may attach a downgrading and declassification notice to the inside of the file drawers or other storage container instead of the re-marking otherwise required.

(3) When such documents or materials are withdrawn from the container solely for transfer to another container, or when the container is transferred from one place to another, the transfer may be made without re-marking if the notice is attached to the new container or remains with each shipment.

(4) For the purpose of paragraphs (i)(2) and (i)(3) in this section, the contractor must include in the downgrading and declassification notice:

(i) The authority for the downgrading or declassification action.

(ii) The date of the action.

(iii) The storage container to which it applies.

(j) *Upgrading action.* (1) When the contractor receives notice from the GCA to upgrade material to a higher level; for example, from CONFIDENTIAL to SECRET, the contractor will:

(i) Immediately enter the new markings on the material according to the notice to upgrade, and strike through all the superseded markings.

(ii) Enter the authority for and the date of the upgrading action on the material.

(iii) Ensure all records affected are stored at the appropriate level of security, including digital networks and systems. Upgrades requiring network or system adjustment will be coordinated with the GCA to mitigate or account for impact on the execution of the contract.

(2) The contractor will notify all holders to whom they disseminated the material. The contractor will not mark the notice as classified unless it contains additional information warranting classification.

(3) In the case of material which was inadvertently released as UNCLASSIFIED, the contractor will mark and protect the notice as classified at the CONFIDENTIAL level, unless it contains additional information warranting a higher classification. The contractor will cite the applicable Contract Security Classification Specification, or equivalent, or other classification guide on the ''Derived From'' line and mark the notice with an appropriate declassification instruction.

(k) *Dissemination of improperly marked information.* If the contractor inadvertently distributes classified material without the proper classification assigned to it, or without any markings to identify the material as classified, as appropriate, the contractor will:

(1) Determine whether all holders of the material are cleared and authorized access to it.

(2) If recipients are authorized persons, and the contractor disseminated the information through authorized channels, promptly provide written notice to all holders of the proper classification to be assigned. The contractor will also include the classification source as well as declassification instructions in the notification.

(3) Report compromises to the CSA in accordance with the provisions of § 117.8(d), if:

(i) Any of the recipients of the material are not authorized persons.

(ii) Any material cannot be accounted for.

(iii) The material was transmitted through unauthorized channels.

(l) *Marking foreign government classified material.* Foreign government classified information will retain its original classification markings or will be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the foreign government entity that furnished the information in accordance with 32 CFR 2001.54. The equivalent U.S. classification and the country of origin will be marked on the front and back in English.

(m) *Foreign government restricted information and ''in confidence'' information.*

(1) Some foreign governments have a fourth level of classification that does not correspond to an equivalent U.S. classification that is identified as RESTRICTED information. In many cases, security agreements require RESTRICTED information to be protected as U.S. CONFIDENTIAL information.

(2) Some foreign governments may have a category of unclassified information that is protected by law. This latter category is normally provided to other governments with the expectation that the information will be treated ''In Confidence.'' The foreign government or international organization must state that the information is provided in confidence and that it must be protected from release.

(i) 10 U.S.C. 130c protects information provided ''In Confidence'' by foreign governments which is not classified but meets special requirements.

(ii) This provision also applies to RESTRICTED information which is not required by an agreement to be protected as classified information.

(iii) The contractor will not disclose information protected by this statutory provision to anyone except personnel who require access to the information in connection with the contract.

(3) It is the responsibility of the foreign entity that awards the contract to incorporate requirements for the protection and marking of RESTRICTED or ''In Confidence'' information in the contract. The contractor will advise the CSA if requirements were not provided by the foreign entity.

(n) *Marking U.S. documents containing FGI.* (1) U.S. documents containing FGI must be marked on the front, ''THIS DOCUMENT CONTAINS (indicate country of origin) INFORMATION.'' In addition, the portions must be marked to identify both the country and classification level, (*e.g.,* (UK–C), (GE–C)). The ''Derived From'' line will identify U.S. as well as foreign classification sources.

(2) If the identity of the foreign government must be concealed, the front of the document will be marked ''THIS DOCUMENT CONTAINS FOREIGN GOVERNMENT INFORMATION;'' paragraphs will be marked FGI, together with the classification level (*e.g.,* (FGI–C)); and the ''Derived From'' line will indicate FGI in addition to any U.S. source. The identity of the foreign government will be maintained with the record copy of the document.

(3) A U.S. document that contains FGI will not be downgraded below the highest level of FGI contained in the document or be declassified without the written approval of the foreign government that originated the information. Recommendations concerning downgrading or declassification will be submitted to the GCA or foreign government contracting authority, as applicable.

(o) *Marking documents prepared for foreign governments.* Documents prepared for foreign governments that contain U.S. classified information and FGI will be marked as prescribed by the foreign government. In addition, they will be marked on the front, ''THIS DOCUMENT CONTAINS UNITED STATES CLASSIFIED INFORMATION.'' Portions will be marked to identify the U.S. classified information.

(p) *Marking requirements for transfers of defense articles to Australia (AUS) or the United Kingdom (UK).* Marking requirements for transfers of defense articles to AUS or the UK without a license or other written authorization are pursuant to § 117.19(i).

(q) *Commingling of RD and FRD.* Commingling of RD, FRD, and TFNI with national security information (NSI) in the same document should be avoided to the greatest degree possible. When mixing this information cannot be avoided, the marking requirements in 10 CFR part 1045, section 140(f) and declassification requirements of 10 CFR part 1045, section 155 apply.

§ 117.15 Safeguarding Classified Information.

(a) *General safeguarding.* Contractors will be responsible for safeguarding classified information in their custody or under their control, with approval for such storage of classified information by the applicable CSA. Individuals are responsible for safeguarding classified information entrusted to them. Contractors will provide the extent of protection to classified information sufficient to reasonably protect it from loss or compromise.

(1) *Oral discussions.* Contractors will ensure that all cleared personnel are aware of the prohibition against discussing classified information over unsecured telephones, in public conveyances or places, or in any other manner that permits interception by unauthorized persons.

(2) *End of day security checks.* (i) Contractors that store classified material will establish a system of security checks at the close of each working day to verify that all classified material and security repositories have been appropriately secured.

(ii) Contractors that operate multiple work shifts will perform the security checks at the end of the last working shift in which classified material was removed from storage for use. The checks are not required during continuous 24-hour operations.

(3) *Perimeter controls.* (i) Contractors authorized to store classified material will establish and maintain a system to deter and detect unauthorized introduction or removal of classified material from their facility without proper authority.

(ii) If the unauthorized introduction or removal of classified material can be reasonably prevented through technical means (*e.g.,* an intrusion detection system), which are encouraged, no further controls are necessary. The contractor will provide appropriate authorization to personnel who have a legitimate need to remove or transport classified material for passing through designated entry or exit points.

(iii) The contractor will:

(A) Provide appropriate authorization to personnel who have a legitimate need to remove or transport classified material for passing through designated entry or exit points.

(B) Conspicuously post notices at all pertinent entries and exits that persons who enter or depart the facility are subject to an inspection of their personal, except under circumstances where the possibility of access to classified material is remote.

(C) Limit inspections to buildings or areas where classified work is being performed.

(D) Establish the extent, frequency, and location of inspections in a manner consistent with contractual obligations and operational efficiency. The contractor may use any appropriate random sampling technique.

(E) Seek legal advice during the formulation of implementing procedures.

(F) Submit significant problems pertaining to perimeter controls and inspections to the CSA.

(iv) Contractors will develop procedures for safeguarding classified material in emergency situations.

(A) The procedures should be as simple and practical as possible and adaptable to any type of emergency that may reasonably arise.

(B) Contractors will promptly report to the CSA any emergency situation that renders them incapable of safeguarding classified material.

(b) *Standards for Security Equipment.* Contractors will follow guidelines established in 32 CFR part 2001, when procuring storage and destruction equipment. Authorized repairs for GSA-approved security containers and vaults must be in accordance with Federal Standard 809.

(c) *Storage.* Contractors will store classified information and material in General Services Administration (GSA)-approved security containers, vaults built to Federal Standard 832, or an open storage area constructed in accordance with 32 CFR 2001.53. In the instance that an open storage area has a false ceiling or raised floor, contractors shall develop and implement procedures to ensure their structural integrity. Nothing in 32 CFR part 2001, should be construed to contradict or inhibit compliance with local laws or building codes, but the contractor will notify the applicable CSA if there are any conflicting issues that would inhibit compliance. Contractors will store classified material in accordance with the specific sections of 32 CFR 2001.43:

(1) CONFIDENTIAL. See 32 CFR 2001.43(b)(3).

(2) SECRET. See 32 CFR 2001.43(b)(2).

(3) TOP SECRET Documents. See 32 CFR 2001.43(b)(1).

(d) *Intrusion Detection Systems (IDS).* This paragraph specifies the minimum standards for an approved IDS when used for supplemental protection of TOP SECRET and SECRET material. The CSA will provide additional guidance for contingency protection procedures in the event of IDS malfunction, including contractors located in USG owned contractor operated facilities.

(1) *CSA approval.* (i) CSA approval is required before installing an IDS. The CSA will base approval of a new IDS on the criteria of Intelligence Community Directive 705 (available at: *https://www.dni.gov/files/documents/ICD/ICD_705_SCIFs.pdf*) and any applicable intelligence community standard, Underwriters Laboratories (UL) Standard 2050 (Government agencies with a role as a CSA or CSO may obtain this reference without charge; available at: *www.ul.com/contact*), or the CSA may base approval on written CSA-specific standards for the information to be protected.

(ii) Installation will be performed by an alarm services company certified by a NRTL that meets the requirements in 29 CFR 1910.7 to perform testing and certification. The NRTL-approved alarm service company is responsible for completing the appropriate alarm system description form approved by the NRTL.

(iii) All the intrusion detection equipment (IDE) used in the IDS installation will be tested and approved (or listed) by a NRTL, ensuring its proper operation and resistance from tampering. Any IDE that has not been tested and approved by a NRTL will require CSA approval.

(2) *Central monitoring station.* (i) For the purpose of monitoring alarms, an equivalent level of monitoring service is available from multiple types of providers. The central monitoring station may be located at a one of the following:

(A) Government contractor monitoring station (GCMS), formerly called a proprietary central station.

(B) Cleared commercial central station.

(C) Cleared protective signal service station (*e.g.,* fire alarm monitor).

(D) Cleared residential monitoring station.

(E) National industrial monitoring station.

(ii) SECRET-cleared central station employees at the alarm monitoring station will be in attendance in sufficient number to monitor each alarmed area within the cleared contractor facility.

(iii) The central monitoring station will be supervised continuously by a U.S. citizen who has eligibility for access to SECRET information.

(iv) The IDS must be activated at the close of business whenever the area is not occupied by cleared personnel. Any IDS exit delay function must expire prior to the cleared personnel leaving the immediate area. A record will be maintained to identify the person or persons who are responsible for setting and deactivating the IDS.

(v) Records will be maintained for 12 months indicating time of receipt of alarm, name(s) of security force personnel responding, time dispatched to facility or area, time security force personnel arrived, nature of alarm, and what follow-up actions were accomplished.

(3) *Investigative response to alarms.* (i) Alarm response teams will ascertain if intrusion has occurred and, if possible, assist in the apprehension of the individuals involved.

(A) If an alarm activation resets in a reasonable amount of time and no damage to the area is visible, then entrance into the area is not required and an initial response team may consist of uncleared personnel.

(B) If the alarm activation does not reset and damage is observed, then a cleared response team must be dispatched. The initial uncleared response team must stay on station until relieved by the cleared response team. If a cleared response team does not arrive within 1 hour, then a report to the CSA must be made by the close of the next business day.

(ii) The following resources may be used to investigate alarms: Proprietary security force personnel, central station guards, local law enforcement personnel, or a subcontracted guard service. The CSA may approve procedures for the use of entity cleared employees who can meet the minimum response requirements outlined in this section.

(A) For a GCMS, trained proprietary or subcontractor security force personnel, cleared to the SECRET level and sufficient in number to be dispatched immediately to investigate each alarm, will be available at all times when the IDS is in operation.

(B) For a commercial central station, protective signaling service station, or residential monitoring station, there will be a sufficient number of trained guards available to respond to alarms. Guards will be cleared only if they have the ability and responsibility to access the area or container(s) housing classified material (*i.e.,* keys to the facility have been provided or the personnel are authorized to enter the building or check the container or area that contains classified material).

(C) Uncleared guards dispatched by a commercial central station, protective signaling service station, or residential monitoring station in response to an alarm will remain on the premises until a designated, cleared representative of the facility arrives, or for a period of not less than 1 hour, whichever comes first. If a cleared representative of the facility does not arrive within 1 hour following the arrival of the guard, the central control station must provide the CSA with a report of the incident that includes the name of the subscriber facility, the date and time of the alarm, and the name of the subscriber's representative who was contacted to respond. A report will be submitted to the CSA by the end of business on the next business day.

(D) Subcontracted guards must be under a classified contract with either the installing alarm service company or the cleared facility.

(iii) The response time will be in accordance with the provisions in paragraphs (c)(1) through (c)(3) in this section as applicable. When environmental factors (*e.g.,* traffic, distance) legitimately prevent meeting the requirements for TOP SECRET information, as indicated in paragraph (c)(3) in this section, the CSA may authorize up to a 30-minute response time. The CSA approval will be documented on the alarm system description form and the specified response time will be noted on the alarm certificate. The requirement for response is 80 percent within the time limits.

(4) *Installation.* The IDS will be installed by an NRTL-approved entity or by an entity approved in writing by the CSA. When connected to a commercial central station, GCMS, national industrial monitoring station, or residential monitoring station, the service provided will include line security (*i.e.,* the connecting lines are electronically supervised to detect evidence of tampering or malfunction). The level of protection for the alarmed area will include all points of probable entry (perimeter doors and accessible windows) with magnetic contacts and motion detectors positioned in the probable intruder paths from the probable points of entry to the classified information. In accordance with Federal Standard 809, no IDS sensors (magnetic contacts or vibration detectors) will be installed on GSA-approved security containers. CSA authorization on the alarm system description form is required in the following circumstances:

(i) When line security is not available, installation will require two independent means of transmission of the alarm signal from the alarmed area to the monitoring station.

(ii) Alarm installation provides a level of protection, *e.g.* UL's Extent 5, based on patrolling employees and CSA approval of security-in-depth.

(iii) Where law enforcement personnel are the primary alarm response. Under those circumstances, the contractor must obtain written assurance from the police department regarding the ability to respond to alarms in the required response time.

(iv) Alarm signal transmission is over computer-controlled data-networks (*e.g.,* internet, intranet). The CSA will provide specific acceptance criteria (*e.g.,* encryption requirements) for alarms monitored over data networks.

(v) Alarm investigator response time exceeds the parameters outlined in paragraphs (c)(1) through (c)(3) in this section as applicable.

(5) *Certification of compliance.* Evidence of compliance with the requirements of this section will consist of a valid (current) certification by an approved NRTL for the appropriate category of service. This certificate:

(i) Will have been issued to the protected facility by the NRTL, through the alarm service company.

(ii) Serves as evidence that the alarm service company that did the installation is:

(A) Listed as furnishing security systems of the category indicated.

(B) Authorized to issue the certificate of installation as representation that the equipment is in compliance with requirements established by NRTL for the class of alarm system.

(C) Subject to the NRTL inspection program whereby periodic inspections are made of representative alarm installations by NRTL personnel to verify the correctness of certification practices.

(6) *Exceptional cases.* (i) If the requirements in paragraphs (d)(1) through (d)(5) in this section cannot be met, the contractor may request CSA approval for an alarm system meeting one of these conditions, which will be documented on the alarm system description form:

(A) Monitored by a central control station but responded to by a local (municipal, county, state) law enforcement organization.

(B) Connected by direct wire to alarm receiving equipment located in a local (municipal, county, State) police station or public emergency service dispatch center. This alarm system is activated and deactivated by employees of the contractor, but the alarm is monitored and responded to by personnel of the monitoring police or emergency service dispatch organization. Personnel monitoring alarm signals at police stations or dispatch centers do not require PCLs. Police department response systems may be requested only when:

(*1*) The contractor facility is located in an area where central control station services are not available with line security or proprietary security force personnel, or a contractually-dispatched response to an alarm signal cannot be achieved within the time limits required by the CSA.

(*2*) It is impractical for the contractor to establish a GCMS or proprietary guard force at that location. In this case, installation of these systems must use NRTL-approved equipment and be accomplished by an NRTL-approved entity meeting the applicable testing standard for the category of service.

(ii) An installation proposal, explaining how the system would operate, will be submitted to the CSA. The proposal must include:

(A) Sufficient justification for the granting of an exception and the full name and address of the police department that will monitor the system and provide the required response.

(B) The name and address of the NRTL-approved entity that will install the system, and inspect, maintain, and repair the equipment.

(iii) The response times will be in accordance with the provisions in paragraphs (c)(1) through (c)(3) in this section as applicable. Arrangements will be made with the central monitoring station to immediately notify a contractor representative on receipt of the alarm. The contractor representative is required to go immediately to the facility to investigate the alarm and to take appropriate measures to secure the classified material.

(iv) In exceptional cases where central station monitoring service is available, but no proprietary security force, central station, or subcontracted guard response is available, and where the police department does not agree to respond to alarms, and no other manner of investigative response is available, the CSA may approve cleared employees as the sole means of response.

(e) *Information controls.*—(1) *Information management system.* Contractors will establish:

(i) A system to verify that classified information in their custody is used or retained only for a lawful and authorized USG purpose.

(ii) An information management system to protect and control the classified information in their possession regardless of media, to include information processed and stored on authorized information systems.

(2) *Top secret information.* Contractors will establish controls for TOP SECRET information and material to validate procedures are in place to address accountability, need to know, and retention, e.g., demonstrating that TOP SECRET material stored in an electronic format on an authorized classified information system does not need to be individually numbered in series. These controls are in addition to the information management system and must be applied, unless otherwise directed by the applicable CSA, regardless of the media of the TOP SECRET information, to include information processed and stored on authorized information systems. Unless otherwise directed by the applicable

CSA, the contractor will establish the following additional controls:

(i) Designate TOP SECRET control officials to receive, transmit, and maintain access and accountability records to TOP SECRET information.

(ii) Conduct an annual inventory of TOP SECRET information and material.

(iii) Establish a continuous receipt system for the transmittal of TOP SECRET information within and outside the contractor location.

(iv) Number each item of TOP SECRET material in a series. Place the copy number on TOP SECRET documents, regardless of media, and on all associated transactions documents.

(v) Establish a record of TOP SECRET material when the material is:

(A) Completed as a finished document.

(B) Retained for more than 180 days after creation, regardless of the stage of development.

(C) Transmitted outside the contractor location.

(vi) Establish procedures for destruction of TOP SECRET material by two authorized persons.

(vii) Establish destruction records for TOP SECRET material and maintain the records for two years in accordance with § 117.13(d)(5) or in accordance with GCA requirements.

(3) *Working papers.* Contractors will establish procedures for the control of classified working papers generated in the preparation of a finished document. The contractor will:

(i) Date working papers when they are created.

(ii) Mark each page of the working papers with the highest classification level of any information contained in them and with the annotation ''WORKING PAPERS.''

(iii) Destroy working papers when no longer needed.

(iv) Mark in the same manner prescribed for a finished document at the same classification level if released outside the contractor location or retained for more than 180 days from the date of origin.

(4) *Combinations to locks.* Contractors will follow the guidance in 32 CFR 2001.45(a)(1) and 2001.43 (c) to address thresholds when combinations will be changed. Combinations to locks used to secure vaults, open storage areas, and security containers that are approved for the safeguarding of classified information will be protected in the same manner as the highest level of classified information that the vault, open storage area, or security container is used to protect.

(5) *Information system passwords.* Contractors will follow the guidance established in 32 CFR 2001.45(a)(2) for the protection of passwords to information systems authorized to process and store classified information at the highest level of classification to which the information system is authorized.

(6) *Reproduction of classified information.* Contractors will follow the guidance established in 32 CFR 2001.45(b) for the reproduction of classified information.

(f) *Transmission of classified information.* Contractors will establish procedures for transmitting and receiving classified information and material in accordance with 32 CFR 2001.46.

(1) *Top secret.* The contractor must have written authorization from the GCA to transmit TOP SECRET material outside the contractor location.

(2) *Transmission outside the United States and its Territorial Areas.* The contractor may transmit classified material to a USG activity outside the United States or a U.S. territorial area only under the provisions of a classified contract or with written authorization from the GCA.

(3) *Commercial delivery entities.* The CSA may approve contractors to transmit SECRET or CONFIDENTIAL information within the United States and its territorial areas by means of a commercial delivery entity that is a current holder of the GSA contract for overnight delivery, and which provides nation-wide, overnight service with computer tracking and reporting features (a list of current contract holders may be found at: *https://www.archives.gov/isoo/faqs#what-is-overnightcarriers*). Such entities do not need to be determined eligible for access to classified information.

(i) Prior to CSA approval, the contractor must establish and document procedures to ensure the proper protection of incoming and outgoing classified packages, including the street delivery address, for each cleared facility intending to use GSA-listed commercial delivery entities for overnight services.

(ii) Contractors will establish procedures for the use of commercial delivery entities in accordance with 32 CFR part 2001. The procedures will:

(A) Confirm that the commercial delivery entity provides nationwide, overnight delivery service with automated in-transit tracking of the classified packages.

(B) Ensure the package integrity during transit and that incoming shipments are received by appropriately cleared personnel.

(C) Not be used for COMSEC, NATO, or FGI.

(4) *Couriers and hand carriers.* Contractors may designate cleared employees as couriers or hand carriers. Contractors will:

(i) Brief employees providing such services on their responsibility to safeguard classified information and keep classified material in their possession at all times.

(ii) Provide employees with an identification card or badge which contains the contractor's name and the name and a photograph of the employee.

(iii) Make arrangements in advance of departure for overnight storage at a USG installation or at a cleared contractor's facility that has appropriate storage capability, if needed.

(iv) Conduct an inventory of the material prior to departure and upon return. The employee will carry a copy of the inventory with them.

(5) *Use of commercial passenger aircraft.* The contractor may authorize cleared employees to hand carry classified material aboard commercial passenger aircraft.

(i) *Routine processing.* Employees hand carrying classified material are subject to routine processing by airline security agents. Hand-held packages will normally be screened by x-ray examination. If security personnel are not satisfied with the results of the inspection and requests the prospective passenger to open a classified package for visual examination, the traveler must inform the screener that the carry-on items contain USG classified information and cannot be opened. Under no circumstances may traveler or security personnel open the classified material unless required by customs or other government officials.

(ii) *Special processing.* The contractor will contact the appropriate air carrier in advance to explain the particular circumstances and obtain instructions on the special screening procedures to follow when:

(A) Routine processing would subject the classified material to compromise or damage.

(B) Visual examination is or may be required to successfully screen a classified package.

(C) Classified material is in specialized containers, which due to its size, weight, or other physical characteristics cannot be routinely processed.

(iii) *Authorization letter.* Contractors will provide employees with written authorization to hand carry classified material on commercial aircraft that includes:

(A) Full name, date of birth, height, weight, and signature of the traveler and statement that he or she is authorized to transmit classified material.

(B) Description of the type of identification the traveler will present on request.

(C) Description of the material being hand carried, with a request that it be exempt from opening.

(D) Identification of the points of departure, destination, and known transfer points.

(E) Name, telephone number, and signature of the FSO, and the location and telephone number of the CSA.

(6) *Escorts.* If an escort is necessary to ensure the protection of the classified information being transported, the contractor will assign a sufficient number to each classified shipment to ensure continuous surveillance and control over the shipment while in transit. The contractor will furnish escorts with specific written instructions and operating procedures prior to shipping that include:

(i) Name and address of persons, including alternates, to whom the classified material is to be delivered.

(ii) Receipting procedures.

(iii) Means of transportation and the route to be used.

(iv) Duties of each escort during movement, during stops end route, and during loading and unloading operations.

(v) Emergency and communication procedures.

(g) *Destruction.* Contractors will:

(1) Destroy classified material in their possession based on the disposition instructions in the contract security classification specification or equivalent.

(2) Follow the guidance for destruction of classified material in accordance with 32 CFR 2001.47 and the destruction equipment standards in accordance with 32 CFR 2001.42(b). See *https://www.nsa.gov/resources/everyone/media-destruction/* and any CSA provided guidance for additional information.

(h) *Disclosure.* Contractors will establish processes by which classified information is disclosed only to authorized persons.

(1) *Disclosure to employees.* Contractors are authorized to disclose classified information to their cleared employees with the appropriate eligibility for access to classified information and need to know as necessary, including cleared employees across the MFO, when applicable, for the performance of tasks or services essential to the fulfillment of a classified contract or subcontract.

(2) *Disclosure to subcontractors.*—(i) *Contractors:* (A) Are authorized to disclose classified information to a cleared subcontractor with the appropriate entity eligibility determination (also known as a facility security clearance) and need to know when access to classified information is necessary for the performance of tasks or services essential to the fulfillment of a prime contract or a subcontract.

(B) Will convey appropriate classification guidance for the classified information to be disclosed with the subcontract in accordance with § 117.13.

(ii) *The CSA must have:* (A) Made a determination of eligibility for access to classified information for the subcontractor, at the same level, or higher, than the classified information to be disclosed, to allow for such disclosures.

(B) Approved storage capability for classified material at the subcontractor location if a physical transfer of classified material occurs.

(3) *Disclosure between parent and subsidiaries*—(i) *Contractors:* (A) Are authorized to disclose classified information between parent and subsidiary entities with the appropriate entity eligibility determination (also known as a facility security clearance) and need to know when access to classified information is necessary for the performance of tasks or services essential to the fulfillment of a prime or subcontract.

(B) Will convey appropriate classification guidance with the agreement or procurement action that necessitates the disclosure.

(ii) *The CSA must have:* (A) Made a determination of eligibility for access to classified information for both the parent and subsidiary, at the same level, or higher, than the classified information to be disclosed, to allow for such disclosures.

(B) Approved storage capability for classified material at the parent and the subsidiary if a physical transfer of classified material occurs.

(4) *Disclosure to federal agencies.* Contractors will not disclose classified information received or generated under a contract from one agency to any other federal agency unless specifically authorized by the agency that has classification jurisdiction over the information.

(5) *Disclosure of classified information to foreign persons.* Contractors will not disclose classified information to foreign persons unless specified by the contract and release of the information is authorized in writing by the government agency having classification jurisdiction over the information involved, *i.e.* the DOE for RD and FRD (also see § 117.23), the NSA for COMSEC, the DNI for SCI, and all other executive branch departments and agencies for classified information under their respective jurisdictions.

(6) *Disclosure to other contractors.* Contractors will not disclose classified information to another contractor except in furtherance of a contract, subcontract, or other GCA purpose without the authorization of the GCA, if such authorization is required by contract.

(7) *Disclosure of classified information in connection with litigation.* Contractors will not disclose classified information to:

(i) Attorneys hired solely to represent the contractor in any civil or criminal case in federal or State courts unless the disclosure is specifically authorized by the agency that has jurisdiction over the information.

(ii) Any federal or state court except on specific instructions of the agency, which has jurisdiction over the information or the attorney representing the United States in the case.

(8) *Disclosure to the public.* Contractors will not disclose classified information to the public. Contractors will not disclose unclassified information pertaining to a classified contract to the public without prior review and clearance as specified in the Contract Security Classification Specification, or equivalent, for the contract or as otherwise specified by the GCA. The procedures of this paragraph also apply to information pertaining to classified contracts intended for use in unclassified brochures, promotional sales literature, reports to stockholders, or similar material.

(i) The contractor will:

(A) Submit requests for approval through the activity specified in the GCA-provided classification guidance for the contract involved.

(B) Include in each request the approximate date the contractor intends to release the information for public disclosure and identify the media to be used for the initial release.

(C) Retain a copy of each approved request for release for a period of one inspection cycle for review by the CSA.

(D) Clear all information developed subsequent to the initial approval through the appropriate office prior to public disclosure.

(ii) Unless specifically prohibited by the GCA, the contractor does not need to request approval for disclosure of:

(A) The fact that a contract has been received, including the subject of the contract or type of item in general terms

provided the name or description of the subject is not classified.

(B) The method or type of contract.

(C) Total dollar amount of the contract unless that information equates to:

(*1*) A level of effort in a sensitive research area.

(*2*) Quantities of stocks of certain weapons and equipment that are classified.

(D) Whether the contract will require the hiring or termination of employees.

(E) Other information that from time-to-time may be authorized on a case-by-case basis in a specific agreement with the contractor.

(F) Information previously officially approved for public disclosure.

(iii) Information that has been declassified is not authorized for public disclosure. If the information is comingled with CUI, or qualifies as CUI once declassified, it will be marked and protected as CUI until it is decontrolled pursuant to 32 CFR part 2002 and reviewed for public release. If the information does not qualify as CUI, it will be protected in accordance with the basic safeguarding requirements in 48 CFR 52.204–21 and subject to the agency's public release procedures. Contractors will request approval for public disclosure of declassified information in accordance with the procedures of this paragraph.

(i) *Disposition.* Contractors will:

(1) Establish procedures for review of their classified holdings on a recurring basis to ensure the classified holdings are in support of a current contract or authorization to retain beyond the end of the contract period.

(2) Destroy duplicate copies as soon as practical.

(3) For disposition of classified material not received under a specific contract:

(i) Return or destroy classified material received with a bid, proposal, or quote if the bid, proposal, or quote is not:

(A) Submitted or is withdrawn within 180 days after the opening date of bids, proposals, or quotes.

(B) Accepted within 180 days after notification that a bid, proposal, or quote has not been accepted.

(ii) If the classified material was not received under a specific contract, such as material obtained at classified meetings or from a secondary distribution center, return or destroy the classified material within one year after receipt.

(j) *Retention.* The provisions of § 117.13(d)(5) apply for retention of classified material upon completion of a classified contract.

(1) If contractors propose to retain copies of classified material beyond 2 years, the contractor will identify:

(i) TOP SECRET material identified in a list of specific documents unless the GCA authorizes identification by subject and approximate number of documents.

(ii) SECRET and CONFIDENTIAL material may be identified by general subject and the approximate number of documents.

(iii) Contractors will include a statement of justification for retention beyond two years based on if the material:

(A) Is necessary for the maintenance of the contractor's essential records.

(B) Is patentable or proprietary data to which the contractor has the title.

(C) Will assist the contractor in independent research and development efforts.

(D) Will benefit the USG in the performance of other prospective or existing agency contracts.

(E) Will benefit the USG in the performance of another active contract and will be transferred to that contract (specify contract).

(2) If the GCA does not authorize retention beyond two years, the contractor will destroy all classified material received or generated in the performance of a classified contract unless it has been declassified or the GCA has requested that the material be returned.

(k) *Termination of security agreement.* Notwithstanding the provisions for retention outlined in paragraph (i) in this section, in the event that the CSA terminates the contractor's eligibility for access to classified information, the contractor will return all classified material in its possession to the GCA concerned, or dispose of such material in accordance with instructions from the CSA.

(l) *Safeguarding CUI.* While outside the requirements of the NISPOM, when a classified contract also includes provisions for protection of CUI, contractors will comply with those contract requirements.

§ 117.16 Visits and meetings.

(a) *Visits.* This paragraph applies when, for a lawful and authorized USG purpose, it is anticipated that classified information will be disclosed during a visit to a cleared contractor facility or to a USG facility.

(1) *Classified visits.* The number of classified visits will be held to a minimum. The contractor:

(i) Must determine that the visit is necessary and the purpose of the visit cannot be achieved without access to, or disclosure of, classified information.

(ii) Will establish procedures to ensure positive identification of visitors, appropriate PCL, and need-to-know prior to the disclosure of any classified information.

(iii) Will establish procedures to ensure that visitors are only afforded access to classified information consistent with the purpose of the visit.

(2) *Need-to-know determination.* The responsibility for determining need-to-know in connection with a classified visit rests with the individual who will disclose classified information during the visit. Need-to-know is generally based on a contractual relationship between the contractors. In other circumstances, disclosure of the information will be based on an assessment that the receiving contractor has a bona fide need to access the information in furtherance of a GCA purpose.

(3) *Visits by USG representatives.* Representatives of the USG, when acting in their official capacities as inspectors, investigators, or auditors, may visit a contractor's facility, provided these representatives present appropriate USG credentials upon arrival.

(4) *Visit authorization.* (i) If a visit requires access to classified information, the host contractor will verify the visitor's PCL level. Verification of a visitor's PCL may be accomplished by a review of a CSA-designated database that contains the information or by a visit authorization letter (VAL) provided by the visitor's employer.

(ii) If a CSA-designated database is not available and a VAL is required, contractors will include in all VALs:

(A) Contractor's name, employee's name, address, and telephone number, assigned commercial and government entity (CAGE) code, if applicable, and certification of the level of the entity eligibility determination.

(B) Name, date and place of birth, and citizenship of the employee intending to visit.

(C) Certification of the proposed visitor's PCL and any special access authorizations required for the visit.

(D) Name of person(s) to be visited.

(E) Purpose and sufficient justification for the visit to allow for a determination of the necessity of the visit.

(F) Date or period during which the VAL is to be valid.

(5) *Long term visitors.* (i) When USG employees or employees of one contractor are temporarily stationed at another contractor's facility, the security procedures of the host contractor will govern.

(ii) USG personnel assigned to or visiting a contractor facility and engaged in oversight of an acquisition program

will retain control of their work product. Classified work products of USG employees will be handled in accordance with this rule. Contractor procedures will not require USG employees to relinquish control of their work products, whether classified or not, to a contractor.

(iii) Contractor employees at USG installations will follow the security requirements of the host. This does not relieve the contractor from security oversight of their employees who are long-term visitors at USG installations.

(b) *Classified meetings.* This paragraph applies to a conference, seminar, symposium, exhibit, convention, training course, or other such gathering during which classified information is disclosed, hereafter called a ''meeting.'' Disclosure of classified information to large diverse audiences such as conferences increases security risks. Classified disclosure at such meetings may occur when it serves a government purpose and adequate security measures have been provided in advance.

(1) *Meeting conducted by a cleared contractor.* If conducted by a cleared contractor, the meeting is authorized by a USG agency that has agreed to assume security jurisdiction. The USG agency:

(i) Must approve security arrangements, announcements, attendees, and the location of the meeting.

(ii) May delegate certain responsibilities to a cleared contractor for the security arrangements and other actions necessary for the meeting under the general supervision of the USG agency.

(2) *Request for authorization.* Contractors desiring to conduct meetings that require sponsorship will submit their requests to the USG agency that has principal interest in the subject of each meeting. Requests for authorization will include:

(i) An explanation of the USG purpose to be served by disclosing classified information at the meeting and why the use of conventional channels for release of the classified information will not advance those interests.

(ii) The subject of the meeting and scope of classified topics, to include the classification level, to be disclosed at the meeting.

(iii) The expected dates and location of the meeting.

(iv) The general content of the proposed announcement or invitation to be sent to prospective attendees or participants.

(v) The identity of any other non-government organization involved and a full description of the type of support it will provide.

(vi) A list of any foreign representatives (including their nationality, name, organizational affiliation) whose attendance at the meeting is proposed.

(vii) A description of the security arrangements necessary for the meeting to comply with the requirements of this rule.

(3) *Locations of meetings.* Classified sessions will be held only at a USG installation or a cleared contractor facility where adequate physical security and procedural controls have been approved. The authorizing USG agency is responsible for evaluating and approving the location proposed for the meeting.

(4) *Security arrangements for meetings.* The contractor will develop the security measures and procedures to be used and obtain the authorizing agency's approval. The security arrangements must provide:

(i) *Announcements.* Approval of the authorizing agency will be obtained for all announcements of the meeting.

(A) Announcements will be unclassified and will be limited to a general description of topics expected to be presented, names of speakers, and administrative instructions for requesting invitations or participation. Classified presentations will not be solicited in the announcement.

(B) When the meeting has been approved, announcements may only state that the USG agency has authorized the conduct of classified sessions and will provide necessary security assistance.

(C) The announcement will further specify that security clearances and justification to attend classified sessions are to be forwarded to the authorizing agency or its designee.

(D) Invitations to foreign persons will be sent by the authorizing USG agency.

(ii) *Clearance and need-to-know.* All persons in attendance at classified sessions will possess the requisite clearance and need-to-know for the information to be disclosed.

(A) Need-to-know will be determined by the authorizing agency or its designee based on the justification provided.

(B) Attendance will be authorized only to those persons whose security clearance and justification for attendance have been verified by the security officer of the organization represented.

(C) The names of all authorized attendees or participants must appear on an access list with entry permitted to the classified session only after verification of the attendee's identity based on presentation of official photographic identification such as a passport, contractor or USG identification card.

(iii) *Presentations.* Classified information must be authorized for disclosure in advance by the USG agency having jurisdiction over the information to be presented.

(A) Individuals making presentations at meetings will provide sufficient classification guidance to enable attendees to identify what information is classified and the level of classification.

(B) Classified presentations will be delivered orally or visually.

(C) Copies of classified presentation materials will not be distributed at the classified meeting, and any classified notes or electronic recordings of classified presentations will be classified, safeguarded, and transmitted as required by this rule.

(iv) *Physical security.* The physical security measures for the classified sessions will provide for control of, access to, and dissemination of, the classified information to be presented and will provide for secure storage capability, if necessary.

(5) *Disclosure authority at meetings.* Authority to disclose classified information at meetings, whether disclosure is by officials of industry or USG, must be granted by the USG agency or activity that has classification jurisdiction over the information to be disclosed. Each contractor that desires to disclose classified information at a meeting is responsible for requesting and obtaining disclosure approvals. Associations are not responsible for ensuring that classified presentations and papers of other organizations have been approved for disclosure. A contractor desiring to disclose classified information at a meeting will:

(i) Obtain prior written authorization for each proposed disclosure of classified information from the USG agency having jurisdiction over the information involved.

(ii) Furnish a copy of the disclosure authorization to the USG agency sponsoring the meeting.

(6) *Requests to attend classified meetings.* Before a contractor employee can attend a classified meeting, the contractor will provide justification for why the employee requires access to the classified information, cite the classified contract or GCA program or project involved, and forward the information to the authorizing USG agency.

§ 117.17 Subcontracting.

(a) *Prime contractor responsibilities.*—(1) *Responsibilities.* Before a prime contractor may release or disclose classified information to a subcontractor, or cause classified information to be generated by a subcontractor, a determination that access to classified information will be required and such access serves a legitimate USG requirement for the performance of a ''classified contract'' in accordance with § 117.9(a) must be made. Prime contractors are responsible for communicating the appropriate security requirements to all subcontractors.

(i) A ''security requirements clause'' and a ''Contract Security Classification Specification,'' or equivalent, will be incorporated in the solicitation and in the subcontract. (See the ''security requirements clause'' in the prime contract.)

(ii) The subcontractor must possess an appropriate entity eligibility determination and a classified information safeguarding capability if possession of classified information will be required.

(A) If access to classified information will not be required in the pre-award phase, prospective subcontractors are not required to possess an entity eligibility determination to receive or bid on the solicitation.

(B) If a prospective subcontractor requires access to classified information during the pre-award phase and does not have the appropriate entity eligibility determination or a classified information safeguarding capability, the prime contractor will request the CSA of the subcontractor to initiate the necessary action.

(iii) If access to classified information will not be required, the contract is not a classified contract within the meaning of this rule. If the prime contract contains requirements for release or disclosure of protected information that is not classified, such as CUI, the requirements will be incorporated in the solicitation and the subcontract and are not covered by this rule.

(2) *Prospective subcontractors entity eligibility determinations.* (i) The prime contractor will verify whether the prospective subcontractors have the appropriate entity eligibility determination and also a classified information safeguarding capability, if a subcontract requirement. This determination can be made if there is an existing contractual relationship between the parties involving classified information of the same or higher category, and must be verified by accessing the CSA-designated database, or by contacting the CSA.

(ii) If a prospective subcontractor does not have the appropriate entity eligibility determination or a classified information safeguarding capability, the prime contractor will request that the CSA of the subcontractor initiate the necessary action.

(A) Requests will include, at a minimum, the full name, address, and contact information for the requester; the full name, address, and contact information for a contact at the facility to be processed for an entity eligibility determination; the level of clearance and the required classified information safeguarding capability; and full justification for the request.

(B) Requests for safeguarding capability will include a description, quantity, end-item, and classification of the information related to the proposed subcontract.

(C) Other factors necessary to help the CSA determine if the prospective subcontractor meets the requirements of this rule will be identified, such as any special access requirements.

(3) *Lead time for entity eligibility determination when awarding to an uncleared subcontractor.* Requesting contractors will allow sufficient lead time in connection with the award of a classified subcontract to enable an uncleared bidder to be processed for the necessary entity eligibility determination. When the entity eligibility determination cannot be granted in sufficient time to qualify the prospective subcontractor for participation in the current procurement action, the CSA will continue the entity eligibility determination processing action to qualify the prospective subcontractor for future contract consideration provided:

(i) The delay in processing the entity eligibility determination was not caused by a lack of cooperation on the part of the prospective subcontractor.

(ii) Future classified negotiations may occur within 12 months.

(iii) There is reasonable likelihood the subcontractor may be awarded a classified subcontract.

(iv) *Subcontracting that involves access to FGI.* (A) A U.S. contractor may award a subcontract that involves access to FGI to another U.S. contractor after verifying with the CSA that the prospective subcontractor has the appropriate entity eligibility determination and a classified information storage capability, and review of the prime contract to determine if there are any contractual limitations for approval before awarding a subcontract. The contractor awarding a subcontract will provide appropriate security classification guidance and incorporate the pertinent security provisions in the subcontract.

(B) The contractor cannot award subcontracts involving FGI to a contractor in a third country or to a U.S. entity with a limited entity eligibility determination based on third-country FOCI without the express written consent of the originating foreign government. The CSA will coordinate with the appropriate foreign government authorities.

(b) *Security classification guidance.* (1) Prime contractors will ensure that a Contract Security Classification Specification, or equivalent, is incorporated in each classified subcontract.

(i) When preparing classification guidance for a subcontract, the prime contractor may extract pertinent information from:

(A) The Contract Security Classification Specification, or equivalent, issued with the prime contract.

(B) Security classification guides issued with the prime contract.

(C) Any security guides that provide guidance for the classified information furnished to, or that will be generated by, the subcontractor.

(ii) The Contract Security Classification Specification, or equivalent, prepared by the prime contractor will be certified by a designated official of the contractor.

(iii) In the absence of exceptional circumstances, the classification specification will not contain any classified information. If classified supplements are required as part of the Contract Security Classification Specification, or equivalent, they will be identified and forwarded to the subcontractor by separate correspondence.

(2) An original Contract Security Classification Specification, or equivalent, will be included with each RFQ, RFP, IFB, or other solicitation to ensure that the prospective subcontractor is aware of the security requirements of the subcontract and can plan accordingly. An original Contract Security Classification Specification, or equivalent, will also be included in the subcontract awarded to the successful bidder.

(3) A revised Contract Security Classification Specification, or equivalent, will be issued as necessary during the lifetime of the subcontract when the security requirements change.

(4) Requests for public release by a subcontractor will be forwarded through the prime contractor to the GCA.

(c) *Responsibilities upon completion of the subcontracts.* (1) Upon completion of the subcontract, the subcontractor may retain classified material received or generated under the subcontract for a two-year period, in accordance with the provisions in § 117.13(d)(5).

(2) If retention is required beyond the two-year period, the subcontractor must request written retention authority through the prime contractor to the GCA, including the information required by § 117.15(j).

(3) If retention authority is approved by the GCA, the prime contractor will issue a final Contract Security Classification Specification, or equivalent, annotated to provide the retention period and final disposition instructions.

(d) *Notification of invalidation, marginal, or unsatisfactory conditions.* The prime contractor will be notified if the CSA discovers marginal or unsatisfactory conditions at the subcontractor's facility or if the CSA invalidates the subcontractor's facility clearance. Once notified, the prime contractor will follow the instructions received on what action, if any, should be taken in order to safeguard classified material relating to the subcontract.

§ 117.18 Information system security.

(a) *General.* (1) Contractor information systems that are used to capture, create, store, process, or distribute classified information must be properly managed to protect against unauthorized disclosure of classified information. The contractor will implement protective measures using a risk-based approach that incorporates minimum standards for their insider threat program in accordance with CSA-provided guidance.

(2) The CSA will issue guidance based on requirements for federal systems, pursuant to 44 U.S.C. Ch. 35 of subchapter II, also known as the ''Federal Information Security Modernization Act,'' and as set forth in National Institute of Standards and Technology (NIST) Special Publication 800–37 (available at: *https://csrc.nist.gov/publications/detail/sp/800-37/rev-2/final*), Committee on National Security Systems (CNSS) Instruction 1253 (available at: *https://www.cnss.gov/CNSS/openDoc.cfm?QwPYrAJ5Ldq+s+jvttTznQ==*), and other applicable CNSS and NIST publications (*e.g.,* NIST Special Publication 800–53).

(b) *Information system security program.* The contractor will maintain an information system security program that supports overall information security by incorporating a risk-based set of management, operational, and technical security controls in accordance with CSA-provided guidance. The contractor will incorporate into the program:

(1) Policies and procedures that reduce information security risks to an acceptable level and address information security throughout the information system life cycle.

(2) Plans and procedures to assess, report, isolate, and contain data spills and compromises, to include sanitization and recovery methods.

(3) Information system security training for authorized users, as required in CSA provided guidance.

(4) Policies and procedures that address key components of the contractor's insider threat program, such as:

(i) User activity monitoring network activity, either automated or manual.

(ii) Information sharing procedures.

(iii) A continuous monitoring program.

(iv) Protecting, interpreting, storing, and limiting access to user activity monitoring automated logs to privileged users.

(5) Processes to continually evaluate threats and vulnerabilities to contractor activities, facilities, and information systems to ascertain the need for additional safeguards.

(6) Change control processes to accommodate configuration management and to identify security relevant changes that may require re-authorization of the information system.

(7) Methods to ensure users are aware of rights and responsibilities through the use of banners and user agreements.

(c) *Contractor responsibilities*—(1) *Certification.* The contractor will:

(i) Certify to the CSA that the security program for information systems to process classified information addresses management, operation, and technical controls in accordance with CSA-provided guidelines.

(ii) Provide adequate resources to the information system security program and organizationally align to ensure prompt support and successful execution of a compliant information system security program.

(2) *ISSM.* Contractors that are or will be processing classified information on an information system will appoint an employee ISSM. The contractor will confirm that the ISSM is adequately trained, has sufficient experience, and possesses technical competence commensurate with the complexity of the information system. The ISSM will:

(i) Oversee the development, implementation, and evaluation of the contractor's information system program for contractor management, information system personnel, users, and others as appropriate.

(ii) Coordinate with the contractor's insider threat senior program official so that insider threat awareness is addressed in the contractor's information system security program.

(iii) Develop, document, and monitor compliance of the contractor's information system security program in accordance with CSA-provided guidelines for management, operational, and technical controls.

(iv) Verify self-inspections are conducted at least every 12 months on the contractor's information systems that process classified information, and that corrective actions are taken for all identified findings.

(v) Certify to the CSA in writing that the systems security plan (SSP) is implemented for each authorized information systems, specified in the SSP; the specified security controls are in place and properly tested; and the information system continues to function as described in the SSP.

(vi) Brief users on their responsibilities with regard to information system security and verify that contractor personnel are trained on the security restrictions and safeguards of the information system prior to access to an authorized information system.

(vii) Develop and maintain security documentation of the security authorization request to the CSA. Documentation may include:

(A) SSPs.

(B) Security assessment reports.

(C) Plans of actions and milestones.

(D) Risk assessments.

(E) Authorization decision letters.

(F) Contingency plans.

(G) Configuration management plans.

(H) Security configuration checklists.

(I) System interconnection agreements.

(3) *Information systems security officer (ISSO).* The ISSM may assign an ISSO. If assigned, the ISSO will:

(i) Verify the implementation of the contractor's information system security program as delegated by the ISSM.

(ii) Ensure continuous monitoring strategies and verify corrective actions to the ISSM.

(iii) Conduct self-inspections and verify corrective actions to the ISSM.

(4) *Information system users.* All information system users will:

(i) Comply with the information system security program requirements as part of their responsibilities for protecting classified information.

(ii) Be accountable for their actions on an authorized information system.

(iii) Not share any authentication mechanisms (including passwords) issued for the control of their access to an information system.

(iv) Protect authentication mechanisms at the highest classification level and most restrictive classification category of information to which the mechanisms permit access.

(v) Be subject to monitoring of their activity on any classified network, understanding that the results of such monitoring can be used against them in a criminal, security, or administrative proceeding or action.

(vi) Notify the ISSM or ISSO when access to a classified system is no longer required.

(d) *Information system security life-cycle.* The CSA-provided guidance on the information system security life-cycle is based on the risk management framework outlined in NIST special publication 800–37 that emphasizes:

(1) Building security into information systems during initial development.

(2) Maintaining continuous awareness of the current state of information system security.

(3) Keeping contractor management informed to facilitate risk management decisions.

(4) Supporting reciprocity of information system authorizations.

(e) *Risk management framework.* The risk management framework is a seven-step process used for managing information system security-related risks. These steps will be used to help ensure security capabilities provided by the selected security controls are implemented, tested, validated, and approved by the USG authorizing official with a degree of assurance appropriate for the information system. This process accommodates an on-going risk mitigation strategy.

(1) *Prepare.* The contractor will execute essential activities at the organization, mission and business process, and system levels of the organization to help prepare the organization to manage its security and privacy risks using the Risk Management Framework.

(2) *Categorize.* The contractor will categorize the information system and the information processed, stored, and transmitted by the information system based on an impact analysis. Unless imposed by contract, the information system baseline is moderate-confidentiality, low-integrity, and low-availability.

(3) *Select.* The contractor will select an initial set of baseline security controls for the information system based on the security categorization; tailoring and supplementing the security control baseline as needed based on an organizational assessment of risk and local conditions.

(4) *Implement.* The contractor will implement the security controls and document how the controls are deployed within the information system and the operational environment.

(5) *Assess.* The contractor will assess the security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for the information system. The contractor will review and certify to the CSA that all systems have the appropriate protection measures in place.

(6) *Authorize.* The CSA will use the information provided by the contractor to make a timely, credible, and risk-based decision to authorize the system to process classified information. The CSA must authorize the system before the contractor can use the system to process classified information.

(7) *Monitor.* The contractor will monitor and assess selected security controls in the information system on an ongoing basis:

(i) Effectiveness of security controls.

(ii) Documentation of changes to the information system and the operational environment.

(iii) Analysis of the security impact of changes to the information system.

(iv) Making appropriate reports to the CSA.

(f) *Unclassified information systems that process, store, or transmit CUI.* While outside the requirements of the NISPOM, contractors will comply with contract requirements regarding contractor information systems that process, store, or transmit CUI.

§ 117.19 International security requirements.

(a) *General.* This section provides information and procedures governing the protection of classified information in international programs.

(b) *Disclosure of classified U.S. information to foreign interests.*—(1) *Applicable federal law.* The transfer of articles, services, and related data to a foreign person, within or outside the United States, or the movement of such material or information to any destination outside of the legal jurisdiction of the United States constitutes an export. Depending on the nature of the articles or data, most exports are pursuant to (1) 22 U.S.C. chapter 39, also known and referred to in this rule as the ''Arms Export Control Act,'' (2) 50 U.S.C. 4801 *et seq.,* also known as the ''Export Control Reform Act of 2018,'' or (3) the AEA. This section applies to those exports that involve classified information.

(2) *Security agreements.*—(i) Bilateral security agreements (*e.g.,* General Security of Information Agreements and General Security of Military Information Agreements) are negotiated with various foreign governments. Confidentiality requested by some foreign governments prevents a listing of the countries that have executed these agreements. The bilateral security agreement, negotiated through diplomatic channels:

(A) Requires that each government provide substantially the same degree of protection to classified information released by the other government.

(B) Contains provisions concerning limits on the use of each government's information, including restrictions on third-party transfers and proprietary rights.

(C) Does not commit governments to share classified information, nor does it constitute authority to release classified material to that government.

(D) Satisfies, in part, the eligibility requirements of the Arms Export Control Act concerning the agreement of the recipient foreign government to protect U.S. classified defense articles and classified information.

(ii) The applicable CSA will provide a mechanism for contractors to access, for official purposes, classified general security agreements.

(iii) Industrial security agreements have been negotiated with certain foreign governments that identify the procedures to be used when foreign government classified information is provided to U.S. industry and UUSG classified information is provided to foreign defense industry.

(3) *Authorization for disclosure.* The GCA will provide disclosure guidance.

(i) Contractors will only disclose non-public USG information to foreign persons in accordance with specified requirements of the contract. In the absence of any specified requirements the contractor will not disclose non-public USG information to foreign persons.

(ii) Disclosure authorization may be in the form of an export license or other export authorization by a cognizant export authority.

(iii) The contractor may not use disclosure guidance provided by the GCA for a previous contract or program unless so instructed in writing by the GCA or the licensing authority.

(iv) Disclosure and export of classified information, authorized by an appropriate USG disclosure official, by a contractor will ensure the following:

(A) *International agreements.* Contractors may not disclose classified information until agreements are signed by the participating government and disclosure guidance and security arrangements are established. The export of technical data pursuant to such agreements may be exempt by approval of the Department of State or the Department of Commerce.

(B) *Symposia, seminars, exhibitions, and conferences.* Contractors must assure that any foreign nationals who will be attending a classified gathering have the appropriate export license, disclosure authority, and security assurance on file.

(C) *Visits by foreign nationals to the contractor.* The contractor will limit disclosure of classified information to that specific information authorized in connection with an approved visit request and an export authorization, as required.

(D) *Temporary exports.* Classified articles, including articles that require the use of classified information for operation, exported for demonstration purposes must remain under U.S. control. The contractor must obtain an export authorization from the relevant authority (*i.e.,* from the Department of State in accordance with 22 CFR parts 120–130, also known as and referred to in this rule as the ''International Traffic in Arms Regulations,'' or from the Department of Commerce in accordance with 15 CFR parts 730–774, also known as the ''Export Administration Regulations'').

(4) *Direct commercial arrangements.* (i) The disclosure of classified information may be authorized pursuant to a direct commercial sale with the appropriate export authorization. A direct commercial arrangement includes sales, loans, leases, or grants of classified items, including sales under a government agency sales financing program.

(ii) If a proposed disclosure is in support of a foreign government requirement, the contractor should consult with U.S. in-country officials, normally the U.S. Security Assistance/Armaments Cooperation Office or Commercial Counselor.

(A) Before a contractor makes a proposal to a foreign interest that involves the eventual disclosure of U.S. classified information, the contractor must obtain appropriate government disclosure authorization.

(B) Such disclosure authorization does not equate with authorization for export. Export authorization must be obtained from the appropriate regulatory body.

(iii) The contractor will request a FCL assurance for a foreign entity through the CSA from the security authority of the foreign entity's sponsoring government prior to entering into a contractual arrangement with the foreign entity.

(5) *Subcontract security provisions.* (i) A U.S. contractor may be authorized to enter into an agreement involving classified information with a foreign contractor. The U.S. contractor's empowered official will verify the contractor can release the information to a foreign person. Such agreements may include:

(A) Award of a subcontract.

(B) Department of State authorized manufacturing license agreement, technical assistance agreement, or other direct commercial arrangement.

(ii) The contractor will incorporate security provisions into the subcontract document or agreement, and provide security classification guidance by means of a Contract Security Classification Specification, or equivalent.

(iii) The contractor will provide a copy of the signed contract with the provisions and the classification guidance to the CSA.

(iv) If the export authorization specifies that additional security arrangements are necessary for performance on the contract, the contractor will incorporate those additional arrangements by appropriate provision in the contract or in a separate security document.

(v) The contractor will prepare and maintain a written record that identifies the originator or source of classified information that will be used in providing classified defense articles, material or services to foreign customers. The contractor will maintain this listing with the contractor's record copy of the pertinent export authorization.

(vi) The contractor will include the security provisions in accordance with paragraph (b)(5) in this section in all contracts and subcontracts involving classified information that are awarded to foreign contractors. Contractors must insert the bracketed contract specific information (*e.g.,* applicable country and disposition of classified material) where noted, when using the following security clauses in the contract.

(A) All classified information and material furnished or generated under the contract will be protected to ensure that:

(*1*) The recipient will not release the information or material to any third party without disclosure authorization and export authorization, as appropriate.

(*2*) The recipient will afford the information and material a degree of protection equivalent to that afforded it by the releasing government.

(*3*) The recipient will not use the information and material for other than the purpose for which it was furnished without the prior written consent of the releasing government.

(B) Classified information and material furnished or generated under this contract will be transferred through government channels or other channels specified in writing by the governments of the United States and [insert applicable country]. It will only be transferred to persons who have an appropriate security clearance and an official need for access to the information in order to perform on the contract.

(C) Classified information and material furnished under the contract will be re-marked by the recipient with its government's equivalent security classification markings.

(D) Classified information and material generated under the contract must be assigned a security classification as specified by the Contract Security Classification Specifications, or equivalent, provided with this contract.

(E) All cases in which it is known or there is reason to believe that classified information or material furnished or generated under the contract has been lost or disclosed to unauthorized persons will be reported promptly and fully by the contractor to its government's security authorities.

(F) Classified information and material furnished or generated pursuant to the contract will not be further provided to another potential contractor or subcontractor unless:

(*1*) A potential contractor which is located in the United States or [insert applicable country] has been approved for access to classified information and material by the USG or [insert applicable country] security authorities; or

(*2*) If located in a third country, prior written USG consent is obtained.

(G) Upon completion of the contract, all classified material furnished or generated pursuant to the contract will be [insert whether the material is to be returned or destroyed, or provide other instructions].

(H) The recipient contractor will insert terms that substantially conform to the language of these provisions, including this one, in all subcontracts under this contract that involve access

to classified information furnished or generated under this contract.

(c) *FGI.*—(1) *General.* The contractor will notify the csa when awarded contracts by a foreign interest that will involve access to classified information. The csa will oversee and ensure implementation of the security requirements of the contract on behalf of the foreign government, including the establishment of channels for the transfer of classified material.

(2) *Contract security requirements.* The foreign entity that awards a classified contract is responsible for providing appropriate security classification guidance and any security requirements clauses. The contractor will report to the CSA when a foreign entity fails to provide classification guidance.

(3) *Marking foreign government classified material.* Foreign government classified material will be marked in accordance with § 117.14(l).

(4) *Foreign Government RESTRICTED Information and ''In Confidence'' Information.* Foreign government RESTRICTED information and ''in confidence'' information will be marked in accordance with § 117.14(m).

(5) *Marking U.S. documents containing FGI.* U.S. documents containing FGI will be marked in accordance with § 117.14(n).

(6) *Marking documents prepared for foreign governments.* Marking documents prepared for foreign governments will be marked in accordance with § 117.14(o).

(7) *Storage and control.* Contractors will store foreign government material and control access generally in the same manner as U.S. classified material of an equivalent classification. Contractors will store foreign government material in a manner that will separate it from other material. Separation can be accomplished by establishing distinct files in a storage container or on an information system.

(8) *Disclosure and use limitations.* (i) FGI is provided by the foreign government to the United States. The contractor will:

(A) Not disclose FGI to nationals of a third country, or to any other third party, or use it for any purpose other than that for which it was provided without the prior written consent of the originating foreign government.

(B) Submit requests for other uses or further disclosure to the GCA for U.S. contracts, and through the CSA for direct commercial contracts.

(ii) Approval of the request by the foreign government does not eliminate the requirement for the contractor to obtain an export authorization.

(9) *Transfer.* The contractor will transfer FGI within the United States and its territories using the same channels as specified for U.S. classified information of an equivalent classification, except that contractors cannot use non-cleared express overnight carriers for FGI.

(10) *Reproduction.* The reproduction of foreign government TOP SECRET or equivalent information requires the written approval of the originating government.

(11) *Disposition.* The contractor:

(i) Will destroy FGI on completion of the contract unless the contract specifically authorizes retention or return of the information to the U.S. GCA or foreign government that provided the information.

(ii) Must witness the destruction of TOP SECRET, execute a destruction certificate, and retain the destruction certificate for two years.

(12) *Reporting of improper receipt of foreign government material.* The contractor will report improper receipt of foreign government material in accordance with § 117.8(c)(13).

(13) *Subcontracting.* Subcontracting procedures will be in accordance with § 117.17(a)(4).

(d) *International transfers of classified material.*—(1) *General.* This paragraph (d) contains the procedures for international transfers of classified material through government-to-government channels or other arrangements agreed to by the governments involved, otherwise referred to as government-to-government transfers. The requirements in this paragraph (d) do not apply to the transmission of classified material to usg activities outside the united states.

(i) All international transfers of classified material must take place through channels approved by both governments. U.S. control of classified material must be maintained until the material is officially transferred to the intended recipient government through its designated government representative (DGR).

(ii) To ensure government control, written transmission instructions must be prepared for all international transfers of classified material. The contractor is responsible for the preparation of instructions for direct commercial arrangements, and the GCA will prepare instructions for government arrangements.

(iii) The contractor will contact the CSA at the earliest possible stage in deliberations that will lead to the international transfer of classified material. The CSA will advise the contractor on the transfer arrangements, identify the recipient government's DGR, appoint a U.S. DGR, and ensure that the transportation plan prepared by the contractor or foreign government is adequate.

(iv) The contractor's empowered official is responsible for requests for all export authorizations, including ones that will involve the transfer of classified information.

(2) *Transfers of freight.*—(i) *Transportation plan (TP).* (A) A requirement to prepare a TP will be included in each arrangement that involves the international transfer of classified material as freight. The TP will:

(*1*) Describe requirements for the secure shipment of the material from the point of origin to the ultimate destination.

(*2*) Provide for security requirements in the event the transfer cannot be made promptly.

(B) The U.S. and recipient government DGRs will be identified in the TP as well as any requirement for an escort. When there are to be repetitive shipments, a notice of classified consignment will be used.

(ii) *Government agency arrangements.* Classified material to be furnished to a foreign government under such transactions normally will be shipped via government agency-arranged transportation and be transferred to the foreign government's DGR within the recipient government's territory.

(A) The government agency that executes the arrangement is responsible, in coordination with the recipient foreign government, for preparing a TP.

(B) When the point of origin is a U.S. contractor facility, the GCA will provide the contractor with a copy of the TP and the applicable letter of offer and acceptance. If a freight forwarder will be involved in processing the shipment, the GCA will provide a copy of the TP to the freight forwarder.

(C) *Commercial arrangements.* (*1*) The contractor will prepare a TP in coordination with the receiving government. This requirement applies whether the material is moved by land, sea, or air, and applies to U.S. and foreign classified contracts.

(*2*) After the CSA approves the TP, the CSA will forward it to the recipient foreign government security authorities for final coordination and approval. The CSA will notify the contractor upon the concurrence by the respective parties.

(D) *International carriers.* The international transfer of classified material will be made using only ships, aircraft, or other carriers that:

(*1*) Are owned or chartered by the USG or under U.S. registry;

(*2*) Are owned or chartered by or under the registry of the recipient government; or

(*3*) Are other than those described that are expressly authorized to perform this function in writing by the Designated Security Authority of the GCA and the security authorities of the foreign government involved. This authority cannot be delegated and this exception may be authorized only when a carrier described in paragraph (d)(2)(iv)(A) or (d)(2)(iv)(B) in this section is not available and an urgent operational requirement dictates use of the exception.

(E) *Escorts.* (*1*) The contractor must provide escorts for international shipments of SECRET or CONFIDENTIAL material by air.

(*2*) Escorts must have an eligibility determination and access to classified information at the classification level of the material being shipped.

(*3*) Escorts are responsible for ensuring that the classified material being shipped is safeguarded in the event of an emergency stop en route, re-routing of the aircraft, or in the event that the recipient government's representative fails to meet the shipment at its destination.

(*4*) The contractor does not have to provide escorts if:

(*i*) The classified material is shipped by the Defense Transportation System or a U.S. military carrier.

(*ii*) The recipient government DGR has signed for the receipt of the classified material within the United States.

(*iii*) The classified material is shipped via a military carrier of the recipient government or a carrier owned by or registered to the recipient government.

(*iv*) The classified material is shipped via a cleared U.S. commercial freight carrier, so long as the contractor has a written agreement from the U.S. commercial freight carrier to provide an escort who is eligible for access to classified information and has access to classified information at the classification level of the material being shipped.

(*v*) There are exceptional circumstances, and procedures have been approved by both the USG and the recipient government.

(3) *Secure communications plan.* (i) The contractor is required to meet all requirements outlined in this section, as applicable, for the secure communications plan.

(ii) The secure communications plan may be approved within a program security instruction, SSP, or a government to government agreement by the designated security authorities. A separate memorandum of understanding or memorandum of agreement is not required.

(iii) Additionally, an SSP must be authorized in accordance with § 117.18 and the CSA provided guidance.

(4) *Return of material for repair, modification, or maintenance.* (i) A foreign government or foreign contractor may return classified material to a U.S. contractor for repair, modification, or maintenance.

(ii) The approved methods of return will be specified in either the GCA sales arrangement, the security requirements section of a direct commercial sales arrangement or, in the case of material transferred as freight, in the original TP.

(iii) The contractor, on receipt of notification that classified material is to be received, will notify the applicable CSA.

(5) *Use of freight forwarders.* (i) A commercial freight forwarder may be used to arrange for the international transfer of classified material as freight.

(A) The freight forwarder must be under contract to a USG agency, U.S. contractor, or the recipient foreign government.

(B) The contract will describe the specific functions to be performed by the freight forwarder.

(C) The responsibility for security and control of the classified material that is processed by freight forwarders remains with the USG until the freight is transferred to a DGR of the recipient government.

(ii) Only freight forwarders that have a valid determination of eligibility for access to classified information and storage capability for classified material at the appropriate level are eligible to take custody or possession of classified material for delivery as freight to foreign recipients. Freight forwarders that only process unclassified paperwork and make arrangements for the delivery of classified material to foreign recipients do not require an eligibility determination for access to classified information.

(iii) A freight forwarder cannot serve as a DGR.

(6) *Hand carrying classified material.* To meet contractual requirements, the CSA may authorize contractor employees to hand carry classified material outside the United States. SECRET is the highest level of classified material to be carried and it must be of such size and weight that the courier can retain it in his or her possession at all times.

(i) The CSA will ensure that the contractor has made necessary arrangements with U.S. airport security and customs officials and that security authorities of the receiving government approve the plan. If the transfer is under a contract or a bilateral or multinational government program, the GCA will approve the request in writing. The contractor will notify the CSA of a requirement to hand carry at least 5 working days in advance of the transfer.

(ii) The courier must be a full-time employee of the dispatching or receiving contractor who has been determined eligible and has been granted access to classified information.

(iii) The employing contractor will provide the courier with a courier certificate that is consecutively numbered and valid for one journey only. The journey may include more than one stop if approved by the CSA and secure government storage has been arranged at each stop. The courier will return the courier certificate to the dispatching contractor immediately on completion of the journey.

(iv) Before commencement of each journey, the courier will read and initial the notes to the courier attached to the courier certificate and sign the courier declaration. The contractor will maintain the declaration until completion of the next CSA security review.

(v) The dispatching contractor will inventory, wrap, and seal the material in the presence of the U.S. DGR. The contractor will place the address of the receiving security office and the return address of the dispatching contractor security office on the inner envelope or wrapping and mark it with the appropriate classification. The contractor will place the address of the receiving government's DGR on the outer envelope or wrapping along with the return address of the dispatching contractor.

(vi) The dispatching contractor will prepare three copies of a receipt based on the inventory and list the classified material that is being sent. The dispatching contractor will retain one copy of the receipt. The contractor will pack the other two copies with the classified material. The contractor will obtain a receipt for the sealed package from the courier.

(vii) The dispatching contractor will provide the receiving contractor with 24 work hours advance notification of the anticipated date and time of the courier's arrival and the identity of the courier. The receiving contractor must notify the dispatching contractor if the courier does not arrive within 8 hours of the expected time of arrival. The dispatching contractor will notify its DGR of any delay, unless officially notified otherwise of a change in the courier's itinerary.

(viii) The receiving DGR will verify the contents and sign the receipts enclosed in the consignment. The receiving DGR will return one copy to the courier. On return, the courier will provide the executed receipt to the dispatching contractor.

(ix) Throughout the journey, the courier will maintain the classified material under direct personal control. The courier will not leave the material unattended at any time during the journey, in the transport being used, in hotel rooms, in cloakrooms, or other such location, and will not deposit it in hotel safes, luggage lockers, or in luggage offices. In addition, the courier will not open envelopes or packages containing the classified material en route, unless required by customs or other government officials.

(x) When inspection by government officials is unavoidable, the courier will request that the officials provide written verification that they have opened the package. The courier will notify their employing contractor as soon as possible. The contractor will notify the U.S. DGR. If the inspecting officials are not of the same country as the dispatching contractor, the CSA will notify the designated security authority in the country whose officials inspected the consignment. Under no circumstances will the courier hand over the classified material to customs or other officials for their custody.

(xi) When carrying classified material, the courier will not travel by surface routes through third countries, except as authorized by the CSA. The courier will travel only on carriers described in paragraph (d)(2)(iv) in this section, and will travel direct routes between the United States and the destination.

(7) *Classified material receipts.* (i) The U.S. DGR and the DGR of the ultimate foreign recipient will maintain a continuous chain of receipts to record international transfers of all classified material from the contractor through the dispatching DGR and recipient DGR to the ultimate foreign recipient. The dispatching contractor will retain:

(A) An active suspense record until return of applicable receipts for the material.

(B) A copy of the external receipt that records the passing of custody of the package containing the classified material and each intermediate consignee in a suspense file until the receipt that is enclosed in the package is signed and returned.

(ii) The contractor will initiate follow-up action through the CSA if the signed receipt is not returned within 45 days.

(8) *Contractor preparations for international transfers of classified material pursuant to direct commercial and foreign military sales.* To prepare for international transfers the contractor will:

(i) Identify each party to be involved in the transfer in the applicable contract or agreement and in the license application or letter request.

(ii) Notify the appropriate U.S. DGR when the material is ready.

(iii) When the classified material is also ITAR-controlled, provide documentation or written certification by an empowered official (as defined in the ITAR) to the U.S. DGR. This documentation must verify that the classified shipment is within the limitation scope of the pertinent export authorization or an authorized exemption to the export authorization requirements, or is within the limitations of the pertinent GCA contract.

(iv) Have the classified shipment ready for visual review and verification by the DGR. As a minimum this will include:

(A) Preparing the packaging materials, address labels, and receipts for review.

(B) Marking the contents with the appropriate U.S. classification or the equivalent foreign government classification, downgrading, and declassification markings, as applicable.

(C) Ensuring that shipping documents (including, as appropriate, the shipper's export declaration) include the name and contact information for the CSA that validates the license or letter authorization, and the FSO or designee for the particular transfer.

(D) Sending advance notification of the shipment to the CSA, the recipient, and to the freight forwarder, if applicable. The notification will require that the recipient confirm receipt of the shipment or provide notice to the contractor if the shipment is not received in accordance with the prescribed shipping schedule.

(9) *Transfers pursuant to an ITAR exemption.* (i) The contractor will provide to the DGR valid documentation (*i.e.,* license, export authorization, letter of offer and acceptance, or agreement) to verify the export authorization for classified technical data information or certain defense articles to be transferred under an exemption to the ITAR exemption. The documentation must include a copy of the Department of State Form DSP–83 associated with the original export authorization.

(ii) Classified technical data information or certain defense articles to be exported pursuant to ITAR exemptions will be supported by a written authorization signed by an authorized exemption official or exemption certifying official who has been appointed by the GCA's responsible disclosure authority.

(A) The contractor will provide a copy of the authorization to the CSA.

(B) The CSA will provide a copy of the authorization to the Department of State Directorate of Defense Trade Controls (DDTC).

(e) *International visits.*—(1) *General.* (i) The contractor will establish procedures to monitor international visits by their employees and visits or assignments of foreign nationals to the contractor location. Doing so will ensure that the disclosure of, and access to, classified export-controlled articles related to classified information are limited to those that are approved by an export authorization.

(ii) Contractors cannot use visit authorizations to employ or otherwise acquire the services of foreign nationals that require access to export-controlled information. An export authorization is required for such situations.

(2) *International visits by U.S. contractor employees.*—(i) *Types and purpose of international visits.*—(A) *One-time visits.* A visit for a single, short-term occasion (normally 30 days or fewer) for a specified purpose.

(B) *Recurring visits.* Intermittent, recurring visits over a specified period of time, normally up to one year in duration, in support of a government-approved arrangement, such as an agreement, contract, or license. By agreement of the governments, the term of the authorization may be for the duration of the arrangement, subject to annual review, and validation.

(C) *Long-term visits.* A single visit for an extended period of time, normally up to one year, in support of an agreement, contract, or license.

(D) *Emergency visits.* A visit related to a specific government-approved contract, international agreement or announced request for proposal, and failure to make the visit could be reasonably expected to seriously jeopardize performance on the contract or program, or result in the loss of a contract opportunity.

(ii) *Requests for visits.* Visit requests are necessary to make administrative arrangements and disclosure decisions and obtain security assurances.

(A) Many foreign governments require the submission of a visit request for all visits to a government facility or a cleared contractor facility, even though classified information may not be involved. They may also require that the requests be received a specified number of days in advance of the visit.

(B) The contractor can obtain information pertaining to the visit

requirements of other governments and the NATO from the CSA. The contractor must obtain an export authorization if classified export controlled articles or technical data is to be disclosed or if information to be divulged is related to a classified USG program, unless the disclosure of the information is covered by other agreements, authorizations, or exemptions.

(iii) *Request format.* Contractors will request a visit request template from the CSA. The contractor will forward the visit request to the security official designated by the CSA. The host for the visit should coordinate the visit in advance with appropriate government authorities who are required to approve the visit. It is the visitor's responsibility to ensure that such coordination has occurred.

(iv) *Government agency programs.* The contractor will submit a visit request when contractor employees are to visit foreign government facilities or foreign contractors on USG orders in support of a government contract or agreement.

(v) *Requests for emergency visits.* The requester will include in the emergency visit request, and any other requirements in accordance with applicable CSA guidance:

(A) The complete name, position, address, and telephone number of the person to be visited.

(B) A knowledgeable foreign government point of contact.

(C) The identification of the contract, agreement, or program and the justification for submission of the emergency visit request.

(vi) *Requests for recurring visits.* Contractors will request recurring visit authorizations at the beginning of each program. After approval of the request, the contractor may arrange individual visits directly with the security office of the location to be visited subject to 5 working days advance notice.

(vii) *Amendments.* (A) Once visit requests have been approved or are being processed, the contractor may amend them only to change, add, or delete names and change dates.

(B) The contractor cannot amend visit requests to specify dates that are earlier than originally specified.

(C) The contractor cannot amend emergency visit authorizations.

(3) *Classified visits by foreign nationals to U.S. contractors.*—(i) *Requests for classified visits.* Requests for visits by foreign nationals to U.S. contractors that will involve the disclosure of classified information may require authorization by the Department of State. Classified visits by foreign nationals must be processed by government national security authorities on behalf of the contractor through the sponsoring foreign government (normally the visitor's embassy) to the USG for approval.

(ii) *USG approval.* The USG may approve or deny the request or decline to render a decision.

(A) *USG-Approved Visits.* (*1*) USG approved classified visits cannot be used to avoid the export licensing requirements for commercial initiatives.

(*2*) When the cognizant USG agency approves a classified visit, the notification of approval will contain instructions on the level and scope of classified and unclassified information authorized for disclosure, as well as any limitations.

(*3*) Final acceptance for the visit will be subject to the concurrence of the contractor. The contractor will notify the USG agency when a classified visit is not desired.

(B) *Visit request denials.* (*1*) If the USG agency does not approve the disclosure of the information related to the proposed classified visit, it will deny the classified visit request. The USG agency will advise the requesting government and the contractor to be visited of the reason for the denial.

(*2*) The contractor may accept the visitor(s), but only information that is in the public domain may be disclosed during the classified visit.

(C) *Non-sponsorship.* The USG agency will decline to render a decision on a classified visit request that is not in support of a USG program. The USG agency will furnish a declination notice indicating that the classified visit is not USG-approved (*i.e.,* the classified visit is non-sponsored) to the requesting foreign government with an information copy to the U.S. contractor to be visited.

(*1*) A declination notice does not preclude the classified visit, provided the contractor has, or obtains, an export authorization for the information involved and, has been notified that the requesting foreign government has provided the required security assurance of the proposed visitor to the USG agency in the original classified visit request.

(*2*) It is the contractor's responsibility to consult applicable export regulations to determine licensing requirements regarding the disclosure of export-controlled information during such classified visits by foreign nationals.

(D) *Visits to subsidiaries.* A classified visit request authorization for a classified visit to any element of a corporate family may be used for visits to other divisions or subsidiaries within the same corporate family in accordance with § 117.15(h)(3), provided disclosures are for the same purpose and the information to be disclosed does not exceed the parameters of the approved classified visit request.

(E) *Long-term classified visits and assignments of foreign nationals.* Extended classified visits and assignments of foreign nationals to contractor locations can be authorized only when it is essential pursuant to a contract or government agreement (*e.g.,* joint venture, liaison representative to a joint or multinational program, and direct commercial sale). The contractor will:

(*1*) Consult with its empowered official for guidance.

(*2*) Notify the CSA in advance of all long-term classified visits and assignments of foreign nationals.

(*3*) Provide the CSA with a copy of the approved classified visit authorization or the USG export authorization.

(4) *Control of foreign visitors to U.S. contractors.*—(i) *Contractor.* The contractor will:

(A) Establish procedures to ensure that foreign visitors are not afforded access to classified information except as authorized by an export license, approved visit request, or other exemption to the licensing requirements.

(B) Not inform the foreign visitor of the scope of access authorized or of the limitations imposed by the government.

(ii) *Foreign visitors.* Foreign visitors will not be given custody of classified material except when they are acting as official couriers of the government and the CSA authorizes the transfer.

(iii) *Visitor records.* The contractor will maintain a record of foreign visitors for one year when the visit involves access to classified information.

(iv) *Temporary approval of safeguarding.* (A) Classified U.S. and foreign government material at a U.S. contractor location is to remain under U.S. contractor custody and control and is subject to self-inspection and CSA security reviews.

(B) This does not preclude the contractor from furnishing a foreign visitor with a security container for the temporary storage of classified material, consistent with the purpose of the visit or assignment, provided the CSA approves and responsibility for the container and its contents remains with the U.S. contractor.

(*1*) The CSA may approve exceptions to this policy on a case-by-case basis for the storage of foreign government classified information furnished to the visitor by the visitor's government through government channels.

(*2*) The CSA must approve such exceptions in advance in writing with

agreement from the visitor's government. The agreed procedures will be included in the contractor's TCP, will require the foreign nationals to provide receipts for the material, and will include an arrangement for the CSA to ensure compliance, including provisions for the CSA to inspect and inventory the material.

(v) *TCP.* A TCP is required to control access by foreign nationals assigned to, or employed by, cleared contractor facilities, and when foreign nationals visit cleared contractor facilities on a long-term or extended basis, unless the CSA determines that procedures already in place at the contractor's facility are adequate. The TCP will contain procedures to control access for all export-controlled information. A sample TCP may be obtained from the CSA.

(f) *Contractor operations abroad.*—(1) *Access by contractor employees assigned outside the United States.* (i) Contractor employees assigned outside the United States, its possessions, or territories may have access to classified information in connection with performance on a specified U.S., NATO, or foreign government classified contract.

(ii) The assignment of an employee who is a non-U.S. citizen outside the United States on programs that will involve access to classified information is prohibited.

(2) *Storage, custody, and control of classified information abroad by contractor employees.* (i) The USG is responsible for the storage, custody, and control of classified information required by a U.S. contractor employee abroad. Therefore, the storage of classified information by contractor employees at any location abroad that is not under USG control is prohibited. The storage may be at a U.S. military facility, an American Embassy or consulate, or other location occupied by a USG organization.

(ii) A contractor employee may be furnished a security container to temporarily store classified material at a USG agency overseas location. The decision to permit a contractor to temporarily store classified information must be approved in writing by the senior security official for the USG host organization.

(iii) A contractor employee may be permitted to temporarily remove classified information from an overseas USG-controlled facility when necessary for the performance of a GCA contract or pursuant to an approved export authorization.

(A) The responsible USG security official at the facility will verify that the contractor has an export authorization or other written USG approval to have the material, verify the need for the material to be removed from the facility, and brief the employee on handling procedures.

(*1*) In such cases, the contractor employee will sign a receipt for the classified material.

(*2*) Arrangements will also be made with the USG custodian for the return and storage of the classified material during non-duty hours.

(B) The security office at the USG facility will report violations of this policy to the applicable CSA.

(iv) A contractor employee will not store classified information at overseas divisions or subsidiaries of U.S. entities incorporated or located in a foreign country.

(A) The divisions or subsidiaries may possess classified information that has been transferred to the applicable foreign government through government-to-government channels pursuant to an approved export authorization or other written USG authorization.

(B) Access to this classified information at such locations by a U.S. contractor employee assigned abroad by the parent facility on a visit authorization in support of a foreign government contract or subcontract, is governed by the laws and regulations of the country in which the division or subsidiary is registered or incorporated. The division or subsidiary that has obtained the information from the foreign government will provide the access.

(v) U.S. contractor employees assigned to foreign government or foreign contractor locations under a direct commercial sales arrangement will be subject to the host-nation's industrial security policies.

(3) *Transmission of classified material to employees abroad.* The transmission of classified material to a cleared contractor employee located outside the United States will be through USG channels.

(i) If the material is to be used for other than USG purposes, an export authorization is required and a copy of the authorization, validated by the DGR, will accompany the material. The material will be addressed to a U.S. military organization or other USG organization (*e.g.,* an embassy).

(ii) USG organization abroad will be responsible for custody and control of the material.

(4) *Security briefings.* An employee being assigned outside the United States will be briefed on the security requirements of his or her assignment, including the handling, disclosure, and storage of classified information overseas.

(g) *NATO information security requirements.*—(1) *General.* This section provides the security requirements needed to comply with the procedures established by the U.S. Security Authority for NATO Affairs Instruction 1–07 (available at: *http://archives.nato.int/informationobject/browse?topLod=0&query=United+States+Security+Authority+for+NATO+Affairs+Instruction+1-07*) for safeguarding NATO information provided to U.S. industry.

(2) *NATO security classification levels.*

TABLE 1 TO PARAGRAPH (g)(2) NATO SECURITY CLASSIFICATION LEVELS

NATO security classification	Classification level
COSMIC TOP SECRET	Top Secret.
NATO SECRET	Secret.
NATO CONFIDENTIAL	Confidential.
NATO RESTRICTED [1]	Does not correspond to an equivalent U.S. classification.

[1] Pursuant to applicable NATO security regulations and United States Security Authority, NATO Instruction 1–07, security accreditation may be delegated to contractors for information systems processing only NATO RESTRICTED information. The contractor will be responsible for executing specific provisions under contract for the accreditation of such systems, and shall provide the Contracting Authority with a written statement confirming the information system has been accredited in compliance with the minimum requirements established in the contract security clause or contract Security Aspects Letter.

(3) *ATOMAL Classification Markings.* ATOMAL is a marking applied to U.S. RESTRICTED DATA or FORMERLY RESTRICTED DATA and UK Atomic information that has been released to the NATO.

TABLE 2 TO PARAGRAPH (g)(3) ATOMAL CLASSIFICATION MARKINGS

ATOMAL marking	Classification level
COSMIC TOP SECRET ATOMAL	Top Secret.
NATO SECRET ATOMAL	Secret.
NATO CONFIDENTIAL ATOMAL	Confidential.

(4) *NATO contracts.* NATO contracts involving NATO-unique systems, programs, or operations are awarded by a NATO Production and Logistics Organization (NPLO), a designated NATO Management Agency, the NATO Research Staff, or a NATO Command. In the case of NATO infrastructure projects (*e.g.,* airfields, communications), the NATO contract is awarded by a contracting agency or prime contractor of the NATO nation responsible for the infrastructure project.

(5) *NATO facility security clearance certificate (FSCC).* A NATO FSCC is required for a contractor to negotiate or perform on a NATO classified contract.

(i) A U.S. entity qualifies for a NATO FSCC if it has an equivalent U.S. entity eligibility determination and its personnel have been briefed on NATO procedures.

(ii) The CSA will provide the NATO FSCC to the requesting activity.

(iii) A NATO FSCC is not required for GCA contracts involving access to NATO classified information.

(6) *Eligibility for personnel access to classified information.* Access to NATO classified information requires a final determination that an individual is eligible for access to classified information at the equivalent level.

(7) *NATO briefings.* Before having access to NATO classified information, the contractor will give employees a NATO security briefing that covers the requirements of this section and the consequences of negligent handling of NATO classified information. A representative of the CSA will give the initial briefing to the contractor. The contractor must conduct annual refresher briefings.

(i) When access to NATO classified information is no longer required, the contractor will debrief the employees. The employees will sign a certificate stating that they have been briefed or debriefed, as applicable, and acknowledge their responsibility for safeguarding NATO information.

(ii) The contractor will maintain certificates for two years for NATO SECRET and CONFIDENTIAL, and three years for COSMIC TOP SECRET and all ATOMAL information. The contractor will maintain a record of all NATO briefings and debriefings in the CSA-designated database.

(8) *Access to NATO classified information by foreign nationals.* Foreign nationals of non-NATO nations may have access to NATO classified information only with the consent of the NATO Office of Security and the contracting activity.

(i) Requests will be submitted to the Central U.S. Registry (CUSR).

(ii) Access to NATO classified information may be permitted for citizens of NATO member nations, provided a NATO security clearance certificate is provided by their government and they have been briefed.

(9) *Subcontracting for NATO contracts.* The contractor will obtain prior written approval from the NATO contracting activity and a NATO FSCC must be issued prior to awarding the subcontract. The contractor will forward the request for approval through the CSA.

(10) *Preparing and marking NATO documents.* All classified documents created by a U.S. contractor will be portion-marked. Any portion extracted from a NATO document that is not portion marked, must be assigned the classification that is assigned to the NATO document.

(i) All U.S.-originated NATO classified documents will bear an assigned reference number and date on the first page. The reference numbers will be assigned as follows:

(A) The first element will be the abbreviation for the name of the contractor.

(B) The second element will be the abbreviation for the highest classification followed by a hyphen and the 4-digit sequence number for the document within that classification that has been generated for the applicable calendar year.

(C) The third element will be the year; *e.g.,* MM/NS–0013/17.

(ii) COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents will bear the reference number on each page and a copy number on the cover or first page.

(A) Copies of NATO documents will be serially numbered.

(B) Pages will be numbered.

(C) The first page, index, or table of contents will include a list, including page numbers, of all annexes and appendices.

(D) The total number of pages will be stated on the first page.

(E) All annexes or appendices will include the date of the original document and the purpose of the new text (addition or substitution) on the first page.

(iii) One of the following markings will be applied to NATO documents that contain ATOMAL information:

(A) ''This document contains U.S. ATOMIC Information (RESTRICTED DATA or FORMERLY RESTRICTED DATA) made available pursuant to the NATO Agreement for Cooperation Regarding ATOMIC Information, dated 18 June 1964, and will be safeguarded accordingly.''

(B) ''This document contains UK ATOMIC Information. This information is released to NATO including its military and civilian agencies and member states on condition that it will not be released by the recipient organization to any other organization or government or national of another country or member of any other organization without prior permission from H.M. Government in the United Kingdom.''

(iv) Working papers will be retained only until a final product is produced and in accordance with § 117.15(e)(3).

(11) *Classification guidance.* Classification guidance will be in the form of a NATO security aspects letter and a security requirements checklist for NATO contracts, or a Contract Security Classification Specification, or equivalent.

(i) If adequate classification guidance is not received, the contractor will contact the CSA for assistance.

(ii) NATO classified documents and NATO information in other documents will not be declassified or downgraded without the prior written consent of the originating activity.

(iii) Recommendations concerning the declassification or downgrading of NATO classified information will be forwarded to the CUSR.

(12) *Further distribution.* The contractor will not release or disclose NATO classified information to a third party or outside the contractor's facility for any purpose without the prior written approval of the contracting agency.

(13) *Storage of NATO documents.* NATO classified documents will be stored as prescribed for U.S. documents of an equivalent classification level, except as follows:

(i) NATO classified documents will not be comingled with other documents.

(ii) Combinations for containers used to store NATO classified information will be changed annually. The combination also will be changed when an individual with access to the container departs or no longer requires access to the container, and if the combination is suspected of being compromised.

(iii) When the combination is recorded it will be marked with the highest classification level of documents stored in the container as well as to indicate the level and type of NATO documents in the container. The combination record must be logged and controlled in the same manner as NATO classified documents.

(14) *International transmission.* The NATO has a registry system for the receipt and distribution of NATO documents within each NATO member nation. The central distribution point for the United States is the CUSR now located at 9301 Chapek Road, Building 1458, Fort Belvoir, Virginia 22060.

(i) The CUSR establishes sub registries at USG organizations for further distribution and control of NATO documents. Sub registries may establish control points at contractor facilities.

(ii) COSMIC TOP SECRET, NATO SECRET, and all ATOMAL documents will be transferred through the registry system. NATO CONFIDENTIAL documents provided as part of NATO infrastructure contracts will be transmitted via government channels in compliance with paragraph (d) in this section.

(15) *Hand carrying.* NATO SECRET and NATO CONFIDENTIAL documents may be hand carried across international borders if authorized by the GCA. The courier will be issued a NATO Courier Certificate by the CSA. When hand carrying is authorized, the documents will be delivered to a U.S. organization at NATO, which will transfer them to the intended NATO recipient.

(16) *Reproduction.* Reproductions of COSMIC TOP SECRET and COSMIC TOP SECRET ATOMAL information will be performed by the responsible Registry. The reproduction of NATO SECRET and CONFIDENTIAL documents may be authorized to meet contractual requirements unless reproduction is prohibited by the contracting entity. Copies of COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents will be serially numbered and controlled and accounted for in the same manner as the original.

(17) *Disposition.* (i) Generally, all NATO classified documents will be returned to the contracting activity that provided them on completion of the contract. Documents provided in connection with an invitation to bid also will be returned immediately if the bid is not accepted or submitted.

(ii) NATO classified documents may also be destroyed when permitted. COSMIC TOP SECRET and COSMIC TOP SECRET ATOMAL documents will be destroyed by the registry that provided the documents.

(A) Destruction certificates are required for all NATO classified documents except NATO CONFIDENTIAL.

(B) The destruction of COSMIC TOP SECRET, NATO SECRET, and all ATOMAL documents must be witnessed.

(18) *Accountability records.* Logs, receipts, and destruction certificates are required for NATO classified information. Records for NATO documents will be maintained separately from records of non-NATO documents (methods such as separate drawers of a container).

(i) COSMIC TOP SECRET and all ATOMAL documents will be recorded on logs maintained separately from other NATO logs and will be assigned unique serial control numbers.

(ii) Additionally, disclosure records bearing the name and signature of each person who has access are required for all COSMIC TOP SECRET, COSMIC TOP SECRET ATOMAL, and all other ATOMAL or NATO classified documents to which special access limitations have been applied.

(iii) Minimum identifying data on logs, receipts, and destruction certificates will include the NATO reference number, short title, date of the document, classification, and serial copy numbers. Logs will reflect the short title, unclassified subject, and distribution of the documents.

(iv) Receipts are required for all NATO classified documents except NATO CONFIDENTIAL.

(v) Inventories will be conducted annually of all COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents.

(vi) Accountability records for ATOMAL documents will be retained for 10 years after transfer or destruction of the ATOMAL document. Destruction certificates will be retained for 10 years after destruction of the related ATOMAL documents.

(19) *Security violations and loss, compromise, or possible compromise.* The contractor will immediately report the loss, compromise, or suspected loss or compromise, as well as any other security violations involving NATO classified information to the CSA.

(20) *Extracting from NATO documents.* Permission to extract from a COSMIC TOP SECRET or ATOMAL document will be obtained from the CUSR.

(i) If extracts of NATO information are included in a U.S. document prepared for a non-NATO contract, the document will be marked with U.S. classification markings. The caveat, ''THIS DOCUMENT CONTAINS NATO (level of classification) INFORMATION'' also will be marked on the front cover or first page of the document. Additionally, each paragraph or portion containing the NATO information will be marked with the appropriate NATO classification, abbreviated in parentheses (*e.g.,* ''NS'' for NATO SECRET) preceding the portion or paragraph. Declassification and downgrading instructions shall indicate that the NATO information is exempt from declassification or downgrading without the prior consent of NATO, in the absence of other originator instructions, citing the reason ''Foreign Government Information.''

(ii) The declassification or downgrading of NATO information in a U.S. document requires the approval of the originating NATO activity. Requests will be submitted to the CUSR for NATO contracts, through the GCA for U.S. contracts, and through the CSA for non-NATO contracts awarded by a NATO member nation.

(21) *Release of U.S. information to NATO.* (i) Release of U.S. classified or export-controlled information to NATO requires an export authorization or other written disclosure authorization. When a document containing U.S. classified information is being prepared for NATO, the appropriate NATO classification markings will be applied to the document.

(A) Documents containing U.S. classified information and U.S. classified documents that are authorized for release to NATO will be marked on the cover or first page ''THIS DOCUMENT CONTAINS U.S. CLASSIFIED INFORMATION. THE INFORMATION IN THIS DOCUMENT HAS BEEN AUTHORIZED FOR RELEASE TO (cite the NATO organization) BY (cite the applicable license or other written authority).''

(B) The CSA will provide transmission instructions to the contractor. The material will be

addressed to a U.S. organization at NATO, which will then place the material into NATO security channels. The material will be accompanied by a letter to the U.S. organization that provides transfer instructions and assurances that the material has been authorized for release to NATO. The inner wrapper will be addressed to the intended NATO recipient.

(C) Material to be sent to NATO via mail will be routed through the U.S. Postal Service and U.S. military postal channels to the U.S. organization that will make the transfer.

(ii) A record will be maintained that identifies the originator and source of classified information that are used in the preparation of documents for release to NATO. The record will be provided with any request for release authorization.

(22) *Visits.* NATO visits will be handled in accordance with the requirements in paragraph (e) of this section. A NATO Certificate of Security Clearance will be included with the visit request.

(i) *NPLO and NATO industrial advisory group (NIAG) recurring visits.* NATO has established special procedures for recurring visits involving contractors, government departments and agencies, and NATO commands and agencies that are participating in a NPLO or NIAG contract or program. The NATO management office or agency responsible for the NPLO program will prepare a list of the government and contractor facilities participating in the program. For NIAG programs, the list will be prepared by the responsible NATO staff element. The list will be forwarded to the appropriate clearance agency of the participating nations, which will forward it to the participating contractor.

(ii) *Visitor record.* The contractor will maintain a record of NATO visits including those by U.S. personnel assigned to NATO. The records will be maintained for three years.

(h) *Security and export control violations involving foreign nationals.* Contractors will report any violation of administrative security procedures or export control regulations that would subject classified information to possible compromise by foreign visitors or foreign national employees to the applicable CSA.

(i) *Transfers of defense articles to the UK or AUS without a license or other written authorization.*—(1) *Treaties with AUS and UK.* Exemptions in ITAR parts 126.16 and 126.17 implement the Defense Trade Cooperation Treaty between the Government of the United States of America and the Government of the UK of Great Britain and Northern Ireland and the Defense Trade Cooperation Treaty between the Government of the United States of America and the Government of AUS, also known as the ''U.S.-UK Treaty'' and ''U.S.-AUS Treaty,'' respectively, referred to collectively in this rule as ''the Treaties.''

(i) The Treaties provide a comprehensive framework for exports and transfers to the UK or AUS of certain classified and unclassified defense articles without a license or other written authorization.

(ii) The ITAR part 126, supplement no. 1 identifies those defense articles and services that are not eligible for export via treaty exemptions.

(iii) This exemption applies to contractors registered with the DDTC and eligible to export defense articles.

(2) *Defense articles.* Defense articles fall under the scope of the Treaties when they are in support of:

(i) U.S. and UK or U.S. and AUS combined military or counter-terrorism operations.

(ii) U.S. and UK or U.S. and AUS cooperative security and defense research, development, production, and support programs.

(iii) Mutually agreed specific security and defense projects where the government of the UK or AUS is the end-user.

(iv) USG end-use.

(3) *Marking requirements.* Contractors are required to mark defense articles that fall under the scope of the treaty prior to transferring from the U.S. to the UK in accordance with the provisions of this paragraph. All other standard classification marking in accordance with § 117.14 also apply. When defense articles are returned from the UK or AUS to the United States, any defense articles marked as RESTRICTED in the manner shown in Table 4 purely for the purposes of the treaties will be considered to be unclassified and such marking will be removed.

TABLE 3 TO PARAGRAPH (i)(3) CLASSIFIED U.S. DEFENSE ARTICLE MARKINGS

UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Treaty with:	Marking	Example (for SECRET classified defense articles)
Government of UK	//CLASSIFICATION LEVEL USML/REL GBR AND USA TREATY COMMUNITY//.	//SECRET USML//REL GBR AND USA TREATY COMMUNITY//''
Government of AUS	//CLASSIFICATION LEVEL USML/REL AUS AND USA TREATY COMMUNITY//.	//SECRET USML//REL AUS AND USA TREATY COMMUNITY//''

TABLE 4 TO PARAGRAPH (i)(3) UNCLASSIFIED U.S. DEFENSE ARTICLE MARKINGS

UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Treaty with:	Marking
Government of UK	//RESTRICTED–USML//REL GBR AND USA TREATY COMMUNITY//
Government of AUS	//RESTRICTED–USML//REL AUS AND USA TREATY COMMUNITY//

(4) *Notice.* A notice will be included (*e.g.,* as part of the bill of lading) whenever defense articles are exported in accordance with the provisions of these treaties and the ITAR.

TABLE 5 TO PARAGRAPH (i)(4) NOTICE TEXT FOR EXPORTED DEFENSE ARTICLES

Notice text	These U.S. Munitions List commodities are authorized by the U.S. Government under the U.S. [AUS or UK, as applicable] Defense Trade Cooperation Treaty for export only to [AUS or UK, as applicable] for use in approved projects, programs or operations by members of the [AUS or UK, as applicable] Community. They may not be retransferred or re-exported or used outside of an approve project, program, or operation, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.

(5) *Labeling.* (i) Defense articles (other than technical data) will be individually labeled with the appropriate identification; or, where such labeling is impracticable (*e.g.,* propellants, chemicals), will be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings.

(ii) Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (*i.e.,* physical, oral, or electronic), will be individually labeled with the appropriate identification detailed. Where such labeling is impracticable, the data will be accompanied by documentation (such as contracts or invoices) or oral notification clearly associating the technical data with the appropriate markings.

(iii) Defense services will be accompanied by documentation (*e.g.* contracts, invoices, shipping bills, or bills of lading clearly labeled with the appropriate identification).

(6) *Transfers.* (i) All defense articles that fall under the scope of the Treaties must be transferred from the U.S. point of embarkation through channels approved by both the United States and the UK or the United States and AUS, as applicable.

(ii) For transfers of defense articles as freight, the contractor will prepare a transportation plan. For transfer of classified U.S. defense articles, a freight forwarder must have a valid entity eligibility determination and a classified information storage capability at the appropriate level. For unclassified U.S. defense articles transferred as freight, a freight forwarder is not required to be cleared.

(7) *Records.* Contractors will maintain records of exports, transfers, re-exports, or re-transfers of defense articles subject to the Treaties for a minimum of five years. The contractor will make records available to the CSA upon request. In accordance with the ITAR parts 126.16 and 126.17 the records will contain:

(i) Port of entry or exit.

(ii) Date and time of export or import.

(iii) Method of export or import.

(iv) Commodity code and description of the commodity, including technical data.

(v) Value of export.

(vi) Justification for export under the Treaties.

(vii) End-user or end-use.

(viii) Identification of all U.S. and foreign parties to the transaction.

(ix) How export was marked.

(x) Security classification of the export.

(xi) All written correspondence with the USG on the export.

(xii) All information relating to political contributions, fees, or commissions furnished or obtained, offered, solicited, or agreed upon, as outlined in the ITAR parts 126.16(m) or 126.17(m).

(xiii) Purchase order, contract, or letter of intent.

(xiv) Technical data actually exported.

(xv) The internal transaction number for the electronic export information filing in the automated export system.

(xvi) All shipping documentation (including, but not limited to, the airway bill, bill of lading, packing list, delivery verification, and invoice).

(xvii) Statement of registration (Department of State Form DS–2032 (available at: *https://www.pmddtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=dabc05f6db6be344529d368d7c961984*)).

§ 117.20 Critical Nuclear Weapon Design Information (CNWDI).

(a) *General.* This section contains the special requirements for protection of CNDWI. The sensitivity of DoD CNWDI is such that access shall be granted to the absolute minimum number of employees who require it for the accomplishment of assigned responsibilities on a classified contract. Because of the importance of such information, special requirements have been established for its control. DoDI 5210.02, ''Access to and Dissemination of Restricted Data and Formerly Restricted Data'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/521002p.pdf?ver=2019-01-14-072742-700*) establishes these controls in the DoD.

(b) *Briefings.* Prior to having access to CNWDI, employees will be briefed on its sensitivity by the FSO or his or her alternate. The FSO will be initially briefed by a USG representative.

(1) The briefing will include:

(i) The definition of CNWDI.

(ii) A reminder of the extreme sensitivity of the information.

(iii) An explanation of the individual's continuing responsibility for properly safeguarding CNWDI and for ensuring that dissemination is strictly limited to other personnel who have been authorized for access and have a need-to-know for the particular information.

(2) The briefing will also be tailored to cover any special local requirements. Upon termination of access to CNWDI, the employee will be given an oral debriefing.

(c) *Markings.* In addition to any other required markings, CNWDI material will be clearly marked in accordance with DoDI 5210.02. At a minimum, CNWDI documents will show such markings on the cover or first page. Portions of documents that contain CNWDI will be marked with an (N) or (CNWDI) following the classification of the portion; for example, TS (RD)(N) or TS(RD)(CNWDI).

(d) *Subcontractors.* Contractors will not disclose CNWDI to subcontractors without the prior written approval of the GCA. This approval may be included in a contract security classification specification, or equivalent, other contract-related document, or by separate correspondence.

(e) *Transmission outside the facility.* Transmission of CNWDI outside the contractor's facility is authorized only to the GCA, or to a subcontractor as described in paragraph (d) of this section. Any other transmission must be approved by the GCA.

(1) Prior to transmission to another cleared facility, the contractor will verify from the CSA that the facility has been authorized access to CNWDI. When CNWDI is transmitted to another facility, the inner wrapping will be addressed to the personal attention of the FSO or his or her alternate, and in addition to any other prescribed markings, the inner wrapping will be marked: ''Critical Nuclear Weapon Design Information-DoD Instruction 5210.02 Applies.''

(2) The same marking will be used on the inner wrapping of transmissions addressed to the GCA or other USG.

(f) *Records.* Contractors will annotate CNWDI access in the CSA-designated database for all employees who have been authorized access to CNWDI.

(g) *Nuclear weapon data.* Some nuclear weapon data is divided into Sigma categories, the protection of which is prescribed by DOE Order 452.8 (available at: *https://www.directives.doe.gov/directives-documents/400-series/0452.8-border/@@images/file*). However, certain nuclear weapon data has been re-categorized as CNWDI and is protected as described in this section.

§ 117.21 COMSEC.

(a) *General.* The procedures in this section pertaining to classified COMSEC information will apply to contractors when the contractor:

(1) Requires the use of COMSEC systems in the performance of a contract.

(2) Is required to install, maintain, or operate COMSEC equipment for the USG.

(3) Is required to accomplish research, development, or production of COMSEC systems, COMSEC equipment, or related COMSEC material.

(b) *Instructions.* Specific requirements for the management and safeguarding of COMSEC material in industry are established in the COMSEC material control and operating procedures provided to the account manager of each industrial COMSEC account by the agency central office of record (COR) responsible for establishing the account. Such procedures that are above the baseline requirements detailed in the other sections of this rule will be contractually mandated.

(c) *Clearance and access requirements.* (1) Before a COMSEC account can be established and a contractor may receive or possess COMSEC material accountable to a COR, individuals occupying the positions of FSO, COMSEC account manager, and alternate COMSEC account manager must have a final PCL appropriate for the material to be held in the account.

(i) COMSEC account managers and alternate COMSEC account managers having access to operational TOP SECRET keying material marked as CRYPTO must have a final TOP SECRET security clearance based upon a current investigation of a scope that meets or exceeds that necessary for the access required.

(ii) This requirement does not apply to contractors using only data transfer devices and seed key.

(2) Before disclosure of COMSEC information to a contractor, GCAs must first verify with the CSA that appropriate COMSEC procedures are in place at the contractor facility. If procedures are not in place, the GCA will provide a written request and justification to the CSA to establish COMSEC procedures and a COMSEC account, if appropriate, at the facility and to conduct the initial COMSEC or cryptographic access briefings for the FSO and COMSEC account personnel.

(3) Access to COMSEC information by a contractor requires a final entity eligibility determination and a USG-issued final PCL at the appropriate level; however, an Interim TOP SECRET entity eligibility determination or PCL is valid for access to COMSEC at the SECRET and CONFIDENTIAL levels.

(4) If a COMSEC account will be required, the Contract Security Classification Specification, or equivalent, will contain a statement regarding the establishment of a COMSEC account as appropriate.

(d) *Establishing a COMSEC account.* (1) When COMSEC material that is accountable to a COR is to be provided, acquired, or produced under a contract, the contracting officer will inform the contractor that a COMSEC account must be established. The contractor will forward the names of U.S. citizen employees who will serve as the COMSEC account manager and alternate COMSEC account manager to the CSA. The CSA will forward the names of the FSO, COMSEC account manager, and alternate COMSEC account manager, along with a contractual requirement for the establishment of a COMSEC account (using DD Form 254 or equivalent) to the appropriate COR, with a copy to the GCA, indicating that the persons have been cleared and COMSEC has been briefed.

(2) The COR will then establish the COMSEC account and notify the CSA that the account has been established.

(3) An individual may be appointed as the COMSEC account manager or alternate COMSEC account manager for more than one account only when approved by each COR concerned.

(e) *COMSEC briefing and debriefing.* (1) All contractor employees who require access to classified COMSEC information in the performance of their duties will be briefed before access is granted. Depending on the nature of COMSEC access required, either a COMSEC briefing or a cryptographic access briefing will be given. The FSO, the COMSEC account manager, and the alternate COMSEC account manager will be briefed by a USG representative or their designee. Other contractor employees will be briefed by the FSO, the COMSEC account personnel, or other individual designated by the FSO. The purpose of the briefing is to ensure that the contractor understands:

(i) The unique nature of COMSEC information and its unusual sensitivity.

(ii) The special security requirements for the handling and protection of COMSEC information.

(iii) The penalties prescribed in 18 U.S.C. 793, 794, and 798 for disclosure of COMSEC information.

(2) COMSEC debriefings are not required.

(3) The contractor will maintain a record of all COMSEC briefings as specified by the appropriate COR.

(f) *U.S. classified cryptographic information access briefing and debriefing requirements.* (1) U.S. classified cryptographic information does not include seed key or controlled cryptographic items.

(2) A contractor's employee may be granted access to U.S. classified cryptographic information only if the employee:

(i) Is a U.S. citizen.

(ii) Has a final USG-issued eligibility determination appropriate to the classification of the U.S. cryptographic information to be accessed.

(iii) Has a valid need-to-know to perform duties for, or on behalf of, the USG.

(iv) Receives a security briefing appropriate to the U.S. Classified Cryptographic Information to be accessed.

(v) Acknowledges the granting of access to classified information by executing Section I of Secretary of Defense (SD) Form 572, ''Cryptographic Access Certification and Termination'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/sd/sd0572.pdf*).

(vi) Where so directed by a USG department or agency head, acknowledges the possibility of being subject to a CI scope polygraph examination that will be administered in accordance with department or agency directives and applicable law.

(3) An employee granted access to cryptographic information will be debriefed and execute Section II of the SD 572 not later than 90 days from the date access is no longer required.

(4) The contractor will maintain the SD 572 for a minimum of five years following the debriefing.

(5) Cryptographic access briefings must fully meet the requirements of paragraph (e) of this section.

(g) *Destruction and disposition of COMSEC material.* The appropriate GCA representative, *e.g.,* the contracting officer representative, will provide directions to the contractor when accountable COMSEC material is to be destroyed. These directions may be provided in superseding editions of publications or by specific instructions.

(h) *Subcontracting COMSEC work.* Subcontracts requiring the disclosure of classified COMSEC information will be awarded only upon the written approval of the GCA.

(i) *Unsolicited proposals.* Any unsolicited proposal for a COMSEC system, equipment, development, or study that may be submitted by a contractor to a USG agency will be forwarded to the Deputy National Manager for National Security Systems for review and follow up action at: Deputy National Manager for National Security Systems, NSA, Fort George G. Meade, MD 20755–6000.

§ 117.22 DHS CCIPP.

(a) *General.* DHS will coordinate with other USG agencies that have an equity with a private sector entity and the CCIPP in accordance with § 117.6(f).

(b) *Authority.* (1) The Secretary of Homeland Security has the authority to determine the eligibility for personnel security clearances and to administer the sharing of relevant classified NSI with certain private sectors or non-federal partners for the purpose of furthering cybersecurity information sharing among critical infrastructure partners pursuant to E.O. 13691.

(2) DHS provides security oversight and assumes security responsibilities similar to those of an FSO, unless otherwise provided in this section. Participating entities will cooperate with DHS security officials to ensure the entity is in compliance with requirements in this rule.

§ 117.23 Supplement to this rule: Security Requirements for Alternative Compensatory Control Measures (ACCM), Special Access Programs (SAPs), Sensitive Compartmented Information (SCI), Restricted Data (RD), Formerly Restricted Data (FRD), Transclassified Foreign Nuclear Information (TFNI), and NNPI.

(a) *General.* Given the sensitive nature of Alternative Compensatory Control Measures (ACCM), SAPs, SCI, RD, FRD, TFNI, and NNPI, the security requirements prescribed in this section exceed baseline standards for this rule and must be applied, as applicable, through specific contract requirements.

(1) *Compliance.* The contractor will comply with the security measures reflected in this section and other documents specifically referenced, when applied by the GCA or designee as part of a contract. Acceptance of the contract security measures is a prerequisite to any negotiations leading to program participation and an area accreditation (*e.g.,* an SCI facility or SAP facility accreditation).

(2) *CSA-imposed higher standards.* In some cases, security or sensitive factors of a CSA-created program may require security measures that exceed the standards of this section. In such cases, the CSA-imposed higher standards specifically detailed in the contract or conveyed through other applicable directives will be binding on USG and contractor participants. In cases of doubt over the specific provisions, the contractor should consult the program security officer and the contracting officer before taking any action or expending program-related funds. In cases of extreme emergencies requiring immediate attention, the action taken should protect the USG's interest and the security of the program from loss or compromise.

(3) *Waivers.* Every effort will be made to avoid waivers to established standards unless they are in the best interest of the USG. In those cases where waivers are deemed necessary, a request will be submitted in accordance with the procedures established by the CSA.

(b) *Intelligence information.* National intelligence is under the jurisdiction and control of the DNI, who establishes security policy for the protection of national intelligence and intelligence sources, methods, and activities. In addition to the guidance in this rule, contractors will follow Intelligence Community directives, policy guidance, standards, and specifications for the protection of classified national intelligence and SCI.

(c) *ACCM.* Contractors may participate in ACCMs, or be directed to participate, only when such access and the associated security plan are identified in DD Form 254 or equivalent. Care must be taken to ensure identification of the security plan does not disclose ACCM-protected data.

(1) *ACCM contracts.* DoD contractors will implement the security requirements for ACCMs, when established by contract, in accordance with applicable statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, and memorandums.

(2) *Non-DoD with ACCMs.* Contractors performing on ACCM contracts issued by other than DoD GCAs will implement ACCM protection requirements imposed in their contracts.

(d) *SAPs.*—(1) *DoD SAP contracts.* Contractors will implement the security requirements for SAPs codified in SAP-related policy, when established by contract. These documents include, but are not limited to, statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, memorandums, and other SAP security related policy documents.

(2) *Non-DoD SAPs.* Contractors performing on SAP contracts issued by non-DoD GCAs will implement SAP protection requirements imposed in their contracts. These requirements may be from, but are not limited to, statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, memorandums, and other SAP security related policy documents.

(e) *RD, FRD, and TFNI.*—(1) *General.* This section describes some of the requirements for nuclear-related information designated RD, FRD, or TFNI in accordance with the AEA and 10 CFR part 1045. 10 CFR part 1045 contains the full requirements for classification and declassification of RD, FRD, and TFNI. Information on safeguarding of RD by access permittees is contained in 10 CFR part 1016. For RD that is NNPI, the additional provisions of paragraph (f) of this section apply.

(i) The DOE is the sole authority for establishing requirements for classifying, accessing, handling, securing, and protecting RD. The DOE and the DoD share authority for the requirements for FRD. The DOE and ODNI share authority for establishing requirements for TFNI.

(ii) RD, FRD, and TFNI categories are distinguished from the NSI category, which is governed in accordance with E.O. 13526.

(A) RD, FRD, and TFNI have unique marking requirements and are not subject to automatic declassification. In addition, RD and FRD have special restrictions regarding foreign release.

(B) It is necessary to differentiate between the handling of this information and NSI because of its direct relationship to our nation's nuclear deterrent.

(iii) Some access requirements for RD and FRD exceed the requirements for NSI. Due to the unique national security implications of RD and FRD, and to facilitate maintaining consistency of codified requirement, they are not repeated in the baseline of this rule, but may be applied through specific contract requirements.

(iv) When RD is transclassified as TFNI, it is safeguarded as NSI. Such information will be labeled as TFNI. The label TFNI will be included on

documents to indicate it is exempt from automatic declassification as specified in 10 CFR part 1045, the AEA, E.O. 13526, and 32 CFR part 2001.

(2) *Unauthorized disclosures.* Contractors will report all unauthorized disclosures involving RD, FRD and TFNI information to the CSA.

(3) *International requirements.* The AEA provides for a program of international cooperation to promote common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit.

(i) Information controlled in accordance with the AEA, RD, and FRD may be shared with another nation only under the terms of an agreement for cooperation. The disclosure by a contractor of RD and FRD will not be permitted until an agreement is signed by the United States and participating governments, and disclosure guidance and security arrangements are established.

(ii) RD and FRD will not be transmitted to a foreign national or regional defense organization unless such action is approved and undertaken under an agreement for cooperation between the United States and the cooperating entity and supporting statutory determinations, as prescribed in the AEA.

(4) *Personnel security clearance and access.* Only the DOE, the NRC, the DoD, and the National Aeronautics and Space Agency can grant access to RD and FRD that is under their cognizance. Access to RD and FRD must be granted in accordance with the AEA. Baseline requirements for access to RD and FRD are codified in specific DoD, DOE, NRC, and the National Aeronautics and Space Agency directives and regulations. In addition, need-to-know and other restrictions on access apply.

(5) *Classification and declassification.* (i) All persons with access to RD and FRD must receive initial and periodic refresher training as required under § 1045.120 10 CFR. The training must include the following information:

(A) What information is potentially RD and FRD.

(B) Matter that potentially contains RD or FRD must be reviewed by an RD derivative classifier to determine whether it is RD or FRD.

(C) The DOE must review matter that potentially contains RD or TFNI for public release and DOE or DoD must review matter that potentially contains FRD for public release.

(D) RD derivative classification authority is required to classify or upgrade matter containing RD or FRD, or to downgrade the level of matter containing RD or FRD.

(E) Only a person trained in accordance with § 1045.120 10 CFR may classify matter containing TFNI.

(F) Matter containing RD, FRD, and TFNI is not automatically declassified and only DOE-authorized persons may downgrade the category or declassify matter marked as containing RD. Only DOE or DoD authorized persons may downgrade the category or declassify matter marked as containing FRD.

(G) How to submit a challenge if they believe RD, FRD, or TFNI information (*e.g.,* a guide topic) or matter containing RD, FRD, or TFNI is not properly classified.

(H) Access requirements for matter marked as containing RD or FRD.

(ii) All persons with access to TFNI must receive initial and periodic refresher training as required under § 1045.120 10 CFR. This training may be combined with the training for access to RD and FRD. The training must include the following information:

(A) What information is potentially TFNI.

(B) Only a person with appropriate training may determine if matter contains TFNI.

(C) Marking requirements for matter containing TFNI.

(D) Matter containing TFNI is not automatically declassified and only DOE authorized persons may downgrade the category or declassify matter marked as containing TFNI.

(E) How to submit a challenge if they believe TFNI information (*e.g.,* a guide topic) or matter containing TFNI is not properly classified.

(iii) Persons with access to RD, FRD, or TFNI must submit matter that potentially contains RD or FRD to an RD derivative classifier for review. If matter potentially contains TFNI, it must be submitted to a person trained to make TFNI determinations. Matter potentially containing RD, FRD, or TFNI must be reviewed, even if the potential RD, FRD, or TFNI is derived from the open literature. Prior to review, the matter must be marked as a working paper under 10 CFR 1045.140(c). If the matter is intended for pubic release and potentially contains RD or TFNI, it must be submitted to the DOE for review. If the matter is intended for public release and contains FRD, it must be submitted to the DOE or the DoD.

(iv) Only RD derivative classifiers may classify matter containing RD or FRD. RD derivative classifiers must receive initial training and refresher training every two years as required under 10 CFR 1045.120. The training must include the content for persons with access to RD and FRD, along with the following:

(A) The use of classification guides, classification bulletins, and portion-marked source documents to classify matter containing RD and FRD.

(B) What to do if applicable classification guidance is not available.

(C) Limitations on an RD derivative classifier's authority to remove RD or FRD portions from matter.

(D) Marking requirements for matter containing RD and FRD.

(v) Only persons with appropriate training may review matter to determine if it contains TFNI. Training must be completed prior to making determinations and every two years after. The training must include the content for persons with access to TFNI and the following:

(A) The markings applied to matter containing TFNI.

(B) Limitations on their authority to remove TFNI portions from matter.

(C) Only DOE authorized persons may determine that classified matter no longer contains TFNI.

(D) Only DOE-authorized persons may declassify matter marked as containing TFNI.

(E) The DOE must review matter that potentially contains TFNI for public release.

(vi) RD derivative classifiers must use approved classification guides, classification bulletins, or portion-marked source documents as the basis for classifying matter containing RD and FRD.

(vii) Persons trained to make TFNI determinations must use approved TFNI guidelines, classification guides, classification bulletins, or portion-marked source documents as the basis for classifying or upgrade matter containing TFNI.

(6) *Marking matter containing RD, FRD, and TFNI.* The front page of matter containing RD or FRD must have the highest classification level of the information on the top and bottom of the first page, the RD or FRD admonishment, the subject or title marking, and the classification authority block. Matter containing TFNI must include the TFNI identifier on each page unless the matter also contains RD or FRD, in which case the RD or FRD takes precedence.

(i) Documents classified as RD or FRD must also include a Classification Authority Block with the RD derivative classifier's name and position, title, or unique identifier and the classification guide or source document (by title and

date) used to classify the document. No declassification date or event may be placed on a document containing RD, FRD, or TFNI. If a document containing RD, FRD, or TFNI also contains NSI, ''N/A to RD/FRD/TFNI'' (as appropriate) must be placed on the ''Declassify On:'' line.

(ii) Each interior page of matter containing RD or FRD must be clearly marked at the top and bottom with the overall classification level and category of the matter or the overall classification level and category of the page, whichever is preferred. The abbreviations ''RD'' or ''FRD'' may be used in conjunction with the matter classification (*e.g.,* SECRET//RD, CONFIDENTIAL//FRD).

TABLE 1 TO PARAGRAPH (e)(6)(ii) RD AND FRD ADMONISHMENT MARKINGS

Document containing	Admonishment that must be included on the front page of the document
RD	''RESTRICTED DATA This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954. Unauthorized disclosure is subject to administrative and criminal sanctions.''
FRD	''FORMERLY RESTRICTED DATA Unauthorized disclosure subject to administrative and criminal sanctions. Handle as Restricted Data in foreign dissemination. Section 144b, AEA 1954.''

(iii) Documents classified as RD or FRD must also include a Classification Authority Block with the RD derivative classifier's name and position, title, or unique identifier and the classification guide or source document (by title and date) used to classify the document.

(iv) Other than the required subject or title markings, portion marking is permitted, but not required, for matter containing RD or FRD. Each agency that generates matter containing RD or FRD determines the policy for portion-marking matter generated within the agency. If matter containing RD or FRD is portion-marked, each portion containing RD or FRD must be marked with the level and category of the information in the portion (*e.g.,* SRD, CFRD, S//RD, C//FRD).

(v) Additional information and requirements are in 10 CFR 1045.140. Requests for additional information about the classification and declassification of RD, FRD, and TFNI can be directed to Agency RD Management Officials or the DOE Office of Classification at *outreach@hq.doe.gov* or at (301) 903–7567.

(7) *Declassification.* (i) No date or event for automatic declassification ever applies to RD, FRD, or TFNI documents, even if they contain classified NSI. RD, FRD, or TFNI documents remain classified until a positive action by a designated DOE official (for RD, FRD, or TFNI) or an appropriate DoD official (for FRD) is taken to declassify them.

(ii) RD derivative classifiers may remove RD or FRD from portion-marked source matter if the resulting matter is not for public release. RD derivative classifiers cannot declassify matter marked as containing RD, FRD, and TFNI. Matter that potentially contains RD or TFNI must be sent to designated individuals in the DOE and those containing FRD must be sent to designated individuals in the DoD for declassification or removal of the RD, FRD, or TFNI prior to public release.

(iii) Matter containing TFNI is excluded from the automatic declassification provisions of E.O. 13526 until the TFNI designation is properly removed by the DOE. When the DOE determines that a TFNI designation may be removed, any remaining classified information must be referred to the appropriate agency.

(iv) Any matter marked as or that potentially contains RD, FRD, or TFNI within a document intended for public release that contains RD or FRD subject area indicators must be reviewed by the appropriate DOE organization.

(8) *Challenges to RD, FRD, and TFNI.* A contractor employee who believes RD, FRD, or TFNI is classified improperly or unnecessarily may challenge that classification following the procedures established by the GCA. They may also send challenges directly to the Director, Office of Classification, AU–60/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW, Washington, DC 20585, at any time. Under no circumstance is an employee subject to retribution for challenging the classification status of RD, FRD, or TFNI.

(9) *Commingling.* Commingling of RD, FRD, and TFNI with NSI in the same document should be avoided to the greatest degree possible. When mixing this information cannot be avoided, the marking requirements in 10 CFR part 1045, section 140(f) and declassification requirements of 10 CFR part 1045, section 155 apply.

(10) *Protection of RD and FRD.* Most of the protection requirements for RD and FRD are similar to NSI and are based on the classification level. However, there are some protection requirements for certain RD information that may be applied through specific contract requirements by the GCA. These range from distribution limitations through the limitation of access to specifically authorized individuals to specific storage requirements, including the requirement for IDSs, and additional accountability records.

(i) Any DOE contractor that violates a classified information security requirement may be subject to a civil penalty under the provisions of 10 CFR part 824.

(ii) Certification is required for individuals authorized access to specific Sigma categories, as appropriate. Address questions regarding these requirements to *DOE's National Nuclear Security Administration, Office of Defense Programs.*

(iii) Storage and distribution requirements are determined by the classification level, category, and Sigma category. Sigma designation is not a requirement for all RD documents. Storage and distribution requirements will be dependent only on classification level and category.

(11) *Accountability.* In addition to TOP SECRET information, some SECRET RD information is considered accountable (*e.g.,* specific Sigma 14 matter). Each nuclear weapon data control point will keep a record of transactions involving Secret nuclear weapon data documents under its jurisdiction including origination, receipt, transmission, current custodian, reproduction, change of classification, declassification, and destruction.

(12) *Cybersecurity.* Classified databases, systems, and networks containing RD and FRD are protected under the requirements developed and distributed by the DOE Office of the Chief Information Officer.

(f) *NNPI.* NNPI is information associated with the Naval Nuclear Propulsion Program and is governed by Office of the Chief of Naval Operations

Instruction (OPNAVINST) N9210.3, ''Safeguarding of Naval Nuclear Propulsion Information'' (available at: *https://www.secnav.navy.mil/doni/Directives/09000%20General%20Ship%20Design%20and%20Support/09-200%20Propulsion%20Plants%20Support/N9210.3%20(Unclas%20Portion).pdf*). Naval Reactors, a joint DOE/Department of Navy organization established under 50 U.S.C. 2406 and 2511, is responsible for the protection of this information. All contracts which grant access to NNPI must require compliance with the specific safeguarding requirements contained in OPNAVINST N9210.3. All waivers or deviations involving security requirements protecting NNPI require Naval Reactors' concurrence. Classified NNPI may not be processed on any contractor information system unless approved by the cognizant authorizing authority with concurrence from Naval Reactors.

§ 117.24 Cognizant Security Office information.

(a) *DoD.* Refer to the DCSA website (*https://www.dcsa.mil*) for a listing of office locations and areas of responsibility and for information on verification of facility clearances and safeguarding. In those cases where the cleared facility is located on a DoD installation the applicable DCSA field office can advise if the installation commander is providing security oversight.

TABLE 1 TO PARAGRAPH (a) DOD COGNIZANT SECURITY OFFICE

Designation	Office name	Mailing address	Telephone No.
Headquarters, CSO	Defense Counterintelligence and Security Agency.	27130 Telegraph Rd., Quantico, VA 22134.	(888) 282–7682

(b) *DOE.*

TABLE 2 TO PARAGRAPH (b) DOE COGNIZANT SECURITY OFFICES

Designation	Office name	Mailing address	Telephone No.
Headquarters	Headquarters Office of Security Operations (AU–40).	19901 Germantown Road, Germantown, MD 20874.	(301) 903–2177
CSO, Clearance Agency, Central Verification Activity, Adjudicative Authority, and PCL and FCL databases.	DOE/National Nuclear Security Administration Office of Personnel and Facility Clearances and Classifications.	Pennsylvania & H Street, Kirtland Air Force Base, Albuquerque, NM 87116.	(505) 845–4154
CSO	U.S. Department of Energy, Idaho Operations Office.	850 Energy Drive, Idaho Falls, ID 83401.	(208) 526–2216

TABLE 3 TO PARAGRAPH (b) DOE COGNIZANT SECURITY OFFICES CONTINUED

Designation	Office name	Mailing address	Telephone No.
CSO, Naval Nuclear Propulsion Information.	Director, Naval Reactors	NA–30, 1240 Isaac Hull Ave., SE., Washington Navy Yard, DC 20376.	(202) 781–6297
CSO	U.S. Department of Energy, Office of Science Consolidated Service Center.	200 Administration Road, P.O. Box 2001, Oak Ridge, TN 37830.	(865) 576–2140
CSO	U.S. Department of Energy, Pacific Northwest Site Office.	902 Battelle Boulevard, Richland, WA 99354.	(888) 375–7665
CSO	U.S. Department of Energy, Richland Operations Office.	825 Jadwin Avenue, P.O. Box 550, Richland, WA 99352.	(509) 376–7411
CSO	U.S. Department of Energy, Savannah River Operations Office.	Road 1A, Aiken, SC 29801	(803) 725–6211

(c) *NRC.*

TABLE 4 TO PARAGRAPH (c) NRC COGNIZANT SECURITY OFFICES

Designation	Mailing address	Telephone No.
CSO, Adjudicative Authority, PCL and FCL databases, and Industrial Security Program.	U.S. Nuclear Regulatory Commission, ATTN: Director of Facilities and Security, Washington, DC 20555.	(301) 415–8080
CSO, FCL Database and Industrial Security Program for Licensees.	U.S. Nuclear Regulatory Commission, ATTN: Information Security Branch, 11555 Rockville Pike, Rockville, MD 20853.	(301) 415–7048
Clearance Agency	U.S. Nuclear Regulatory Commission, ATTN: Director of Facilities and Security Personnel Security, 11545 Rockville Pike, Rockville, MD 20853.	(301) 415–8080
Central Verification Agency	U.S. Nuclear Regulatory Commission, ATTN: Director of Security Facilities Security, 11545 Rockville Pike, Rockville, MD 20853.	(301) 415–8080

(d) *DHS.*

TABLE 6 TO PARAGRAPH (d) DHS COGNIZANT SECURITY OFFICE

Designation	Mailing address	Telephone No.
CSO	DHS Cognizant Security Office, ATTN: Chief Security Officer, 245 Murray Lane, M/S 0120–3, Washington, DC 20528.	(202) 447–5424; (202) 447–5345

Dated: December 11, 2020.

Patricia L. Toppings,

OSD Federal Register Liaison Officer, Department of Defense.

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Part IV

Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 Parts 106, 107, et al.

Hazardous Materials: Editorial Corrections and Clarifications; Final Rule

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 106, 107, 171, 172, 173, 174, 175, 176, 177, 178, 179, and 180

[Docket No. PHMSA–2018–0082 (HM–260A)]

RIN 2137–AF43

Hazardous Materials: Editorial Corrections and Clarifications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule corrects editorial errors and improves the clarity of certain provisions in the Hazardous Materials Regulations and PHMSA program and procedural regulations. The intended effect of this rulemaking is to enhance the accuracy and reduce misunderstandings of the regulations. The amendments contained in this final rule are non-substantive changes and do not impose new requirements.

DATES: This final rule is effective January 20, 2021.

FOR FURTHER INFORMATION CONTACT: Yul B. Baker Jr., Standards and Rulemaking Division, Office of Hazardous Materials Safety, (202) 366–8553, PHMSA, East Building, PHH–10, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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I. Background

PHMSA reviews annually the Hazardous Materials Regulations (HMR; 49 Code of Federal Regulations (CFR) parts 171–180), as well as its program and procedural regulations to cure typographical errors, outdated addresses or other contact information, incorrect reference citations, and similar errors, which introduce confusion and lack of clarity for the reader. In this final rule, PHMSA is correcting typographical errors, incorrect regulatory references and citations, inaccurate office address(es), inconsistent use of terminology, misstatements of certain regulatory requirements, and inadvertent omissions of information. Further, within the scope of this rulemaking, PHMSA is revising the HMR and procedural regulations to make them easier to understand. For example, PHMSA frequently issues letters of clarification on the HMR at the request of stakeholders. Where opportunities present themselves, PHMSA adopts non-substantive clarifications into the regulations for the general benefit of regulated entities. Finally, the intended effect of this final rule is to enhance accuracy and reduce misunderstandings of the regulations. The amendments contained in this final rule are non-substantive changes that do not impose new requirements such that solicitation of public comment is unnecessary. Therefore, the final rule will be effective January 20, 2021.

II. Clarifying the Use of the Term ''Movement'' Within the HMR

Throughout the HMR, the term ''movement'' is used to describe a change in position or ''shifting'' of a package or its contents (*i.e.,* inner packagings) in provisions that refer to handling or stowage on a transport vehicle to protect against damage to the package during transportation. However, ''movement'' is specifically defined in § 171.8 as ''the physical transfer of a hazardous material from one geographic location to another by rail car, aircraft, motor vehicle, or vessel.'' In this context, use of the term ''movement'' is not appropriate when prescribing requirements for the safe handling or stowage of packages during transportation. Therefore, PHMSA is revising each instance of ''movement'' to either ''shifting'' or—for §§ 173.31, 174.67, 176.89—''motion'' where the intended meaning is a change in position of the package or its contents rather than physical transfer of the package to a different geographic location. These changes are in the following sections:

172.102(c)(1) and (c)(3)—Special Provisions 384, 386, and B131(d); 173.3; 173.24; 173.31; 173.134; 173.150; 173.159; 173.166; 173.185; 173.219; 173.220; 173.222; 173.301b; 173.306; 173.308; 173.315; 174.67; 175.10, 176.89, 176.200; and 176.906.

III. Section-by-Section Review of Changes

In addition to the specific changes noted in Section II, the following is a section-by-section summary of the minor editorial corrections and clarifications made in this final rule. PHMSA is also making minor technical corrections throughout the HMR to align cross-references with current practice.

Part 106

The authority to transport hazardous materials (hazmat) under the Federal Hazmat Transportation law is codified in 49 U.S.C. 5101 *et seq.* (Federal hazmat law). Previously, the statutory authority for HMR part 106 only referenced 49 U.S.C. 5101 through 5127. PHMSA is revising the referenced statutory authority for 49 CFR part 106 to include all sections of the Federal hazmat law, 49 U.S.C. 5101 through 5128. Additionally, PHMSA is updating the reference to its delegated authority by deleting 49 CFR 1.53 and adding 49 CFR 1.81 and 1.97. These changes accurately reference the sections in 49 CFR part 1 where the Secretary delegates authority to the PHMSA Administrator.

Part 107

Section 107.117

This section provides emergency processing information. PHMSA is updating the Federal Aviation Administration (FAA) office name and contact information in §§ 107.117(d)(1) and (d)(2).

Section 107.125

This section provides the criteria to submit an appeal to the Associate Administrator. Section 107.125(a)(1) ends by repeating the text of paragraph (a)(2). PHMSA is removing the repetitive text from paragraph (a)(1). Specifically, the text ''(2) state in detail any alleged errors of fact and law'' is removed.

Section 107.329

This section establishes the maximum civil penalty requirements for violations of the Federal hazmat law. PHMSA created a new paragraph (c) to this section in the final rule, ''Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains,'' 84 FR 6910 (Feb. 28, 2019). The final rule stated that ''[a]ny owner, operator, or person found to have violated a response plan or provision of 33 U.S.C. 1321(j), or any regulation or order issued thereunder, is subject to an administrative civil penalty under 33 U.S.C. 1321(b)(6), as adjusted by 40 CFR

19.4.'' However, paragraph (c) was inadvertently deleted in a subsequent Department-wide final rule, ''Revisions to Civil Penalty Amounts,'' 84 FR 37059 (Jul. 31, 2019), which was issued by the Office of the Secretary in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, 129 Stat. 599, codified at 28 U.S.C. 2461 note. PHMSA is reinserting paragraph (c) to correct for its inadvertent deletion.

Part 171

Section 171.8

This section contains definitions for terms used in the HMR. PHMSA is revising the definition of ''reportable quantity'' to include a reference to ''Appendix A'' to the Hazardous Materials Table (HMT) at § 172.101 and the specific table columns within Appendix A's tables. The current definition refers to ''the appendix;'' however, there are two appendices to the HMT: Appendix A, List of Hazardous Substances and Reportable Quantities, and Appendix B, List of Marine Pollutants. PHMSA now revises § 171.8 to clarify that it references ''Appendix A'' to the HMT. Further, since Appendix A to the HMT contains two tables that list reportable quantity in different column locations, PHMSA is making clear in § 171.8 that the reportable quantity in Table 1 comes from Column 2 and the reportable quantity in Table 2 comes from Column 3.

Section 171.16

This section provides the requirements for detailed hazardous materials incident reports. PHMSA is revising and updating the FAA office name and contact information. Specifically, in paragraph (b)(2), the office name has changed from ''Security Field Office'' to ''Regional Office.'' In addition, the contact and website information are included to make it easier to locate the nearest FAA Regional Office.

Part 172

Section 172.101

This section contains the HMT and explanatory text for each of the columns in the table. PHMSA makes corrections to the HMT information as follows:

—In a final rule published January 19, 2011, HM–215K [76 FR 3308], PHMSA amended ''UN1655, Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.,'' by adding a ''G'' in Column (1). However, there are now two table entries for ''UN1655,'' one with the ''G'' in Column (1) and one without. Because the entry for ''UN1655'' without the ''G'' and its assigned values was mistakenly added in the HMT, PHMSA is removing the table entry without the ''G.'' Furthermore, for the entry with the ''G'' in Column (1), PHMSA is revising the proper shipping name to include a period at the end. As it reads currently, there is no period at the end of the ''n.o.s'' for ''Nicotine preparations.''

—In a final rule published January 19, 2011, HM–215K [76 FR 3308], the table entry for ''UN1810, Phosphorous oxychloride'' was amended to harmonize with international regulations as a Division 6.1 primary hazard material. The spelling of the hazardous material, ''Phosphorus oxychloride'' was inadvertently changed to ''Phosphorous oxychloride.'' PHMSA is revising the spelling of the material back to ''Phosphorus oxychloride'' for consistency with other phosphorus compounds listed in the table, with international standards, and because the entry is assigned a ''+'' in Column (1) which fixes the proper shipping to what is listed in the table.

—For ''UN3291, Regulated medical waste, n.o.s. *or* Clinical waste, unspecified, n.o.s. *or* (BIO) Medical waste, n.o.s., *or* Biomedical waste, n.o.s. *or* Medical waste, n.o.s.,'' PHMSA is italicizing the ''or(s)'' in the hazardous materials description in Column (2) as the proper shipping name was removed and replaced with the current name featuring unitalicized ''or(s)'' in HM–215I [71 FR 78596], published December 29, 2006. The word ''or'' is not part of the proper shipping name and under § 172.101(c)(2), an ''or'' in italics indicates that there is a choice of proper shipping names.

—In a final rule published January 1, 2009, HM–215J [74 FR 2200], PHMSA amended the HMT entry for ''UN1046, Helium, compressed,'' by adding ''307'' to Column (8A) for reference to § 173.307 packaging exceptions for compressed gases, but the amendment contained formatting errors and ''307'' is still not in Column (8A). Therefore, in this final rule, PHMSA is adding ''307'' to Column (8A) for this table entry.

—In a final rule published June 2, 2016, HM–218H [81 FR 35483], PHMSA removed the packing group (PG) designation for ''NA0337, Toy Caps.'' However, in doing so, PHMSA inadvertently removed Special Provision 382, which was assigned to this entry in a final rule published on January 21, 2016, HM–233F [81 FR 3636]. Therefore, PHMSA is adding Special Provision 382 back to Column (7) for ''NA0337'' to correct the error.

—In a final rule published June 21, 2001, HM–215D [66 FR 33316], PHMSA amended the entry ''NA8001, Dangerous Goods in Machinery *or* Dangerous Goods in Apparatus'' to read ''UN3363, Dangerous Goods in Machinery *or* Dangerous Goods in Apparatus'' with a classification as a Class 9 hazard. However, PHMSA did not include a ''9'' for the label code in Column (6) of the HMT, which reflects the hazard Class or Division assigned in Column (3). Therefore, in the interest of clarity, consistency, and to harmonize with international standards and regulations, PHMSA is modifying this entry to reflect a Class 9 label code. In addition, PHMSA is addressing a typo by removing a period after the letter ''A'' in Column (10A).

—In a final rule published December 29, 1994, HM–215A [59 FR 67390], the Research and Special Programs Administration (RSPA), PHMSA's predecessor agency, added ''UN3252, Difluoromethane'' to the HMT with a reference to ''302'' in Column (8B) for authorized non-bulk packaging. This reference was an inadvertent transcription error and should have instead referenced ''304.'' Section 173.302 outlines authorized packaging and filling requirements for *non-liquefied* (permanent) compressed or absorbed gases (*e.g.,* Argon). However, ''UN3252, Difluoromethane *or* Refrigerant gas R32'' is a *liquefied* compressed gas and would therefore be subject to the packaging and filling requirements found in § 173.304 for liquefied compressed gases and not the inapplicable requirements found in § 173.302. Therefore, PHMSA is correcting the table entry for ''UN3252'' to reflect ''304'' in Column (8B) and for consistency with other refrigerant gas entries in the table that refer to ''304'' (*e.g.,* Refrigerant gas R 404A).

Further, PHMSA is making the following minor edits to HMT entries which include, but are not limited to, removing extra spaces, removing or adding punctuations, and adding the correct unit of measure:

—For ''UN2672, Ammonia solution, *relative density between 0.880 and 0.957 at 15 degrees C in water, with more than 10 percent but not more than 35 percent ammonia,*'' PHMSA is adding a space between ''5'' and ''L'' Column (9A) and between ''60'' and ''L'' in Column (9B).

—For ''UN1401, Calcium,'' PHMSA is adding a space between ''50'' and ''kg'' for the unit of measure in Column in (9B).
—For ''UN2240, Chromosulfuric acid,'' PHMSA is adding a space between ''0.5'' and ''L'' in Column (9A) and between ''2.5'' and ''L'' in Column (9B).
—For ''UN2209, Formaldehyde solutions, *with not less than 25% formaldehyde,*'' PHMSA is adding an ''L'' to indicate liters for the unit of measure in Column (9B), which is consistent with the original intent of the entry in final rule HM–215A [59 FR 67390], published December 29, 1994.
—For ''UN3169, Gas sample, non-pressurized, toxic, n.o.s., *not refrigerated liquid,*'' PHMSA is removing the letter ''D'' in Column (10B) because it is not a code for vessel stowage or handling requirements for Column (10B) under § 176.84, but rather a stowage location code meant for Column (10A) pursuant to § 172.101(k).
—For ''UN2814, Infectious substances, affecting humans,'' PHMSA is removing the space between ''UN'' and ''2814'' in Column (4).
—For ''UN1056, Krypton, compressed,'' PHMSA is revising the table entry by shifting the information provided in the columns one column to the right starting with Column (7) to reflect the table entry as adopted in final rule HM–215J [73 FR 44804], published July 31, 2008. The information provided in Columns (7) through (10A) was inadvertently included in the wrong columns.
—For ''UN3002, Phenyl urea pesticides, liquid, toxic,'' PHMSA is adding a comma between special provisions TP2 and TP27 in Column (7).
—For ''UN3352, Pyrethroid pesticide, liquid toxic, PGII,'' PHMSA is adding a space between ''5'' and ''L'' in Column (9A) and between ''60'' and ''L'' in Column (9B); and for ''UN3352, Pyrethroid pesticide, liquid toxic, PGIII,'' PHMSA is adding a space between ''60'' and ''L'' in Column (9A) and between ''220'' and ''L'' in column (9B).

Section 172.102

PHMSA published a final rule, HM–215K [76 FR 3308] on January 19, 2011. In this final rule, PHMSA added and assigned to the entry ''UN1267, Petroleum crude oil,'' special provision 357 to clarify that petroleum crude oil containing hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard and must be transported under the entry ''Petroleum sour crude oil, flammable, toxic, UN3494'' when transported internationally. In addition, PHMSA added and assigned to the new HMT entry ''UN3494, Petroleum sour crude oil, flammable, toxic,'' special provision 343, which states that this HMT entry must be used for petroleum crude oil containing hydrogen sulfide in sufficient concentration that vapors evolved from the crude oil can present an inhalation hazard when transported internationally. When the final rule was published, PHMSA inadvertently left out specific language related to sour crude oil for special provision 343 and because of the omission, special provisions 343 and 357 contain duplicate language. Special provision 343 is only assigned to ''Petroleum sour crude oil, flammable, toxic,'' and so the reference to crude oil in that special provision could only apply to sour crude oil. Therefore, for clarity, PHMSA is revising special provision 343 to include a reference to ''sour crude oil.''

Section 172.202

This section provides the requirements for describing hazardous materials on shipping papers. In § 172.202(b), the old shipping description sequence that started with the proper shipping name was authorized for use until January 1, 2013. The authorized period of use has ended and, therefore, PHMSA is removing the sunset provision from the paragraph as only the new sequence beginning with the UN number currently applies.

Section 172.322

This section provides the marking requirements for marine pollutants. In the § 172.322(e)(2)(i) introductory text, the U.S. standard unit for the length of each side of the marking for marine pollutants appearing after the metric unit is incorrectly converted to ''4'' inches. While U.S. standard units appearing in parenthesis are for informational purposes and are not intended to be the regulatory standard per § 171.10(a), PHMSA is nonetheless correcting the conversion so that it properly reads ''3.9'' inches for consistency with the same conversion throughout the HMR (see *e.g.,* §§ 172.302(b)(1), 173.4a(g), 173.196(a)(3)). For the same reason, in § 172.322(e)(2)(ii), PHMSA is correcting the U.S. standard unit to read ''9.8'' inches.

Section 172.330

This section provides the marking requirements for tank cars and multi-unit tank car tanks. RSPA published a final rule on May 6, 1997, HM–215B [62 FR 24690], which revised numerous proper shipping names in the HMT by adding or removing the words ''compressed,'' ''inhibited,'' ''liquefied,'' and ''solution'' for consistency with proper shipping names used internationally, including removal of ''liquefied'' from the proper shipping name for ''Ammonia, anhydrous.'' However, in § 172.330(a)(1)(ii), the proper shipping name for ''Ammonia, anhydrous'' still contains the word ''liquefied.'' Therefore, for consistency with the HMT, PHMSA is revising ''Ammonia, anhydrous, liquefied'' to read ''Ammonia, anhydrous.''

Section 172.400

This section provides the general labeling requirements for packages. In a final rule published January 23, 2008, [73 FR 3874], the U.S. Department of Health and Human Services (HHS) removed 42 CFR part 72. This part had governed the interstate shipment of etiologic agents and was removed because DOT already had in effect a more comprehensive set of regulations applicable to the transport in commerce of infectious substances, resulting in the etiologic agent label specified in the HHS regulations at 42 CFR 72.3 being discontinued. As such, PHMSA is removing the footnote for the label name ''Infectious Substance,'' which references the outdated etiologic agent label.

Section 172.446

This section describes the Class 9 label requirements for miscellaneous hazardous materials. In a final rule published July 20, 2011, HM–218F [76 FR 43510], PHMSA revised the Class 9 label design mandated in paragraph (a) by removing the horizontal line running across the label at its midpoint that had been previously required to harmonize with international standards and avoid delays or frustration of shipments. This new labeling requirement was to go into effect on August 19, 2011; however, to deplete existing stocks of labels with this horizontal line, PHMSA provided in paragraph (c) that labels meeting the requirements in effect before August 19, 2011 could continue to be used until October 1, 2014. That transition period has since expired. Furthermore, in paragraph (b), PHMSA provided the option of using a solid horizontal line dividing the lower and upper half of the label consistent with the transition period specified in paragraph (c) of this section. However, with the expiration of the transition period, the solid line is no longer optional or allowed. Therefore, in this rule, PHMSA is deleting the last

sentence in § 172.446(b), which indicated the solid line was optional for consistency and to avoid confusion, and PHMSA is removing the paragraph (c) transition period.

Section 172.800

This section prescribes the requirements for development and implementation of plans to address security risks related to the transportation of hazardous materials in commerce. In § 172.800(b), PHMSA is revising paragraphs (b)(1) through (b)(14) by replacing the semicolons at the end of each paragraph with periods as each is a standalone criterion for being subject to security plan requirements.

Part 173

Section 173.27

This section provides the general requirements for transportation by aircraft. PHMSA is removing reference to the effective date of October 1, 2006 associated with the certification statement requirement in § 173.27(i) because that date has passed. For the limited quantity combination package provisions found in § 173.27(f)(2)(ii), PHMSA is removing the effective date of January 1, 2012, for packages to be marked with the limited quantity ''Y'' mark prescribed in § 172.315 when conforming to Table 3 of § 173.27(f)(3). PHMSA is also removing the transition dates allowing a package to be marked with the proper shipping name ''Consumer commodity'' and ''ORM–D–AIR'' [1] (including ''Charcoal, NA1361) if it contains a consumer commodity. The effective dates and transition period have since passed and, therefore, PHMSA is removing these dates from § 173.27.

Section 173.29

This section provides exceptions and requirements for empty packagings. In a final rule published January 7, 2013, HM–215K [76 FR 3308], PHMSA adopted the new limited quantity provisions and the eventual phase out of the ORM–D hazard class to provide much of the same regulatory relief to limited quantities as was applied to consumer commodity ORM–D material (*i.e.,* shipping papers, marking, packaging). Empty packagings of ORM–D material containing only the residue of a hazardous material are excepted from the HMR. However, PHMSA did not make this exception specifically applicable to empty packagings containing limited quantity material. PHMSA is accordingly revising § 173.29(b)(2)(iv)(A) to include ''a limited quantity or an ORM–D material.''

Section 173.62

This section provides the specific packing requirements for explosives. In a recent final rule published January 21, 2016, HM–233F [81 FR 3636], PHMSA modified Packing Instruction 139 in the paragraph (c) Table of Packing Methods to adopt special permit DOT–SP 12335. The adoption of the special permit allowed for detonating cord to be packed without sealed ends. However, in making this change, PHMSA inadvertently removed the list of authorized inner and outer packagings for Packing Instruction 139. Therefore, PHMSA is amending Packing Instruction 139 to include the list of inner and outer packagings previously authorized. Further review led to discovery of other errors or sources of confusion, such as the packing method for outer packagings in Packing Instruction 130, which is formatted incorrectly due to inaccurate spacing. PHMSA is making technical revisions to the table throughout to correct formatting issues, harmonize inconsistent language, eliminate any possible confusion, and aid in ease of understanding by the reader of what types of inner, intermediate, and outer packagings are authorized.

Section 173.121

This section provides the requirements for Class 3 assignment of packing groups. PHMSA is removing paragraph (c) because the transition deadline of January 1, 2012 has passed.

Section 173.134

This section provides definitions and exceptions for Class 6, Division 6.2 hazardous materials. PHMSA is correcting the authority citation of the Food, Drug, and Cosmetic Act to read ''21 U.S.C. 301 *et seq.*'' in §§ 173.134(b)(7) and 173.134(b)(16). PHMSA is also revising the term ''Agricultural products and food'' found in § 173.134(b)(16) to read ''A raw agricultural commodity'' consistent with the statutory definition in 21 U.S.C. 321. The term ''product'' is not defined at 21 U.S.C § 321 and, therefore, is an ambiguous term, which may cause confusion when considering applicability of the exception.

Section 173.150

This section provides exceptions for Class 3 (flammable and combustible liquids). In a final rule published November 7, 2018, HM–219A [83 FR 55792], PHMSA converted the measurements in paragraphs (g)(1)(iii) and (g)(2)(iii) from U.S. standard units to the International Standard of Units. In doing so, however, PHMSA did not round to the nearest whole number as is done in the rest of the HMR (see *e.g.,* §§ 173.151(b), 173.152(b), and 173.153(b)). Accordingly, in paragraphs (g)(1)(iii) and (g)(2)(iii), the unit of measurement for ''14.9 kilograms'' and ''29.9 kilograms'' is being rounded to read ''15 kilograms'' and ''30 kilograms'' to be consistent with other references to this unit of measurement and conversion in the HMR.

Section 173.156

This section provides exceptions for limited quantity and ORM–D. In the section title, PHMSA inadvertently omitted the hyphen and the letter ''D'' in ''ORM;'' therefore, PHMSA is revising the section title to correct this error.

Section 173.176

This section provides requirements specific to capacitors. In § 173.176(g), PHMSA inadvertently left out the word ''subject'' in the sentence. PHMSA is therefore revising the paragraph to add the word ''subject'' following ''more than 20 Wh are'' to communicate the meaning of the paragraph requirements.

Section 173.197

This section provides requirements for regulated medical waste (RMW). These include requirements for non-bulk packagings used as sharps containers of RMW (§ 173.197(b)), large packagings with an inner packaging used as sharps containers of RMW (Large Packagings) (§ 173.197(c)), and wheeled carts (Carts) or bulk outer packagings (BOPs) with an inner packaging used as sharps containers of RMW (§ 173.197(d)(1)(i)). Paragraph (e) of § 173.197 requires sharps packagings for Large Packagings, Carts, or BOPs to be capable of meeting the requirement in 49 CFR part 178, subpart M ''Testing of Non-bulk Packagings and Packages,'' at the packing group II (PG II) level. Section 178.600 states that 49 CFR part 178, subpart M prescribes certain testing requirements for performance-oriented packagings identified in 49 CFR part 178, subpart L ''Non-bulk Performance-Oriented Packaging Standards.''

The tests and packagings prescribed in the HMR are authorized for non-bulk packagings only. Therefore, the HMR effectively limits the size of sharps

[1] ORM–D-Air (other regulated materials for domestic transportation by air only) is an outdated marking reference that will be phased out December 31, 2020 in accordance with final rule HM–215K [78 FR 1101].

containers to non-bulk by relying on the testing requirements in 49 CFR part 178, subpart M. Recently, PHMSA has received inquiries from regulated entities asking if they can test bulk sharps packagings using the non-bulk PG II test and place these bulk sharps packagings in Large Packagings, Carts, or BOPs. In response to these inquiries, PHMSA is amending this section to clarify that such testing is not consistent with the HMR. PHMSA is revising the introductory text in § 173.197(e)(3) to state explicitly that only non-bulk sharps packagings may be transported in a Large Packaging, Cart, or BOP.

Furthermore, in the § 173.197(e) introductory text, PHMSA is deleting the transition date of ''After September 30, 2003'' as the date has passed.

Finally, PHMSA inadvertently included duplicate language in § 173.197(e)(2). PHMSA is removing the second occurrence of ''conforming to the provisions of subpart B of this part.''

Section 173.199

This section provides the provisions for Category B infectious substances. In this final rule, PHMSA is providing clarity on § 173.199(a)(7). These requirements provide the name and telephone number of a person who is either knowledgeable about the material being shipped and has comprehensive emergency response and incident mitigation information for the material or who has immediate access to a person who possesses such knowledge and information on a written document or on the outer packaging. The paragraph (a)(7) requirements were first introduced in a NPRM published May 19, 2005 [70 FR 29170] as part of a harmonization effort with the 2005–2006 International Civil Aviation Organization Technical Instructions on the Transportation of Dangerous Good by Air (ICAO Technical Instructions), which require a telephone number of a person knowledgeable about the material be provided.

One commenter to the NPRM expressed concern at the potential costs of monitoring a telephone number while a shipment was in transit. In the final rule published June 2, 2006, HM–226A [71 FR 32244], PHMSA clarified that its harmonization effort would not require that the telephone number be monitored at all times the hazardous material is in transportation, because that would be unduly burdensome, but that PHMSA did intend it to be monitored during a company's administrative office hours. Therefore, PHMSA is amending language in § 173.199(a)(7) to clarify the parameters of monitoring the required telephone number consistent with the preamble of HM–226A.

Section 173.301

This section provides the general requirements for shipments of compressed gases and other hazardous materials in cylinders, United Nations (UN) pressure receptacles, and spherical pressure vessels.

On November 7, 2018, PHMSA published final rule HM–219A [83 FR 55792] responding to numerous petitions for rulemakings, including petition P–1641, which requested changes to cylinder valve requirements. In the final rule, PHMSA added § 173.301(a)(11) to require cylinder valves to comply with the Compressed Gas Association (CGA) publication V–9, ''*Compressed Gas Association Standard for Compressed Gas Cylinder Valves*'' (2012 edition). However, CGA V–9 is limited in scope and does not apply to cylinder valves used with certain cylinders, such as valves used with nonrefillable cylinders (*e.g.,* DOT 39). In issuing the HM–219A final rule, PHMSA intended for the cylinder valve requirements in paragraph (a)(11) to apply only to cylinder valves within CGA V–9's scope. It is otherwise impractical for CGA V–9 standards to apply to types of valves excluded from coverage in V–9. Therefore, PHMSA is amending paragraph (a)(11) to clarify that cylinder valves must comply with the applicable requirements in CGA V–9 and that the standard applies only to those cylinder valve types addressed in CGA V–9.

In addition, § 173.301(f)(3) currently incorrectly references a ''3AXX'' specification cylinder as an authorized cylinder. There is no such specification standard in 49 CFR part 178, but rather a specification for a ''3AAX'' cylinder, as found in § 178.37. PHMSA is revising the incorrect reference to read ''3AAX.'' PHMSA is also deleting the transitional provision associated with the first requalification due after December 31, 2003, because sufficient time has passed to ensure all specification cylinders have been requalified. The longest possible requalification for any of these specification is 12 years (see § 180.209).

Section 173.304a

This section provides additional requirements for shipments of liquefied compressed gases in specification cylinders. On June 13, 2005, PHMSA published final rule HM–218C [70 FR 34066] adopting miscellaneous amendments including removal of references in the § 173.304a(a)(2) table to DOT 4, 4A, 9, 38, 40, and 41 specification cylinders that were no longer authorized or part of the HMR. In the HM–218C final rule, PHMSA accordingly removed the phrase ''DOT–4A480'' from the entry ''Hydrogen sulfide,'' as a DOT–480 is a ''4A'' with a specific service pressure rating. The HM–218C final rule also meant to remove DOT–4A, but ''DOT–4A'' is still listed in the table for ''Hydrogen sulfide;'' therefore, PHMSA is removing it from the list of authorized DOT specification cylinders for ''Hydrogen sulfide.'' In addition, Note 14, which authorized the use of a DOT specification cylinder with a marked service of 480 psi until December 31, 2003, was only assigned to ''Hydrogen sulfide'' in the § 173.304a(a)(2) table; since the transition date of December 31, 2003 has passed, PHMSA is removing the note.

Section 173.307

This section provides exceptions for compressed gases. In a final rule published January 14, 2009, HM–215J [74 FR 2199], PHMSA amended § 173.307(a)(5) to except manufactured articles or apparatuses meeting certain conditions from the requirements of the HMR. The conversion factor of limiting the amount of gas per package to 1 gram (0.35 ounce) is incorrect. PHMSA is revising the customary unit to read ''0.035 ounce.''

Section 173.314

This section provides the requirements for compressed gases in tank cars and multi-unit tank cars. In response to a Notice of Proposed Rulemaking (NPRM) [80 FR 3787] published January 23, 2015, PHMSA received comments from the National Propane Gas Association (NPGA) to clarify the use of the term ''offeror'' and ''shipper'' in § 173.314(h)(2) because they believed this paragraph creates confusion by suggesting the terms have different meanings. In the HMR, the terms ''shipper'' and ''offeror (person who offers)'' are synonymous and often used interchangeably. In § 173.314(h)(2) introductory text, PHMSA is replacing the word ''shipper'' with ''offeror'' to clarify that the responsibility for compliance with the odorant fade prevention requirements for liquefied petroleum gas applies to the person who offers the material into transportation. Since ''offeror'' is specifically defined in § 171.8 (whereas ''shipper'' is not defined in that provision), PHMSA is using only the term ''offeror'' in paragraph (h)(2) for clarity.

Section 173.315

This section provides the requirements for compressed gases in

cargo tanks and portable tanks. In §§ 173.315(a)(2) and (h) tables, there are instances where the word ''do'' is listed in the respective tables without a clear understanding of what the word represents. For purposes of this section, PHMSA is clarifying that the word ''do'' is an abbreviation of the word ''ditto'' meaning ''same as above.''

Additionally, as discussed for § 173.314 above, the NPGA asked PHMSA to clarify the use of the term ''offeror'' and ''shipper'' in § 173.315(b)(2) because they believed this paragraph creates confusion by suggesting the terms have different meanings. In the HMR, the terms ''shipper'' and ''offeror (person who offers)'' are synonymous and often used interchangeably. In § 173.315(b)(2) introductory text, PHMSA is replacing the word ''shipper'' with ''offeror'' to clarify that the responsibility for compliance with the odorant fade prevention requirements for liquefied petroleum gas applies to the person who offers the material into transportation. Since ''offeror'' is specifically defined in § 171.8, unlike ''shipper,'' in this instance, PHMSA is using only the term ''offeror'' in paragraph (b)(2) for clarity.

Section 173.335

This section provides the requirements for chemicals under pressure. In the second sentence of § 173.335(a), cylinders filled with a chemical under pressure must be offered for transportation in accordance with the requirements of this section and § 172.301. The reference to § 172.301 is incorrect because it refers to Part 172 general marking requirements for non-bulk packagings rather than Part 173 general packaging requirements for shipments of compressed gases in § 173.301. PHMSA is therefore revising the reference to read § 173.301. Furthermore, PHMSA is moving the exception that these materials are not subject to the cylinder valve cap requirements in §§ 173.301(a)(11) and (12) that was placed at the end of paragraph (a) up in the paragraph to be associated with the reference to § 173.301 for greater ease of understanding.

Section 173.415

This section provides requirements for authorized Type A packages for radioactive materials. In paragraph (a), until January 1, 2017, the HMR required an offeror of a Specification 7A package to maintain on file complete documentation of tests, engineering evaluations or comparative data showing construction methods, packaging designs, and construction materials complying with 7A specification requirements for at least one year from the latest shipment and to provide this to DOT upon request. After January 1, 2017, the offeror is subject to a two-year documentation requirement under one of two options specified in paragraphs (a)(1) and (a)(2). Because January 1, 2017, has passed, PHMSA is revising § 173.415(a) introductory text to remove the language associated with requirements prior to January 1, 2017, to avoid any confusion on applicability.

Section 173.435

This section provides the table for A_1 and A_2 values for radionuclides. On March 10, 1983, RSPA published final rule HM–169 [48 FR 10218], which changed the requirements for the transportation of radioactive materials by harmonizing the HMR with international regulations from the International Atomic Energy Agency (IAEA). These changes provided A_1 and A_2 values for radionuclides in a table along with their respective specific activities in Curie/gram (Ci/g). The final rule provided the standard textbook specific activity for natural rubidium, listed as Rb (nat), as 1.8×10^{-8} Ci/g. On November 14, 1989, RSPA published an NPRM [54 FR 47454] under Docket HM–169A, proposing to expand the radionuclide list and include both Ci/g and TeraBequerel/gram (TBq/g) as units of measure for specific activity. These changes were in part due to the IAEA modifying its system for determining A_1 and A_2 values. Among the proposed changes, RSPA included an error for the specific activity of Rb (nat) in Ci/g with a positive exponent instead of a negative exponent. This led to PHMSA incorrectly converting to a value of 6.7×10^{6} for TBq/g). Thus, this error was codified under final rule HM–169A [60 FR 50292], published September 28, 1995, inaccurately stating a specific activity of 1.8×10^{8} Ci/g (6.7×10^{6} TBq/g). To correct this publication error and state the standard textbook values for natural rubidium, PHMSA is revising the specific activity information in the table in TBq/g and Ci/g for Rb (nat) to 6.7×10^{-10} TBq/g and 1.8×10^{-8} Ci/g, respectively.

Part 174

Section 174.67

This section provides rules for tank car unloading. In the second sentence of § 174.67(a)(3), PHMSA is revising a typographical error by replacing the phrase ''or other equipment that provides and equivalent level of safety'' with ''or other equipment that provides an equivalent level of safety.''

Part 175

Section 175.31

This section provides the requirements of reporting discrepancies for hazardous materials shipments. In § 175.31(a), PHMSA is updating the FAA contact information and including an electronic means of submitting the information to the FAA, which currently can be done at *http://www.faa.gov/hazmat/air_carriers/report_incident/.*

Section 175.75

This section provides the requirements for quantity limitations and cargo locations on aircraft. PHMSA is clarifying that in the context of § 175.75(e)(3)(i), ''FAA Inspector'' means an ''FAA Flight Standards Inspector.''

Section 175.630

This section provides special requirements for Division 6.1 (poisonous) material and Division 6.2 (infectious substances) material by aircraft. In a final rule published January 8, 2015, HM–215M [80 FR 1075], PHMSA removed the segregation requirements for Division 6.1 and 6.2 hazardous materials based on the amendments to the 2013–2014 ICAO Technical Instructions. The final rule deleted and reserved paragraph (a) but did not make a subsequent amendment to § 175.630(b) to address the reference to the now deleted paragraph (a). Therefore, PHMSA is revising § 175.630(b) to delete the last sentence thereby removing the outdated reference to reserved paragraph (a).

Part 177

Section 177.854

This section provides the requirements for disabled motor vehicles and broken or leaking packages as well as repairs. In § 177.854(c)(2), PHMSA authorizes packages of hazardous materials that are damaged or found leaking during transportation and hazardous materials that have spilled or leaked during transportation to be forwarded to their destination or returned to the shipper in a salvage drum in accordance with the requirements in § 173.3(c). PHMSA published final rules HM–233 [70 FR 3302; January 24, 2005] and HM–215M [80 FR 1075; January 8, 2015], which amended § 173.3(d) to allow for salvage cylinders and amended § 173.3(f) to allow for shipments of large salvage packagings, respectively. Since both

salvage cylinders and large salvage packagings are now authorized when packagings of hazardous materials are found to be damaged or leaking, PHMSA is revising § 177.854(c)(2) to reference § 173.3 for authorized salvage packaging.

Part 178

Section 178.338–10

This section provides the requirements for accident damage protection. Section 178.338–10(c)(2) addresses the rear-end tank protection for MC–338 specification cargo tank motor vehicles specifically. An MC–338 cargo tank must conform to the requirements found in § 178.345–8(d). However, § 178.338–10(c)(2) references § 178.345–8(b) inadvertently. Therefore, PHMSA is revising § 178.338–10(c)(2) to include the correct reference to § 178.345–8(d).

Section 178.345–8

This section provides the requirements for cargo tank motor vehicle accident damage protection. Section 178.345.8(b)(1) discusses specifically the bottom damage protection device and the ability to withstand a force of 155,000 pounds (based on ultimate strength of the material) from the front, side, or rear, distributed uniformly over each surface of the device. To eliminate confusion on the intent of the requirement, PHMSA is revising the first sentence of the paragraph by adding ''applied in each direction of the device'' and removing ''over each surface'' from the sentence.

Part 179

Section 179.201–6

This section provides the requirements for manways and manway closures on non-pressure rail tank cars. Based on historical review of the HMR, a typographical error discovered in paragraphs (b) and (c) regarding Specification DOT–111 tank cars was never corrected. These paragraphs reference a DOT 11A specification and no such specification exists in the HMR. PHMSA is revising references to ''DOT 11A'' to read ''DOT 111A'' in each instance it occurs in § 179.201–6. Also, in paragraph (a), PHMSA is deleting dashes from some of the listed specifications; in paragraph (b), PHMSA is adding the phrase ''A manway'' before the word ''cover'' for clarity; and in paragraph (c), PHMSA is revising ''111360W7'' to read ''111A60W7'' as no ''111360W7'' tank car specification exists nor is authorized.

Section 179.202–13

This section provides retrofit standard requirements for specification DOT–117R rail tank cars. Based on a review of the HMR, a typographical error was discovered in paragraphs (h)(1) regarding specification DOT–117R tank cars. This paragraph states that top fittings must be located inside a protective housing not less than 12 inches in thickness. PHMSA made this error in final rule HM–251C [81 FR 53935; August 15, 2016]. In that rule, PHMSA intended to codify Section 7306(a) of the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94), which mandated fittings on specification DOT 117R tank cars to be located inside a protective housing not less than ½-inch in thickness. The erroneous language of ''12-inch-thickness'' was never an acceptable requirement. Therefore, PHMSA is revising this section to ''½-inch-thickness'' to be consistent with the FAST Act's requirement.

Part 180

Section 180.407

This section provides the requirements for test and inspection of specification cargo tanks. Section 180.407(b)(1), (d)(5), and (e)(3) provide the requirements for thickness testing of corroded or abraded areas that might render it unsafe for hazardous materials service. These paragraphs only provide a reference to the minimum thickness standard for MC 300 series cargo tanks (except for MC 331) found in paragraph (i)(5). Minimum thickness standards for MC 331 cargo tanks and DOT 400 series cargo tanks are found in paragraphs (i)(9) and (i)(10). To assist with ease of understanding, PHMSA is revising §§ 180.407(b)(1), (d)(5), and (e)(3) to also include reference to paragraphs (i)(9) and (i)(10).

Additionally, in final rule HM–219A [83 FR 55792; November 7, 2018], for changes made to Table 1 to paragraph (g)(1)(iv), PHMSA made a copy-editing error in the second column of the first row and carried over inadvertently the phrase ''or 1.5 times the maximum allowed working pressure (MAWP), whichever is greater'' mirroring the other column entries. In the June 30, 2016, NPRM [81 FR 42609], PHMSA proposed that the provision would read, ''the test pressure on the name plate or specification plate, 20.7 kPa (3 psig) or design pressure, whichever is greater.'' No commenters provided comment on this provision, and PHMSA intended to keep the language as proposed in the NPRM when it published the HM–219A final rule. The change occurred erroneously when PHMSA sought to respond to a comment by the Truck Trailer Manufacturers Association (TTMA) over a minor error in the DOT 412 entry to Table 1 in paragraph (g)(1)(iv). As the DOT 412 entry in the NPRM read, ''[t]he test pressure on the name plate or specification plate, 1.5 times the MAWP,'' TTMA believed that this should read: ''[t]he test pressure on the name plate or specification plate, *or* 1.5 times the MAWP, whichever is greater.'' In making this change to the DOT 412 entry, however, PHMSA made this same change to the first row of Table 1 in paragraph (g)(1)(iv) inadvertently. Therefore, PHMSA is correcting this inadvertent error in this final rule. Also, PHMSA is revising the last sentence in paragraph (g)(1)(iv) to replace the phrase ''identified in Table 1 to paragraph (g)(1)(iv)'' with the phrase ''identified in the following table'' for further clarity.

IV. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This final rule is published under the authority of the Federal hazmat law which authorizes the Secretary of Transportation to ''prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.'' The Secretary has delegated the authority granted in the Federal hazmat law to the PHMSA Administrator at § 1.97. This final rule amends twelve parts of the HMR, to correct mailing addresses, grammatical and typographical errors, and improve the clarity of certain provisions.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not a significant regulatory action under section 3(f) of Executive Order 12866 (''Regulatory Planning and Review'') [2] and, therefore, was not reviewed by the Office of Management and Budget. Nor is this final rule considered a significant rulemaking under the DOT rulemaking procedures at 49 CFR part 5.

Executive Order 12866 requires agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' Similarly, DOT regulations require that regulations issued by PHMSA and other DOT Operating Administrations ''should be designed to minimize burdens and

[2] 58 FR 51735, (Oc. 4, 1993).

reduce barriers to market entry whenever possible, consistent with the effective promotion of safety'' and should generally ''not be issued unless their benefits are expected to exceed their costs.'' § 5.5(f)–(g).

This final rule does not impose new burdens as the amendments contained in this final rule are non-substantive changes that do not impose new requirements for hazardous materials shippers or carriers. Therefore, it is not necessary to prepare a regulatory impact analysis.

C. Executive Order 13771

This final rule is not a regulatory action under Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') [3] because it is not a significant regulatory action as defined by Executive Order 12866.

D. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria in Executive Order 13132 (''Federalism'') [4] and the President's memorandum (''Preemption'') that was published in the **Federal Register** on May 22, 2009 [74 FR 24693]. Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may 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.''

The HMR amendments in this final rule are non-substantive changes that do not impose any new requirements and will not have substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor do the HMR amendments in this final rule impose direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

E. Executive Order 13175

This final rule was analyzed in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'') [5] and DOT Order 5301.1, ''Department of Transportation Policies, Programs, and Procedures Affecting American Indians, Alaska Natives, and Tribes.'' Executive Order 13175 and DOT Order 5301.1 require DOT Operating Administrations to assure meaningful and timely input from Indian Tribal government representatives in the development of rules that significantly or uniquely affect Tribal communities by imposing ''substantial direct compliance costs'' or ''substantial direct effects'' on such communities or the relationship and distribution of power between the Federal Government and Indian Tribes.

This final rule neither imposes direct compliance costs on Tribal communities, nor has a substantial direct effect on those communities. Therefore, the funding and consultation requirements of Executive Order 13175 and DOT Order 5301.1 do not apply.

F. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires agencies to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. There are no costs to small entities associated with this final rule. This final rule makes non-substantive changes that do not impose new requirements; thus, there are no direct or indirect adverse economic impacts for small units of government, businesses, or other organizations. Consequently, PHMSA certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates Reform Act

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). It does not result in costs of $100 million ($164 million as of 2019 when adjusted for inflation) to either State, local, or tribal governments, in the aggregate, or to the private sector in any one year, and is the least burdensome alternative that achieves the objective of the rule.

H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) no person is required to respond to any information collection unless it has been approved by OMB and displays a valid OMB control number. Section 1320.8(d) of 5 CFR requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information and recordkeeping requests. There are no new information collection requirements in this final rule.

I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and implementing regulations by the Council on Environmental Quality (40 CFR part 1500) require Federal agencies to consider the consequences of Federal actions and prepare a detailed statement on actions that significantly affect the quality of the human environment. DOT Order 5610.1C, ''Procedures for Considering Environmental Impacts,'' establishes departmental procedures for evaluation of environmental impacts under NEPA and its implementing regulations.

The purpose of this final rule is to introduce non-substantive changes that do not impose new requirements. The intended effect of this rule is to enhance the accuracy and reduce misunderstandings of the regulations. Therefore, PHMSA has determined that the implementation of this final rule will not have a significant impact on the quality of the human environment.

J. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (''Unified Agenda''). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

K. Executive Order 13609 and International Trade Analysis

Under Executive Order 13609, ''Promoting International Regulatory Cooperation,'' [77 FR 26413; May 4, 2012] agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by

[3] 82 FR 9339 (Feb. 24, 2017).

[4] 64 FR 43255 (Aug. 10, 1999).

[5] 65 FR 67249 (Nov. 9, 2000).

the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards in order to protect the safety of the American public. PHMSA has assessed the effects of the final rule to ensure that it does not cause unnecessary obstacles to foreign trade. The amendments contained in this rule are non-substantive changes and do not impose new requirements. Further, insofar as many of the amendments introduced by the final rule improve the clarity of the HMR for regulated entities, or better align the HMR with international (*e.g.,* IAEA) standards, the final rule could reduce barriers to international trade. Therefore, this final rule does not present an obstacle to international trade.

List of Subjects

49 CFR Part 106

Administrative practice and procedure, Hazardous materials transportation.

49 CFR Part 107

Administrative practice and procedure; Hazardous materials transportation; Packaging and containers; Penalties; Reporting and recordkeeping requirements.

49 CFR Part 171

Exports, Hazardous materials transportation, Hazardous waste, Imports, Reporting and recordkeeping requirements.

49 CFR Part 172

Education, Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 173

Hazardous materials transportation, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements, Uranium.

49 CFR Part 174

Hazardous materials transportation, Incorporation by reference, Radioactive materials, Railroad safety, Railroads, Reporting and recordkeeping requirements, Security measures.

49 CFR Part 175

Air carriers, Hazardous materials transportation, Incorporation by reference, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 176

Hazardous materials transportation, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 178

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

49 CFR Part 179

Hazardous materials transportation, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 180

Hazardous materials transportation, Incorporation by reference, Motor carriers, Motor vehicle safety, Packaging and containers, Railroad safety, Reporting and recordkeeping requirements.

In consideration of the foregoing, 49 CFR chapter I is amended as follows:

PART 106—RULEMAKING PROCEDURES

■ 1. The authority citation for part 106 is revised to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

PART 107—HAZARDOUS MATERIALS PROGRAM PROCEDURES

■ 2. The authority citation for part 107 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 Section 4; Pub. L. 104–121 Sections 212–213; Pub. L. 104–134 Section 31001; Pub. L. 114–74 Section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97; 33 U.S.C. 1321.

■ 3. Amend § 107.117 by revising paragraphs (d)(1) and (2) to read as follows:

§ 107.117 Emergency Processing.

* * * * *

(d) * * *

(1) *Certificate-Holding Aircraft:* The Federal Aviation Administration (FAA) Director, Office of Hazardous Materials Safety is responsible for the aircraft operator's hazardous materials safety program. The Director, Office of Hazardous Materials Safety, may be reached by calling the FAA Washington Operations Center at 202–267–3333 (any hour), or visiting FAA's website.

(2) *Noncertificate-Holding Aircraft (Those Which Operate Under 14 CFR part 91):* The Federal Aviation Administration (FAA) Regional Office that serves the place where the flight will originate. The nearest Regional Office may be located by calling the FAA Washington Operations Center at 202–267–3333 or visiting FAA's website.

* * * * *

■ 4. Amend § 107.125 by revising paragraph (a)(1) to read as follows:

§ 107.125 Appeal.

(a) * * *

(1) Be in writing or by electronic means and filed within 30 days of receipt of the Associate Administrator's decision on reconsideration;

* * * * *

■ 5. Amend § 107.329 by adding paragraph (c) to read as follows:

§ 107.329 Maximum penalties.

* * * * *

(c) Any owner, operator, or person found to have violated a response plan or provision of 33 U.S.C. 1321(j), or any regulation or order issued thereunder, is subject to an administrative civil penalty under 33 U.S.C. 1321(b)(6), as adjusted by 40 CFR 19.4.

PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 6. The authority citation for part 171 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4; Pub. L. 104–134, section 31001; Pub. L. 114–74 section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97.

■ 7. Amend § 171.8 by revising the definition of ''Reportable quantity (RQ)'' to read as follows:

§ 171.8 Definitions and Abbreviations.

* * * * *

Reportable quantity (RQ) for the purposes of this subchapter, means the quantity specified in Column 2 of Table 1 or Column 3 of Table 2 of Appendix A to § 172.101 for any material identified in Column 1 of the tables.

* * * * *

■ 8. Amend § 171.16 by revising paragraph (b)(2) to read as follows:

§ 171.16 Detailed hazardous materials incident reports.

* * * * *

(b) * * *

(2) For an incident involving transportation by aircraft, submit a written or electronic copy of the Hazardous Materials Incident Report to the Federal Aviation Administration (FAA) Regional Office nearest the location of the incident. The nearest FAA Regional Office may be located by calling the FAA Washington Operations Center at 202–267–3333 (any hour) or visiting FAA's website; and

* * * * *

PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS

■ 9. The authority citation for part 172 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81, 1.96 and 1.97.

■ 10. In § 172.101, the Hazardous Materials Table is amended by removing the entries under ''[REMOVE],'' by adding the entries under ''[ADD],'' and revising the entries under ''[REVISE]'' in the appropriate alphabetical order to read as follows:

§ 172.101 Purpose and use of hazardous materials table.

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* * * * *

§172.101 Hazardous Materials Table

Symbols (1)	Hazardous materials descriptions and proper shipping names (2)	Hazard class or division (3)	Identification Numbers (4)	PG (5)	Label Codes (6)	Special Provisions (§ 172.102) (7)	(8) Packaging (§ 173.***) Exceptions (8A)	Non-bulk (8B)	Bulk (8C)	(9) Quantity limitations (see §§ 173.27 and 175.75) Passenger aircraft/rail (9A)	Cargo aircraft only (9B)	(10) Vessel stowage Location (10A)	Other (10B)
	[REMOVE]												
	*		*		*		*		*		*		*
G	Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.	6.1	UN1655	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
	Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.	6.1	UN1655	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33	153	212	242	25 kg	100 kg	A	

				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
	*		*		*		*		*		*		*
+	Phosphorous oxychloride	6.1	UN1810	I	6.1, 8	2, B9, B14, B32, B77, N34, T20, TP2, TP13, TP38, TP45	None	227	244	Forbidden	Forbidden	D	40
	*		*		*		*		*		*		*
	Regulated medical waste, n.o.s. or Clinical waste, unspecified, n.o.s. or (BIO) Medical waste, n.o.s., or Biomedical waste, n.o.s. or Medical waste, n.o.s.	6.2	UN3291	II	6.2	41, A13, 337	134	197	197	No limit	No limit	B	40
	*		*		*		*		*		*		*
	[**ADD**]												
	*		*		*		*		*		*		*
G	Nicotine compounds, solid, n.o.s. *or* Nicotine preparations, solid, n.o.s.	6.1	UN1655	I	6.1	IB7, IP1, T6, TP33	None	211	242	5 kg	50 kg	B	
				II	6.1	IB8, IP2, IP4, T3, TP33	153	212	242	25 kg	100 kg	A	
				III	6.1	IB8, IP3, T1, TP33	153	213	240	100 kg	200 kg	A	
	*		*		*		*		*		*		*
+	Phosphorus oxychloride	6.1	UN1810	I	6.1, 8	2, B9, B14, B32, B77, N34, T20, TP2, TP13, TP38, TP45	None	227	244	Forbidden	Forbidden	D	40
	*		*		*		*		*		*		*
	Regulated medical waste, n.o.s. *or* Clinical waste, unspecified, n.o.s. *or* (BIO) Medical waste, n.o.s., *or* Biomedical waste, n.o.s. *or* Medical waste, n.o.s	6.2	UN3291	II	6.2	41, A13, 337	134	197	197	No limit	No limit	B	40
	*		*		*		*		*		*		*

	[REVISE]												
	*		*		*		*		*		*		*
	Ammonia solution, *relative density between 0.880 and 0.957 at 15 degrees C in water, with more than 10 percent but not more than 35 percent ammonia*	8	UN2672	III	8	336, IB3, IP8, T7, TP2	154	203	241	5 L	60 L	A	40, 52, 85
	*		*		*		*		*		*		*
	Calcium	4.3	UN1401	II	4.3	IB7, IP2, IP21, T3, TP33, W31, W40	151	212	241	15 kg	50 kg	E	13, 52, 148
	*		*		*		*		*		*		*
	Chromosulfuric acid	8	UN2240	I	8	A7, B4, B6, N34, T10, TP2, TP13	None	201	243	0.5 L	2.5 L	B	40, 53, 58, 66, 74, 89, 90
	*		*		*		*		*		*		*
	Dangerous Goods in Machinery *or* Dangerous Goods in Apparatus	9	UN3363		9	136, A105	None	222	None	See A105	See A105	A	
	*		*		*		*		*		*		*
	Difluoromethane *or* Refrigerant gas R 32	2.1	UN3252		2.1	T50	306	304	314, 315	Forbidden	150 kg	D	40
	*		*		*		*		*		*		*
	Formaldehyde solutions, *with not less than 25 percent formaldehyde*	8	UN2209	III	8	IB3, T4, TP1	154	203	241	5 L	60 L		
	*		*		*		*		*		*		*
	Gas sample, non-pressurized, toxic, n.o.s., *not refrigerated liquid*	2.3	UN3169		2.3	6	306	302, 304	None	Forbidden	1 L	D	
	*		*		*		*		*		*		*
	Helium, compressed	2.2	UN1046		2.2		306, 307	302	302, 314	75 kg	150 kg	A	85
	*		*		*		*		*		*		*
G	Infectious substances, affecting humans	6.2	UN2814		6.2	A82	134	196	None	50 mL or 50 g	4 L or 4 kg	B	40

	*		*		*		*		*		*		*
	Krypton, compressed	2.2	UN1056		2.2		306, 307	302	None	75 kg	150 kg	A	
	*		*		*		*		*		*		*
	Phenyl urea pesticides, liquid, toxic	6.1	UN3002	I	6.1	T14, TP2, TP27	None	201	243	1 L	30 L	B	40
				II	6.1	T7, TP2	None	202	243	5 L	60 L	B	40
				III	6.1	T4, TP1	153	203	241	60 L	220 L	A	40
	*		*		*		*		*		*		*
	Pyrethroid pesticide, liquid toxic	6.1	UN3352	I	6.1	T14, TP2, TP13, TP27	None	201	243	1 L	30 L	B	40
				II	6.1	IB2, T11, TP2, TP27	153	202	243	5 L	60 L	B	40
				III	6.1	IB3, T7, TP2, TP28	153	203	241	60 L	220 L	A	40
	*		*		*		*		*		*		*
D	Toy Caps	1.4S	NA0337		1.4S	382	None	62	None	25 kg	100 kg	01	25
	*		*		*		*		*		*		*

* * * * *

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■ 11. In § 172.102, in paragraph (c)(1), revise special provisions 343, 384, 386, and in paragraph (c)(3), revise special provision B131 to read as follows:

§ 172.102 Special provisions.

* * * * *

(c) * * *

(1) * * *

343 A bulk packaging that emits hydrogen sulfide in sufficient concentration that vapors evolved from the sour crude oil can present an inhalation hazard must be marked as specified in § 172.327.

* * * * *

384 For green graphite electrodes and shapes that are large single component solid objects not subject to shifting, transport in open rail flat cars, open bed motor vehicles, and intermodal containers is also authorized. The objects must be secured to the flat car, motor vehicle, intermodal container, or unitized by steel banding to wooden runners or pallets and the units secured to the flat car, motor vehicle, or freight container to prevent shifting, including relative motion between the objects, under conditions normally incident to transportation. Stacking is permitted two or more levels high to achieve maximum allowable utilization of the designated vehicle, rail car weight, or intermodal freight container weight or vessel hold volume.

* * * * *

386 When transported by private motor carrier only, the following corrosive liquids may be packaged in polyethylene bottles with a capacity no greater than 3.785 L (one gallon), further packed inside an open-top, heavy wall, high density polyethylene box (*i.e.,* crate) in a manner that the polyethylene bottles are not subjected to any superimposed weight, and the boxes must be reasonably secured against shifting within the transport vehicle and loaded so as to minimize the possibility of coming in contact with other lading:

Compounds, cleaning liquid, NA1760, PG II or III;

Corrosive liquid, acidic, inorganic, n.o.s., UN3264, PG II;

Corrosive liquid, acidic, organic, n.o.s., UN3265, PG III;

Corrosive liquid, basic, inorganic, n.o.s., UN3266, PG II;

Hypochlorite solutions, UN1791, PG III;

Hydrochloric acid solution, UN1789, PG II; and

Sulfuric acid, UN2796, PG II.

a. No more than four bottles, securely closed with threaded caps, may be packed in each box.

b. Each empty bottle must have a minimum weight of not less than 140 grams and a minimum wall thickness of not less than 0.020 inch (0.508 mm).

c. The completed package must meet the Packing Group II performance level, as applicable for combination packagings with a plastic box outer packaging, in accordance with subpart M of part 178 of this subchapter.

(i) Tests must be performed on each type and size of bottle, for each manufacturing location. Samples taken at random must withstand the prescribed tests without breakage or leakage.

(ii) One bottle for every two hours of production, or for every 2,500 bottles produced, must be tested by dropping a bottle filled to 98 percent capacity with water from a height of 1.2 meters (3.9 feet) onto solid concrete directly on the closure.

(iii) A copy of the test results must be kept on file at each facility where packagings are offered for transportation, and must be made available to a representative of the Department upon request.

(iv) The name or symbol of the bottle producer, and the month and year of manufacture, must be marked by embossing, ink-jet printing of permanent ink, or other permanent means on the face or bottom of each bottle, in letters and numbers at least 6 mm (0.2 inch) high. Symbols, if used, must be registered with the Associate Administrator.

(v) The box must be constructed from high-density polyethylene in the density range 0.950–0.962, and be capable of holding liquid when in the upright position.

* * * * *

(3) * * *

B131 When transported by highway, rail, or cargo vessel, waste Paint and Paint related material (UN1263; PG II and PG III), when in plastic or metal inner packagings of not more than 26.5 L (7 gallons), are excepted from the marking requirements in § 172.301(a) and (c) and the labeling requirements in § 172.400(a), when further packed in the following specification and non-specification bulk outer packagings and under the following conditions:

a. Primary receptacles must conform to the general packaging requirements of subpart B of part 173 of this subchapter and may not leak. If they do leak, they must be overpacked in packagings conforming to the specification requirements of part 178 of this subchapter or in salvage packagings conforming to the requirements in § 173.12 of this subchapter.

b. Primary receptacles must be further packed in non-specification bulk outer packagings such as cubic yard boxes, plastic rigid-wall bulk containers, dump trailers, and roll-off containers. Bulk outer packagings must be liquid tight through design or by the use of lining materials.

c. Primary receptacles may also be further packed in specification bulk outer packagings. Authorized specification bulk outer packagings are UN11G fiberboard intermediate bulk containers (IBC) and UN13H4 woven plastic, coated and with liner flexible intermediate bulk containers (FIBCs) meeting the Packing Group II performance level and lined with a plastic liner of at least 6 mil thickness.

d. All inner packagings placed inside bulk outer packagings must be blocked and braced to prevent shifting during transportation that could cause the container to open or fall over. Specification IBCs and FIBCs are to be secured to a pallet.

* * * * *

■ 12. In § 172.202, revise paragraph (b) to read as follows:

§ 172.202 Description of hazardous material on shipping papers.

* * * * *

(b) Except as provided in this subpart, the basic description specified in paragraphs (a)(1), (2), (3), and (4) of this section must be shown in sequence with no additional information interspersed. For example, ''UN2744, Cyclobutyl chloroformate, 6.1, (8, 3), PG II.'' Shipping descriptions for hazardous materials offered or intended for transportation by rail that contain all the information required in this subpart and that are formatted and ordered in accordance with recognized electronic data interchange standards and, to the extent possible, in the order and manner required by this subpart are deemed to comply with this paragraph.

* * * * *

■ 13. In § 172.322, revise paragraphs (e)(2)(i) introductory text and (e)(2)(ii) to read as follows:

§ 172.322 Marine Pollutants.

(e) * * *

(2) * * *

(i) At least 100 mm (3.9 inches) as measured from the outside of the lines forming the border for marks applied to:

* * * * *

(ii) At least 250 mm (9.8 inches) for marks applied to all other bulk packages.

* * * * *

■ 14. In § 172.330, revise paragraph (a)(1)(ii) to read as follows:

§ 172.330 Tank cars and multi-unit tank car tanks.

(a) * * *

(1) * * *

(ii) A tank car containing any of the following materials must be marked on each side with the key words of the proper shipping name specified for the material in the § 172.101 table, or with a common name authorized for the material in this subchapter (*e.g.,* ''Refrigerant Gas''):

Acrolein, stabilized
Ammonia, anhydrous
Ammonia solutions (more than 50% ammonia)
Bromine *or* Bromine solutions
Bromine chloride
Chloroprene, stabilized
Dispersant gas *or* Refrigerant gas (as defined in § 173.115 of this subchapter)
Division 2.1 materials
Division 2.2 materials (in Class DOT 107 tank cars only)
Division 2.3 materials
Formic acid
Hydrocyanic acid, aqueous solutions
Hydrofluoric acid, solution
Hydrogen cyanide, stabilized (less than 3% water)
Hydrogen fluoride, anhydrous
Hydrogen peroxide, aqueous solutions (greater than 20% hydrogen peroxide)
Hydrogen peroxide, stabilized
Hydrogen peroxide and peroxyacetic acid mixtures
Nitric acid (other than red fuming)
Phosphorus, amorphous
Phosphorus, white dry *or* Phosphorus, white, under water *or* Phosphorus white, in solution, *or* Phosphorus, yellow dry *or* Phosphorus, yellow, under water *or* Phosphorus, yellow, in solution
Phosphorus white, molten
Potassium nitrate and sodium nitrate mixtures
Potassium permanganate
Sulfur trioxide, stabilized
Sulfur trioxide, uninhibited

* * * * *

■ 15. In § 172.400, revise paragraph (b) to read as follows:

§ 172.400 General labeling requirements.

* * * * *

(b) Labeling is required for a hazardous material which meets one or more hazard class definitions, in accordance with column 6 of the § 172.101 table and the following table:

Hazard class or division	Label name	Label design or section reference
1.1	EXPLOSIVES 1.1	172.411
1.2	EXPLOSIVES 1.2	172.411
1.3	EXPLOSIVES 1.3	172.411
1.4	EXPLOSIVES 1.4	172.411
1.5	EXPLOSIVES 1.5	172.411
1.6	EXPLOSIVES 1.6	172.411
2.1	FLAMMABLE GAS	172.417
2.2	NON-FLAMMABLE GAS	172.415
2.3	POISON GAS	172.416
3 Flammable Liquid (Combustible liquid)	FLAMMABLE LIQUID (none)	172.419
4.1	FLAMMABLE SOLID	172.420
4.2	SPONTANEOUSLY COMBUSTIBLE	172.422
4.3	DANGEROUS WHEN WET	172.423
5.1	OXIDER	172.426
5.2	ORGANIC PEROXIDE	172.427
6.1 (material poisonous by inhalation (see § 171.8 of this subchapter)).	POISON INHALATION HAZARD	172.429
6.1 (other than material poisonous by inhalation)	POISON	172.430
6.1 (inhalation hazard, Zone A or B)	POISON INHALATION HAZARD	172.429
6.1 (other than inhalation hazard, Zone A or B)	POISON	172.430
6.2	INFECTIOUS SUBSTANCE	172.432
7 (see § 172.403)	RADIOACTIVE WHITE–I	172.436
7	RADIOACTIVE YELLOW–II	172.438
7	RADIOACTIVE YELLOW–III	172.440
7 (fissile radioactive material; see § 172.402)	FISSILE	172.441
7 (empty packages, see § 173.428 of this subchapter)	EMPTY	172.450
8	CORROSIVE	172.442
9	CLASS 9	172.446

■ 16. In § 172.446, revise paragraph (b) and remove paragraph (c) to read as follows:

§ 172.446 CLASS 9 label.

* * * * *

(b) In addition to complying with § 172.407, the background on the CLASS 9 label must be white with seven black vertical stripes on the top half. The black vertical stripes must be spaced, so that, visually, they appear equal in width to the six white spaces between them. The lower half of the label must be white with the class number ''9'' underlined and centered at the bottom.

■ 17. In § 172.800, revise paragraphs (b)(1) through (14) to read as follows:

§ 172.800 Purpose and applicability.

* * * * *

(b) * * *

(1) Any quantity of a Division 1.1, 1.2, or 1.3 material.

(2) A quantity of a Division 1.4, 1.5, or 1.6 material requiring placarding in accordance with subpart F of this part.

(3) A large bulk quantity of Division 2.1 material.

(4) A large bulk quantity of Division 2.2 material with a subsidiary hazard of 5.1.

(5) Any quantity of a material poisonous by inhalation, as defined in § 171.8 of this subchapter.

(6) A large bulk quantity of a Class 3 material meeting the criteria for Packing Group I or II.

(7) A quantity of desensitized explosives meeting the definition of Division 4.1 or Class 3 material requiring placarding in accordance with subpart F of this part.

(8) A large bulk quantity of a Division 4.2 material meeting the criteria for Packing Group I or II.

(9) A quantity of a Division 4.3 material requiring placarding in accordance with subpart F of this part.

(10) A large bulk quantity of a Division 5.1 material in Packing Groups I and II; perchlorates; or ammonium nitrate, ammonium nitrate fertilizers, or ammonium nitrate emulsions, suspensions, or gels.

(11) Any quantity of organic peroxide, Type B, liquid or solid, temperature controlled.

(12) A large bulk quantity of Division 6.1 material (for a material poisonous by inhalation see paragraph (5) above).

(13) A select agent or toxin regulated by the Centers for Disease Control and Prevention under 42 CFR part 73 or the U.S. Department of Agriculture under 9 CFR part 121.

(14) A quantity of uranium hexafluoride requiring placarding under § 172.505(b).

* * * * *

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

■ 18. The authority citation for part 173 continues to read as follows:

Authority: 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81, 1.96 and 1.97.

■ 19. In § 173.3, revise paragraph (d)(2)(i) to read as follows:

§ 173.3 Packaging and Exceptions.

* * * * *

(d) * * *

(2) * * *

(i) Must be designed, constructed and marked in accordance with Section VIII, Division I of the ASME Code (IBR, *see* § 171.7 of this subchapter) with a minimum design margin of 4 to 1. Salvage cylinders may not be equipped with a pressure relief device. Damaged cylinders must be securely positioned in the salvage cylinder to prevent excessive shifting. The overpack requirements of § 173.25 do not apply to salvage cylinders used in accordance with this section.

* * * * *

■ 20. In § 173.24, revise paragraph (c)(2) to read as follows:

§ 173.24 General requirements for packagings and packages.

* * * * *

(c) * * *

(2) The use of supplementary packagings within an outer packaging (*e.g.,* an intermediate packaging or a receptacle inside a required inner packaging) additional to what is required by this subchapter is authorized provided all applicable requirements of this subchapter are met and, when necessary, suitable cushioning is used to prevent shifting within the packaging.

* * * * *

■ 21. In § 173.27, revise paragraphs (f)(2)(ii) and (i) to read as follows:

§ 173.27 General requirements for transportation by aircraft.

* * * * *

(f) * * *

(2) * * *

(ii) Packages must be marked with the limited quantity ''Y'' mark as prescribed in § 172.315 of this subchapter when conforming to Table 3 of this paragraph.

* * * * *

(i) Each person who offers a hazardous material for transportation by aircraft must include the certification statement specified in § 172.204(c)(3) of this subchapter.

■ 22. In § 173.29, revise paragraph (b)(2)(iv)(A) to read as follows:

§ 173.29 Empty packagings.

* * * * *

(b) * * *

(2) * * *

(iv) * * *

(A) A limited quantity or an ORM–D material; or

* * * * *

■ 23. In § 173.31, revise paragraphs (g) introductory text and (g)(3) to read as follows:

§ 173.31 Use of tank cars.

* * * * *

(g) *Tank car loading and unloading.* When placed for loading or unloading and before unsecuring any closure, a tank car must be protected against shifting or coupling as follows:

* * *

(3) At least one wheel on the tank car must be blocked against motion in both directions, and the hand brakes must be set. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent motion in both directions.

■ 24. In § 173.62, amend paragraph (c)(5) by revising the table to read as follows:

§ 173.62 Specific packaging requirements for explosives.

* * * * *

(c) * * *

(5) * * *

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Table 2 to paragraph (c)(5): Table of Packing Methods

Packing instruction	Inner packagings	Intermediate packagings	Outer packagings
101	This Packing Instruction may be used as an alternative to a specifically assigned packing method with the approval of the Associate Administrator prior to transportation. When this packing instruction is used, the following must be marked on the shipping documents: "Packaging approved by the Competent Authority of the United States of America (USA)".		
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. Samples of new or existing explosive substances or articles may be transported as directed by the Associate Administrator for purposes including: testing, classification, research and development, quality control, or as a commercial sample. Explosive samples which are wetted or desensitized must be limited to 25 kg. Explosive samples which are not wetted or desensitized must be limited to 10 kg in small packages as specified by the Associate Administrator for Hazardous Materials Safety			
110(a)	Bags, Receptacles	Bags, Receptacles	Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. The Intermediate packagings must be filled with water saturated material such as an anti-freeze solution or wetted cushioning 2. Outer packagings must be filled with water saturated material such as an anti-freeze solution or wetted cushioning. Outer packagings must be constructed and sealed to prevent evaporation of the wetting solution, except when 0224 is being carried dry	*Bags*. plastics, textile, plastic coated or lined rubber textile, rubberized textile *Receptacles.* Wood	*Bags.* plastics, textile, plastic coated or lined rubber textile, rubberized *Receptacles.* plastics metal wood	steel (1A1 or 1A2) other metal (1N1 or 1N2) plastics (1H1 or 1H2)
110(b)	Bags, Receptacles	Dividing partitions	Boxes
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS For UN 0074, 0113, 0114, 0129, 0130, 0135 and 0224, the following conditions must be satisfied: a. inner packagings must not contain more than 50 g of explosive substance (quantity corresponding to dry substance); b. each inner packaging must be separated from other inner packagings by dividing partitions; and c. the outer packaging must not be partitioned with more than 25 compartments	*Bags*. rubber, conductive plastics, conductive *Receptacles.* metal wood rubber, conductive plastics, conductive	metal wood plastics fiberboard	natural wood, sift-proof wall (4C2) plywood (4D) reconstituted wood (4F)
111	Bags, Sheets, Receptacles	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: For UN0159, inner packagings are not required when metal (1A1, 1A2, 1B1, 1B2, 1N1 or 1N2) or plastics (1H1 or 1H2) drums are used as outer packagings	*Bags.* paper, waterproofed plastics textile, rubberized *Sheets.* plastics textile, rubberized *Receptacles.* wood		*Boxes.* steel (4A) aluminum (4B) other metal (4N) natural wood, ordinary (4C1) natural wood, sift proof (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiberboard (1G) plastics (1H1 or 1H2)
112(a)	Bags, Receptacles	Bags, Receptacles	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0004, 0076, 0078, 0154, 0219 and 0394, packagings must be lead free 2. Intermediate packagings are not required if leakproof drums are used as the outer packaging 3. For UN0072 and UN0226, intermediate packagings are not required	*Bags.* paper, multiwall, water resistant plastics textile textile, rubberized woven plastics *Receptacles.* metal plastics wood	*Bags.* plastics textile, plastic coated or lined *Receptacles.* metal plastics wood	*Boxes.* steel (4A) aluminum (4B) other metal (4N) natural wood, ordinary (4C1) natural wood, sift proof (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
112(b)	Bags	Bags	Bags, Boxes, Drums

This packing instruction applies to dry solids other than powders PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0004, 0076, 0078, 0154, 0216, 0219 and 0386, packagings must be lead free 2. For UN0209, bags, sift-proof (5H2) are recommended for flake or prilled TNT in the dry state and a maximum net mass of 30 kg. 3. For UN0222, inner packagings are not required	paper, kraft, paper, multiwall, water resistant plastics textile textile, rubberized plastics woven plastics	(for UN0150 only) plastics textile, plastic coated or lined	*Bags.* woven plastics sift-proof (5H2/3) plastics, film (5H4) textile, sift-proof (5L2) textile, water resistant (5L3) paper, multiwall, water resistant (5M2) *Boxes.* steel (4A) aluminum (4B) other metal (4N) natural wood, ordinary (4C1) natural wood, sift proof (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) plywood (1D) other metal (1N1 or 1N2) fiber (1G) plastics (1H1 or 1H2)
112(c)	Bags, Receptacles	Bags, Receptacles	Boxes, Drums
This packing instruction applies to solid dry powders PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0004, 0076, 0078, 0154, 0216, 0219 and 0386, packagings must be lead free 2. For UN0209, bags, sift-proof (5H2) are recommended for flake or prilled TNT in the dry state. Bags must not exceed a maximum net mass of 30 kg. 3. Inner packagings are not required if drums are used as the outer packaging. 4. At least one of the packagings must be sift-proof 5. For UN 0504, metal packagings must not be used. Packagings of other material with a small amount of metal, for example metal closures or other metal fittings such as those mentioned in part 178 of this subchapter, are not considered metal packagings.	*Bags*. paper, multiwall, water resistant plastics woven plastics *Receptacles*. fiberboard metal plastics wood	*Bags*. paper, multiwall, water resistant with inner lining plastics *Receptacles.* metal plastics wood	*Boxes*. steel (4A) aluminum (4B) other metal (4N) natural wood, ordinary (4C1) natural wood, sift proof (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums*. plastics (1H1 or 1H2) steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G)
113	Bags, Receptacles, Sheets	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN0094 and UN0305, no more than 50 g of substance must be packed in an inner packaging 2. For UN0027, inner packagings are not necessary when drums are used as the outer packaging 3. At least one of the packagings must be sift-proof 4. Sheets must only be used for UN0028	*Bags.* paper plastics textile, rubberized *Receptacles.* fiberboard metal plastics wood *Sheets.* paper, kraft paper, waxed		*Boxes.* steel (4A) aluminum (4B) other metal (4N) natural wood, ordinary (4C1) natural wood, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* plastics (1H1 or 1H2) steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G)
114(a)	Bags, Receptacles	Bags, Receptacles, Dividing Partitions	Boxes, Drums
This packing instruction applies to wetted solids PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0077, 0234, 0235 and 0236, packagings must be lead free 2. For UN0342, inner packagings are not required when metal (1A1, 1A2, 1B1, 1B2, 1N1 or 1N2) or plastics (1H1 or 1H2) drums are used as outer packagings 3. Intermediate packagings are not required if leakproof removable head drums are used as the outer packaging	*Bags.* plastics textile woven plastics *Receptacles.* metal plastics wood	*Bags.* plastics textile, plastic coated or lined *Receptacles.* metal plastics *Dividing partitions.* wood	*Boxes.* steel (4A) other metal (4N) natural wood, ordinary (4C1) natural wood, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2 plywood (1D) fiber (1G) plastics (1H1 or 1H2)
114(b)	Bags, Receptacles	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN Nos. 0077, 0132, 0234, 0235 and 0236, packagings must be lead free 2. For UN0160 and UN0161, when metal drums (1A2, 1B2 or 1N2) are used as the outer packaging, metal packagings must be so constructed that the risk of explosion, by reason of increased internal pressure from internal or external causes, is prevented. 3. For UN0160, UN0161, and UN0508, inner packagings are not necessary if drums are used as the outer packaging 4. For UN0508 and UN0509, metal packagings must not be used. Packagings of other material with a small amount of metal, for example metal closures or other metal fittings such as those mentioned in part 178 of this subchapter, are not considered metal packagings	*Bags.* paper, kraft, plastics textile, sift-proof woven plastics, sift-proof *Receptacles.* fiberboard metal paper plastics wood plastics, sift-proof		*Boxes.* natural wood, ordinary (4C1) natural wood, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
115	Receptacles	Bags, Drums, Receptacles	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For liquid explosives, inner packagings must be surrounded with non-combustible absorbent cushioning material in sufficient quantity to absorb the entire liquid content. Metal receptacles should be cushioned from each other. The net mass of explosive per package may not exceed 30 kg when boxes are used as outer packaging. The net volume of explosive in each package other than boxes must not exceed 120 liters 2. For UN 0075, 0143, 0495 and 0497 when boxes are used as the outer packaging, inner packagings must have taped screw cap closures and be not more than 5 liters capacity each. A composite packaging consisting of a plastic receptacle in a metal drum (6HA1) may be used in lieu of combination packagings. Liquid substances must not freeze at temperatures above −15 °C (+ 5 °F) 3. For UN0144, intermediate packagings are not necessary. Aluminum drums (1B1 and 1B2) and metal, other than steel or aluminum, drums (1N1 and 1N2) must not be used.	*Receptacles.* metal plastics wood	*Bags.* plastics in metal receptacles *Drums.* metal *Receptacles.* Wood	*Boxes.* natural wood, ordinary (4C1) natural wood, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) *Drums.* plastics (1H1 or 1H2) steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) Specification MC-200 containers may be used for transport by motor vehicle.
116	Bags, Receptacles, Sheets	Not necessary	Bags, Boxes, Drums, Jerricans

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0082, 0241, 0331 and 0332, inner packagings are not necessary if leakproof removable head drums are used as the outer packaging. 2. For UN 0082, 0241, 0331 and 0332, inner packagings are not required when the explosive is contained in a material impervious to liquid. 3. For UN 0081, inner packagings are not required when contained in rigid plastic that is impervious to nitric esters. 4. For UN 0331, inner packagings are not required when bags (5H2, 5H3 or 5H4) are used as outer packagings. 5. For UN0081, bags must not be used as outer packagings.	*Bags.* paper, water and oil resistant plastics textile, plastic coated or lined woven plastics, sift-proof *Receptacles.* fiberboard, water resistant metal plastics wood, sift-proof *Sheets.* paper, water resistant paper, waxed plastics		*Bags.* woven plastics (5H1/2/3) paper, multiwall, water resistant (5M2) plastics, film (5H4) textile, sift-proof (5L2) textile, water resistant (5L3) *Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) natural wood, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums*. steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2) *Jerricans*. steel (3A1 or 3A2) plastics (3H1 or 3H2)
117	Not necessary	Not necessary	IBCs

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. This packing instruction may only be used for explosives of UN 0082 when they are mixtures of ammonium nitrate or other inorganic nitrates with other combustible substances that are not explosive ingredients. Such explosives must not contain nitroglycerin, similar liquid organic nitrates, liquid or solid nitrocarbons, or chlorates. 2. This packing instruction may only be used for explosives of UN 0241 that consist of water as an essential ingredient and high proportions of ammonium nitrate or other oxidizers, some or all of which are in solution. The other constituents may include hydrocarbons or aluminum powder, but must not include nitro-derivatives such as trinitrotoluene. 3. Metal IBCs must not be used for UN 0082, UN 0222 and UN 0241. 4. Flexible IBCs may only be used for solids. 5. For UN 0222, when other than metal or rigid plastics IBCs are used, they must be offered for transportation in a closed freight container or a closed transport vehicle. 6. For UN 0222, flexible IBCs must be sift-proof and water-resistant or must be fitted with a sift-proof and water-resistant liner.			*metal* (11A), (11B), (11N), (21A), (21B), (21N), (31A), (31B), (31N). *flexible* (13H2), (13H3), (13H4), (13L2), (13L3), (13L4), (13M2). *rigid plastics* (11H1), (11H2), (21H1), (21H2), (31H1), (31H2). *composite* (11HZ1), (11HZ2), (21HZ1), (21HZ2), (31HZ1), (31HZ2).
130	Not necessary	Not necessary	Boxes, Drums, Large Packagings

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. The following applies to UN 0006, 0009, 0010, 0015, 0016, 0018, 0019, 0034, 0035, 0038, 0039, 0048, 0056, 0137, 0138, 0168, 0169, 0171, 0181, 0182, 0183, 0186, 0221, 0238, 0243, 0244, 0245, 0246, 0254, 0280, 0281, 0286, 0287, 0297, 0299, 0300, 0301, 0303, 0321, 0328, 0329, 0344, 0345, 0346, 0347, 0362, 0363, 0370, 0412, 0424, 0425, 0434, 0435, 0436, 0437, 0438, 0451, 0459, 0488, 0502 and 0510. Large and robust explosives articles, normally intended for military use, without their means of initiation or with their means of initiation containing at least two effective protective features, may be carried unpackaged. When such articles have propelling charges or are self-propelled, their ignition systems must be protected against stimuli encountered during normal conditions of transport. A negative result in Test Series 4 on an unpackaged article indicates that the article can be considered for transport unpackaged. Such unpackaged articles may be fixed to cradles or contained in crates or other suitable handling devices. 2. Subject to approval by the Associate Administrator, large explosive articles, as part of their operational safety and suitability tests, subjected to testing that meets the intentions of Test Series 4 of the UN Manual of Tests and Criteria with successful test results, may be offered for transportation in accordance with the requirements of this subchapter.			*Boxes*. steel (4A) aluminum (4B) other metal (4N) wood natural, ordinary (4C1) wood natural, sift-proof walls 4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums*. steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2) *Large Packagings*. steel (50A) aluminum (50B) metal other than steel or aluminum (50N) rigid plastics (50H) natural wood (50C) plywood (50D) reconstituted wood (50F) rigid fiberboard (50G)
131	Bags, Receptacles, Reels	Not necessary	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0029, 0267 and 0455, bags and reels may not be used as inner packagings. 2. For UN 0030, 0255 and 0456, inner packagings are not required when detonators are packed in pasteboard tubes, or when their leg wires are wound on spools with the caps either placed inside the spool or securely taped to the wire on the spool, so as to restrict free moving of the caps and to protect them from impact forces. 3. For UN 0360, 0361 and 0500, detonators are not required to be attached to the safety fuse, metal-clad mild detonating cord, detonating cord, or shock tube. Inner packagings are not required if the packing configuration restricts free moving of the caps and protects them from impact forces.	*Bags.* paper plastics *Receptacles.* fiberboard metal plastics wood *Reels.*		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) natural wood, sift-proof walls (4C2) plastics, solid (4H2) plywood (4D) reconstituted wood (4F) fiberboard (4G) *Drums*. steel (1A1 or 1A2) Aluminum (1B1 or 1B2) other metal (1N1 or 1N2) Plywood (1D) fiber (1G) plastics (1H1 or 1H2)
132(a)	Not necessary	Not necessary	Boxes

For articles consisting of closed metal, plastic or fiberboard casings that contain detonating explosives, or consisting of plastics-bonded detonating explosives.			*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural; ordinary (4C1) wood, natural, sift proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2)
132(b)	Receptacles, Sheets	Not necessary	Boxes
For articles without closed casings	*Receptacles.* fiberboard metal plastics wood *Sheets.* paper plastics		*Boxes*. steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2)
133	Receptacles, Trays	Intermediate packagings are only needed when trays are used as inner packagings	Boxes
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0043, 0212, 0225, 0268 and 0306 trays are not authorized as inner packagings	*Receptacles.* fiberboard metal plastics wood *Trays, fitted with dividing partitions.* fiberboard plastics wood	*Receptacles.* fiberboard metal plastics wood	*Boxes*. steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2)
134	Bags, Receptacles, Sheets, Tubes	Not necessary	Boxes, Drums

	Bags. water resistant *Receptacles.* fiberboard metal plastics wood *Sheets.* fiberboard, corrugated *Tubes.* fiberboard		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums.* fiberboard (1G) plastics (1H1 or 1H2) steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D)
135	Bags, Receptacles, Sheets	Not necessary	Boxes, Drums
	Bags. paper plastics *Receptacles.* fiberboard metal plastics wood *Sheets.* paper plastics		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, expanded (4H1) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
136	Bags, Boxes, Dividing partitions	Not necessary	Boxes, Drums

	Bags. plastics textile *Boxes*. fiberboard plastics wood *Dividing partitions* in the outer packagings.		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2 plywood (1D) fiber (1G) plastics (1H1 or 1H2)
137	Bags, Boxes, Tubes, Dividing partitions	Not necessary	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: For UN 0059, 0439, 0440 and 0441, when the shaped charges are packed singly, the conical cavity must face downwards and the package marked with orientation markings meeting the requirements of §172.312(a)(2) of this subchapter. When the shaped charges are packed in pairs, the conical cavities must face inwards to minimize the jetting effect in the event of accidental initiation	*Bags.* plastics *Boxes.* fiberboard wood *Tubes.* fiberboard metal plastics *Dividing partitions* in the outer packagings.		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2). aluminum (1B1 or 1B2). other metal (1N1 or 1N2) plywood (1D) fiber (1G). plastics (1H1 or 1H2)
138	Bags	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: If the ends of the articles are sealed, inner packagings are not necessary	plastics		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* fiberboard (1G) plastics, solid (1H1 or 1H2) steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2)
139	Bags, Receptacles, Reels, Sheets	Not necessary	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN0065, 0102, 0104, 0289 and 0290, the ends of the detonating cord must be sealed, for example, by a plug firmly fixed so that the explosive cannot escape. The ends of CORD DETONATING flexible must be fastened securely. 2. For UN0065, 0104, 0289, 0290 the ends of the detonating cord are not required to be sealed provided the inner packaging containing the detonating cord consists of a static-resistant plastic bag of at least 3 mil thickness and the bag is securely closed. 3. For UN0065 and UN0289, inner packagings are not required when they are fastened securely in coils.	*Bags.* plastics *Receptacles.* fiberboard metal plastics wood *Reels.* *Sheets.* paper plastics		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums*. steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
140	Bags, Reels, Sheets, Receptacles	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. If the ends of UN0105 are sealed, no inner packagings are required 2. For UN0101, the packaging must be sift-proof except when the fuse is covered by a paper tube and both ends of the tube are covered with removable caps 3. For UN0101, steel or aluminum boxes or drums must not be used	*Bags.* plastics *Reels.* *Sheets.* paper, kraft plastics *Receptacles.* wood		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
141	Receptacles, Trays, Dividing partitions	Not necessary	Boxes, Drums
	Receptacles. fiberboard metal plastics wood *Trays,* fitted with dividing partitions. plastics wood *Dividing partitions* in the outer packagings.		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
142	Bags, Receptacles, Sheets, Trays	Not necessary	Boxes, Drums

	Bags. paper plastics *Receptacles.* fiberboard metal plastics wood *Sheets.* paper *Trays*, fitted with dividing partitions. plastics		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
143	Bags, Receptacles, Trays	Not necessary	Boxes, Drums
PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: 1. For UN 0271, 0272, 0415 and 0491 when metal packagings are used, metal packagings must be so constructed that the risk of explosion, by reason of increase in internal pressure from internal or external causes is prevented 2. Composite packagings (6HH2) (plastic receptacle with outer solid box) may be used in lieu of combination packagings	*Bags.* paper, kraft plastics textile textile, rubberized *Receptacles.* fiberboard metal plastics wood *Trays*, fitted with dividing partitions. plastics wood		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) wood, natural, sift-proof walls (4C2) plywood (4D) reconstituted wood (4F) fiberboard (4G) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plywood (1D) fiber (1G) plastics (1H1 or 1H2)
144	Receptacles, Dividing partitions	Not necessary	Boxes, Drums

PARTICULAR PACKING REQUIREMENTS OR EXCEPTIONS: For UN0248 and UN 0249, packagings must be protected against the ingress of water. When CONTRIVANCES, WATER ACTIVATED are transported unpackaged, they must be provided with at least two independent protective features that prevent the ingress of water	*Receptacles.* fiberboard metal plastics wood *Dividing partitions* in the outer packagings.		*Boxes.* steel (4A) aluminum (4B) other metal (4N) wood, natural, ordinary (4C1) with metal liner plywood (4D) with metal liner reconstituted wood (4F) with metal liner plastics, expanded (4H1) plastics, solid (4H2) *Drums.* steel (1A1 or 1A2) aluminum (1B1 or 1B2) other metal (1N1 or 1N2) plastics (1H1 or 1H2) plywood (1D)
US 1			
1. A jet perforating gun, charged, oil well may be transported under the following conditions:			
a. Initiation devices carried on the same motor vehicle or offshore supply vessel must be segregated; each kind from every other kind, and from any gun, tool or other supplies, unless approved in accordance with §173.56. Segregated initiation devices must be carried in a container having individual pockets for each such device or in a fully enclosed steel container lined with a non-sparking material. No more than two segregated initiation devices per gun may be carried on the same motor vehicle.			
b. Each shaped charge affixed to the gun may not contain more than 112 g (4 ounces) of explosives.			
c. Each shaped charge if not completely enclosed in glass or metal, must be fully protected by a metal cover after installation in the gun.			
d. A jet perforating gun classed as 1.1D or 1.4D may be transported by highway by private or contract carriers engaged in oil well operations.			
(i) A motor vehicle transporting a gun must have specially built racks or carrying cases designed and constructed so that the gun is securely held in place during transportation and is not subject to damage by contact, one to the other or any other article or material carried in the vehicle; and			
(ii) The assembled gun packed on the vehicle may not extend beyond the body of the motor vehicle.			
e. A jet perforating gun classed as 1.4D may be transported by a private offshore supply vessel only when the gun is carried in a motor vehicle as specified in paragraph (d) of this packing method or on offshore well tool pallets provided that:			
(i) All the conditions specified in paragraphs (a), (b), and (c) of this packing method are met;			
(ii) The total explosive contents do not exceed 95 kg (209.43 pounds) per tool pallet;			
(iii) Each cargo vessel compartment may contain up to 95 kg (209.43 pounds) of explosive content if the segregation requirements in §176.83(b) of this subchapter are met; and			
(iv) When more than one vehicle or tool pallet is stowed "on deck" a minimum horizontal separation of 3 m (9.8 feet) must be provided.			

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§ 173.121 [Amended]

■ 25. In § 173.121, remove paragraph (c).

■ 26. In § 173.134, revise paragraphs (b)(7), (b)(12)(ii)(C), and (b)(16) to read as follows:

§ 173.134 Class 6, Division 6.2—Definitions and exceptions.

* * * * *

(b) * * *

(7) Blood collected for the purpose of blood transfusion or the preparation of blood products; blood products; plasma; plasma derivatives; blood components; tissues or organs intended for use in transplant operations; and human cell, tissues, and cellular and tissue-based products regulated under authority of the Public Health Service Act (42 U.S.C. 264–272) and/or the Food, Drug, and Cosmetic Act (21 U.S.C. 301 *et seq.*).

* * * * *

(12) * * *

(ii) * * *

(C) The secondary container must be placed inside an outer packaging with sufficient cushioning material to prevent shifting between the secondary container and the outer packaging. An itemized list of the contents of the primary container and information concerning possible contamination with a Division 6.2 material, including its possible location on the product, must be placed between the secondary container and the outside packaging.

* * * * *

(16) A raw agricultural commodity as defined in the Federal Food, Drug, and Cosmetics Act (21 U.S.C. 301 *et seq.*).

* * * * *

■ 27. In § 173.150, revise paragraphs (g)(1)(iii) and (g)(2)(iii) to read as follows:

§ 173.150 Exceptions for Class 3 (flammable and combustible liquids).

* * * * *

(g) * * *

(1) * * *

(iii) The net liquid contents of all inner packagings in any single outer packaging may not exceed 5.6 liters (1.5 gallons). The net solid contents of all inner packagings in any single outer packaging may not exceed 15 kilograms (33 pounds). The gross weight of any single outer package shipped may not exceed 30 kilograms (66 pounds); Inner packagings must be secured and cushioned within the outer package to prevent breakage, leakage, and shifting.

(2) * * *

(iii) The net liquid contents of all inner packagings in any single outer packaging may not exceed 5.6 liters (1.5 gallons). The net solid contents of all inner packagings in any single outer packaging may not exceed 15 kilograms (33 pounds). The gross weight of any single outer package shipped may not exceed 30 kilograms (66 pounds). Inner packagings must be secured and cushioned within the outer package to prevent breakage, leakage, and shifting.

* * * * *

§ 173.156 Exceptions for limited quantity and ORM–D.

■ 28. In § 173.156, revise the section title to read as set forth above:

■ 29. In § 173.159, revise paragraph (k)(1)(iv) to read as follows:

§ 173.159 Batteries, wet.

* * * * *

(k) * * *

(1) * * *

(iv) When packaged with other batteries or materials (*e.g.,* on pallets or non-skid rails) and secured to prevent shifting during transport, pack the battery in leakproof packaging to prevent leakage of battery fluid from the packaging under conditions normally incident to transportation.

* * * * *

■ 30. In § 173.166, revise paragraphs (d)(4), (e) introductory text, (e)(4)(i)(C), and (e)(6)(ii) to read as follows:

§ 173.166 Safety devices.

* * * * *

(d) * * *

(4) *Shipments to recycling or waste disposal facilities.* When offered for domestic transportation by highway, rail freight, cargo vessel or cargo aircraft, a serviceable safety device classed as either Class 9 (UN3268) or Division 1.4G removed from a motor vehicle that was manufactured as required for use in the United States may be offered for transportation and transported without compliance with the shipping paper requirement prescribed in paragraph (c) of this section. However, when these articles are shipped to a recycling facility, the word ''Recycled'' must be entered on the shipping paper immediately after the basic description prescribed in § 172.202 of this subchapter. No more than one device is authorized in the packaging prescribed in paragraphs (e)(1), (2) or (3) of this section. The device must be cushioned and secured within the package to prevent shifting during transportation.

* * * * *

(e) *Packagings.* Rigid, outer packagings, meeting the general packaging requirements of part 173 are authorized as follows. Additionally, the UN specification packagings listed in paragraphs (e)(1), (2), and (3) of this section must meet the packaging specification and performance requirements of part 178 of this subchapter at the Packing Group III performance level. The packagings must be designed and constructed to prevent shifting of the articles and inadvertent activation. Further, if the Class 9 designation is contingent upon packaging specified by the authorized testing agency, shipments of the safety device must be in compliance with the prescribed packaging.

* * * * *

(4) * * *

(i) * * *

(C) Internal dunnage must be sufficient to prevent shifting of the devices within the container.

* * * * *

(6) * * *

(ii) Outer packaging consisting of 4H2 solid plastic boxes or non-specification rugged reusable plastic outer packaging and inner static-resistant plastic bags or trays. If not completely enclosed by design, the container or handling device must be covered with plastic, fiberboard, metal or other suitable material. The covering must be secured to the container by banding or other comparable methods. The articles must be packed to prevent shifting within the container during transportation.

* * * * *

■ 31. In § 173.176, revise paragraph (g) to read as follows:

§ 173.176 Capacitors.

* * * * *

(g) Asymmetric capacitors containing an electrolyte meeting the definition of one or more hazard class or division as defined in this part, that are not installed in equipment, and with an energy storage capacity of more than 20 Wh are subject to the requirements of this subchapter.

* * * * *

■ 32. In § 173.185, revise paragraphs (b)(2)(ii), (b)(4)(ii), (b)(5), (e)(2), and (e)(5) to read as follows:

§ 173.185 Lithium cells and batteries.

* * * * *

(b) * * *

(2) * * *

(ii) Damage caused by shifting or placement within the package; and

* * * * *

(4) * * *

(ii) Equipment must be secured to prevent damage caused by shifting within the outer packaging and be packed so as to prevent accidental operation during transport; and

* * * * *

(5) Lithium batteries that weigh 12 kg (26.5 pounds) or more and have a strong, impact-resistant outer casing and assemblies of such batteries, may be packed in strong outer packagings; in protective enclosures (for example, in fully enclosed or wooden slatted crates); or on pallets or other handling devices, instead of packages meeting the UN performance packaging requirements in paragraphs (b)(3)(ii) and (b)(3)(iii) of this section. Batteries or battery assemblies must be secured to prevent inadvertent shifting, and the terminals may not support the weight of other superimposed elements. Batteries or battery assemblies packaged in accordance with this paragraph may be transported by cargo aircraft if approved by the Associate Administrator.

* * * * *

(e) * * *

(2) Appropriate measures shall be taken to minimize the effects of

vibration and shocks and prevent shifting of the cells or batteries within the package that may lead to damage and a dangerous condition during transport. Cushioning material that is non-combustible and electrically non-conductive may be used to meet this requirement;

* * * * *

(5) Lithium batteries, including lithium batteries contained in equipment, that weigh 12 kg (26.5 pounds) or more and have a strong, impact-resistant outer casing or assemblies of such batteries, may be packed in strong outer packagings, in protective enclosures (for example, in fully enclosed or wooden slatted crates), or on pallets or other handling devices, instead of packages meeting the UN performance packaging requirements in paragraphs (b)(3)(ii) and (iii) of this section. The battery or battery assembly must be secured to prevent inadvertent shifting, and the terminals may not support the weight of other superimposed elements;

* * * * *

■ 33. In § 173.197, revise paragraphs (e) introductory text, (e)(2) and (e)(3) introductory text to read as follows:

§ 173.197 Regulated Medical Waste.

* * * * *

(e) *Inner packagings authorized for Large Packagings, Carts, and BOPs.* Inner packagings must be durably marked or tagged with the name and location (city and state) of the offeror, except when the entire contents of the Large Packaging, Cart, or BOP originates at a single location and is delivered to a single location.

* * * * *

(2) *Liquids.* Liquid regulated medical waste or clinical waste or (bio) medical waste transported in a Large Packaging, Cart, or BOP must be packaged in a rigid inner packaging conforming to the provisions of subpart B of this part. Liquid materials are not authorized for transportation in inner packagings having a capacity greater than 19 L (5 gallons).

(3) *Sharps.* Sharps transported in a Large Packaging, Cart, or BOP must be packaged in a puncture-resistant, non-bulk inner packaging (sharps container). Each sharps container must be securely closed to prevent leaks or punctures in conformance with instructions provided by the packaging manufacturer. Each sharps container exceeding 76 L (20 gallons) in volume must be capable of passing the performance tests in part 178, subpart M, of this subchapter at the Packing Group II performance level. A sharps container may be reused only if it conforms to the following criteria:

* * * * *

■ 34. In § 173.199, revise paragraph (a)(7) to read as follows:

§ 173.199 Category B infectious substances.

(a) * * *

(7) The name and telephone number of a person who is either knowledgeable about the material being shipped and has comprehensive emergency response and incident mitigation information for the material, or has immediate access to a person who possesses such knowledge and information, must be included on a written document (such as an air waybill or bill of lading) or on the outer packaging. The telephone number must be monitored during a company's administrative hours (*i.e.,* company's operational business hours).

* * * * *

■ 35. In § 173.219, revise paragraph (c)(3) to read as follows:

§ 173.219 Life-saving appliances.

* * * * *

(c) * * *

(3) Strike-anywhere matches must be cushioned to prevent shifting or friction in a metal or composition receptacle with a screw-type closure in a manner that prevents them from being inadvertently activated;

* * * * *

■ 36. In § 173.220, revise paragraphs (c), (d), and (e) to read as follows:

§ 173.220 Internal combustion engines, vehicles, machinery containing, internal combustion engines, battery-powered equipment or machinery, fuel cell-powered equipment or machinery.

* * * * *

(c) *Battery-powered or installed.* Batteries must be securely installed, and wet batteries must be fastened in an upright position. Batteries must be protected against a dangerous evolution of heat, short circuits, and damage to terminals in conformance with § 173.159(a) and leakage; or must be removed and packaged separately under § 173.159. Battery-powered vehicles, machinery or equipment including battery-powered wheelchairs and mobility aids are not subject to any other requirements of this subchapter except § 173.21 when transported by rail, highway or vessel. Where a vehicle could possibly be handled in other than an upright position, the vehicle must be secured in a strong, rigid outer packaging. The vehicle must be secured by means capable of restraining the vehicle in the outer packaging to prevent any shifting during transport which would change the orientation or cause the vehicle to be damaged.

(d) *Lithium batteries.* Except as provided in § 172.102, special provision A101, of this subchapter, vehicles, engines, and machinery powered by lithium metal batteries, that are transported with these batteries installed, are forbidden aboard passenger-carrying aircraft. Lithium batteries contained in vehicles, engines, or mechanical equipment must be securely fastened in the battery holder of the vehicle, engine, or mechanical equipment, and be protected in such a manner as to prevent damage and short circuits (*e.g.,* by using non-conductive caps that cover the terminals entirely). Except for vehicles, engines, or machinery transported by highway, rail, or vessel with prototype or low production lithium batteries securely installed, each lithium battery must be of a type that has successfully passed each test in the UN Manual of Tests and Criteria (IBR, see § 171.7 of this subchapter), as specified in § 173.185, unless approved by the Associate Administrator. Where a vehicle could possibly be handled in other than an upright position, the vehicle must be secured in a strong, rigid outer packaging. The vehicle must be secured by means capable of restraining the vehicle in the outer packaging to prevent any shifting during transport which would change the orientation or cause the vehicle to be damaged. Where the lithium battery is removed from the vehicle and is packed separate from the vehicle in the same outer packaging, the package must be consigned as ''UN 3481, Lithium ion batteries packed with equipment'' or ''UN 3091, Lithium metal batteries packed with equipment'' and prepared in accordance with the requirements specified in § 173.185.

(e) *Fuel cells.* A fuel cell must be secured and protected in a manner to prevent damage to the fuel cell. Equipment (other than vehicles, engines or mechanical equipment) such as consumer electronic devices containing fuel cells (fuel cell cartridges) must be described as ''Fuel cell cartridges contained in equipment'' and transported in accordance with § 173.230. Where a vehicle could possibly be handled in other than an upright position, the vehicle must be secured in a strong, rigid outer packaging. The vehicle must be secured by means capable of restraining the vehicle in the outer packaging to prevent any shifting during transport which would change the orientation or cause the vehicle to be damaged.

* * * * *

■ 37. In § 173.222, revise paragraph (b)(2) to read as follows:

§ 173.222 Dangerous goods in equipment, machinery, or apparatus.

* * * * *

(b) * * *

(2) Receptacles containing hazardous materials must be secured and cushioned to prevent their breakage or leakage and so as to control their shifting within the machinery or apparatus during normal conditions of transportation. Cushioning material must not react dangerously with the content of the receptacles. Any leakage of the contents must not substantially impair the protective properties of the cushioning material.

* * * * *

■ 38. In § 173.301, revise paragraphs (a)(11) and (f)(3) to read as follows:

§ 173.301 General requirements for shipment of compressed gases and other hazardous materials in cylinders, UN pressure receptacles and spherical pressure vessels.

(a) * * *

(11) Cylinder valves manufactured on or after November 7, 2019, used on cylinders to transport compressed gases must conform to the applicable requirements in CGA V–9 (IBR; see § 171.7 of this subchapter). A valve for a UN pressure receptacle must conform to the requirements of § 173.301b(c)(1). Cylinder valves used on cylinders in liquefied petroleum gas (LPG) service are permitted to comply with the requirements of NFPA 58 (IBR; see § 171.7 of this subchapter).

* * * * *

(f) * * *

(3) For a specification 3, 3A, 3AA, 3AL, 3AX, 3AAX, 3B, 3BN, or 3T cylinder filled with gases in other than Division 2.2 (except oxygen and oxidizing gases transported by aircraft, see §§ 173.302(f) and 173.304(f)), the burst pressure of a CG–1, CG–4, or CG–5 pressure relief device must be at test pressure with a tolerance of plus zero to minus 10 percent. An additional 5 percent tolerance is allowed when a combined rupture disk is placed inside a holder. This requirement does not apply if a CG–2, CG–3, or CG–9 thermally activated relief device or a CG–7 reclosing pressure valve is used on the cylinder.

* * * * *

■ 39. In § 173.301b, revise paragraph (a)(4) to read as follows:

§ 173.301b Additional requirements for shipments of UN pressure receptacles.

(a) * * *

(4) When a strong outer packaging is prescribed, for example as provided by paragraphs (c)(2)(vi) or (d)(1) of this section, the UN pressure receptacles must be protected to prevent shifting. Unless otherwise specified in this part, more than one UN pressure receptacle may be enclosed in the strong outer packaging.

* * * * *

■ 40. In § 173.304a, amend the table in paragraph (a)(2) by:

■ a. Revising the entry for ''Hydrogen sulfide;'' and

■ b. Removing Note 14.

The revision reads as follows:

§ 173.304a Additional requirements for shipment of liquefied compressed gases in specification cylinders.

(a) * * *

(2) * * *

Kind of gas	Maximum permitted filling density (percent) (see Note 1)	Packaging marked as shown in this column or of the same type with higher service pressure must be used, except as provided in §§ 173.301(l), 173.301a(e), and 180.205(a) (see notes following table)
*	*	* * * * *
Hydrogen sulfide (*see* Note 10)	62.5	DOT–3A; DOT–3AA; DOT–3B; DOT–4B; DOT–4BA; DOT–4BW; DOT–3E1800; DOT–3AL.
*	*	* * * * *

* * * * *

■ 41. § 173.306, revise paragraph (h)(1) to read as follows:

§ 173.306 Limited quantities of compressed gases.

* * * * *

(h) * * * (1) Lighter refills (see § 171.8 of this subchapter) must not contain an ignition element but must contain a release device. Lighter refills offered for transportation under this section may not exceed 4 fluid ounces capacity (7.22 cubic inches) or contain more than 65 grams of a Division 2.1 fuel. For transportation by highway or rail, lighter refills must be tightly packed and secured against shifting in strong outer packagings. For transportation by aircraft or vessel, lighter refills must be tightly packed and secured against shifting in any rigid specification outer packaging authorized in subpart L of part 178 of this subchapter at the Packing Group II performance level.

* * * * *

■ 42. In § 173.307, revise paragraph (a)(5) to read as follows:

§ 173.307 Exceptions for compressed gases.

(a) * * *

(5) Manufactured articles or apparatuses, other than light bulbs each containing not more than 100 mg (0.0035 ounce) of inert gas and packaged so that the quantity of inert gas per package does not exceed 1 g (0.035 ounce).

* * * * *

■ 43. In § 173.308, revise paragraphs (c), (e)(2)(ii), and (e)(2)(iii) to read as follows:

§ 173.308 Lighters.

* * * * *

(c) *Packaging requirements*—(1) *Inner containment.* Lighters must be placed in an inner packaging that is designed to prevent shifting of the lighters and inadvertent ignition or leakage. The ignition device and gas control lever of each lighter must be designed, or securely sealed, taped, or otherwise fastened or packaged to protect against accidental functioning or leakage of the contents during transport. If lighters are packed vertically in a plastic tray, a plastic, fiberboard or paperboard partition must be used to prevent friction between the ignition device and the inner packaging.

(2) *Outer packaging.* Lighters and their inner packagings must be tightly packed and secured against shifting in any rigid specification outer packaging authorized in subpart L of part 178 of this subchapter at the Packing Group II performance level.

* * * * *

(e) * * *

(2) * * *

(ii) Lighters must be placed in an inner packaging that is designed to prevent accidental activation of the ignition device or valve, release of gas, and shifting of the lighters (*e.g.,* tray, blister pack, etc.);

(iii) Inner packagings must be placed in a securely closed rigid outer packaging that limits shifting of the inner packagings and protects them from damage;

* * * * *

■ 44. In § 173.314, revise paragraph (h)(2) introductory text:

§ 173.314 Compressed gases in tank cars and multi-unit tank cars.

* * * * *

(h) * * *

(2) *Odorant fade.* In addition to paragraph (h)(1)(i) of this section, the offeror must ensure that enough odorant will remain in the tank car during the course of transportation. The offeror must have procedures in place to:

* * * * *

■ 45. In § 173.315, revise paragraph (a)(2) introductory text, paragraph (b)(2) introductory text, paragraph (h) introductory text, and paragraph (j)(2)(viii) to read as follows:

§ 173.315 Compressed gases in cargo tanks and portable tanks.

(a) * * *

(2) *Cargo tanks and DOT specification portable tanks:* Cargo tanks and DOT specification portable tanks must be loaded and offered for transportation in accordance with the following table (for purposes of the following table, a column entry with ''do'' indicates ''same as above''):

* * * * *

(b) * * *

(2) *Odorant fade.* For cargo tanks or portable tanks being transported from a refinery, gas plant or pipeline terminal and in addition to paragraph (b)(1)(i) of this section, the offeror must ensure that enough odorant will remain in the cargo tank or portable tank during the course of transportation. The offeror must have procedures in place to:

* * * * *

(h) Each cargo tank and portable tank, except a tank filled by weight, must be equipped with one or more of the gauging devices described in the following table which indicate accurately the maximum permitted liquid level (for purposes of the following table, a column entry with ''do'' indicates ''same as above''). Additional gauging devices may be installed but may not be used as primary controls for filling of cargo tanks and portable tanks. Gauge glasses are not permitted on any cargo tank or portable tank. Primary gauging devices used on cargo tanks of less than 3500 gallons water capacity are exempt from the longitudinal location requirements specified in paragraphs (h)(2) and (3) of this section provided: The tank length does not exceed three times the tank diameter; and the cargo tank is unloaded within 24 hours after each filling of the tank.

* * * * *

(j) * * *

(2) * * *

(viii) The storage container must be secured against shifting during transportation. Bracing must conform with the requirements of paragraph (j)(1)(iii) of this section and § 177.834(a) of this subchapter and with Section 6–5.2 of NFPA 58, Liquefied Petroleum Gas Code. Straps or chains used as tie-downs must be rated to exceed the maximum load to be transported and conform to the requirements in §§ 393.100 through 393.106 of this title.

* * * * *

■ 46. In § 173.335, revise paragraph (a) to read as follows:

§ 173.335 Chemicals under pressure n.o.s.

(a) *General requirements.* A cylinder filled with a chemical under pressure must be offered for transportation in accordance with the requirements of this section and § 173.301 (except for the cylinder valve cap requirements in §§ 173.301(a)(11) and (12)). In addition, a DOT specification cylinder must meet the requirements in §§ 173.301a, 173.302, 173.302a, and 173.305, as applicable. UN pressure receptacles must meet the requirements in §§ 173.301b, 173.302b, and 173.304b, as applicable. Where more than one section applies to a cylinder, the most restrictive requirements must be followed.

* * * * *

■ 47. In § 173.415, revise paragraph (a) introductory text to read as follows:

§ 173.415 Authorized Type A packages.

* * * * *

(a) DOT Specification 7A (see § 178.350 of this subchapter) Type A general packaging. Each offeror of a Specification 7A package must maintain on file for at least two years after the offeror's latest shipment, and shall provide to DOT on request, one of the following:

* * * * *

■ 48. In § 173.435, revise table entry for ''Rb (nat)'' to read as follows:

§ 173.435 Table of A_1 and A_2 values of radionuclides.

* * * * *

Symbol of radionuclide	Element and atomic number	A_1 (TBq)	A_1 (Ci) [b]	A_2 (TBq)	A_2 (Ci) [b]	Specific activity	
						(TBq/g)	(Ci/g)
*	*	*	*	*	*	*	*
Rb(nat)		Unlimited	Unlimited	Unlimited	Unlimited	6.7×10^{-10}	1.8×10^{-8}
*	*	*	*	*	*	*	*

* * * * *

PART 174—CARRIAGE BY RAIL

■ 49. The authority citation for part 174 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 50. In § 174.67, revise paragraphs (a)(2) and (3) to read as follows:

§ 174.67 Tank car unloading.

* * * * *

(a) * * *

(2) Each hazmat employee who is responsible for unloading must apply the handbrake and block at least one wheel to prevent motion in any direction. If multiple tank cars are coupled together, sufficient hand brakes must be set and wheels blocked to prevent motion in both directions.

(3) Each hazmat employee who is responsible for unloading must secure access to the track to prevent entry by other rail equipment, including motorized service vehicles. This requirement may be satisfied by lining each switch providing access to the unloading area against shifting and

securing each switch with an effective locking device, or by using derails, portable bumper blocks, or other equipment that provides an equivalent level of safety.

* * * * *

PART 175—CARRIAGE BY AIRCRAFT

■ 51. The authority citation for part 175 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 44701; 49 CFR 1.81 and 1.97.

■ 52. In § 175.10, revise paragraph (a)(17)(iv), to read as follows:

§ 175.10 Exceptions for passengers, crew members, and air operators.

(a) * * *

(17) * * *

(iv) The wheelchair or other mobility aid must be protected from damage by the shifting of baggage, mail, service items, or other cargo;

* * * * *

■ 53. In § 175.31, revise paragraph (a) introductory text to read as follows:

§ 175.31 Reports of discrepancies.

(a) Each person who discovers a discrepancy, as defined in paragraph (b) of this section, relative to the shipment of a hazardous material following its acceptance for transportation aboard an aircraft shall, as soon as practicable, notify the nearest FAA Regional Office by telephone or electronically. The nearest Regional Office may be located by calling the FAA Washington Operations Center 202–267–3333 (any hour). Electronic notifications may be submitted by following instructions on the FAA's website. The following information must be provided:

* * * * *

■ 54. In § 175.75, revised paragraph (e)(3)(i) to read as follows:

§ 175.75 Quantity limitations and cargo location.

* * * * *

(e) * * *

(3) * * *

(i) No person is carried on the aircraft other than the pilot, an FAA Flight Standards inspector, the shipper or consignee of the material, a representative of the shipper or consignee so designated in writing, or a person necessary for handling the material;

* * * * *

■ 55. In § 175.630, revise paragraph (b) to read as follows:

§ 175.630 Special requirements for Division 6.1 (poisonous) material and Division 6.2 (infectious substances) materials.

* * * * *

(b) No person may operate an aircraft that has been used to transport any package required to bear a POISON or POISON INHALATION HAZARD label unless, upon removal of such package, the area in the aircraft in which it was carried is visually inspected for evidence of leakage, spillage, or other contamination. All contamination discovered must be either isolated or removed from the aircraft.

* * * * *

PART 176—CARRIAGE BY VESSEL

■ 56. The authority citation for part 176 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 57. In § 176.89, revise paragraph (a)(3) to read as follows:

§ 176.89 Control of transport vehicles.

(a) * * *

(3) The parking brakes of the vehicle shall be set securely to prevent motion;

* * * * *

■ 58. In § 176.200, revise paragraph (c) to read as follows:

§ 176.200 General stowage requirements.

* * * * *

(c) When cylinders of Class 2 (compressed gas) materials being transported by vessel are stowed in a vertical position they must be stowed in a block and cribbed or boxed-in with suitable sound lumber and the box or crib dunnaged to provide clearance from a steel deck at least 10 cm (3.9 inches) off any metal deck. Pressure receptacles in the box or crib must be braced to prevent any shifting of the pressure receptacles. The box or crib (gas rack) must be securely chocked and lashed to prevent shifting in any direction.

* * * * *

■ 59. In § 176.906, revise paragraph (i)(2)(ii) to read as follows:

§ 176.906 Stowage of engines and machinery.

* * * * *

(i) * * *

(2) * * *

(ii) The engines or machinery must be oriented to prevent inadvertent leakage of dangerous goods and secured by means capable of restraining the engines or machinery to prevent any shifting during transport which would change the orientation or cause them to be damaged;

* * * * *

PART 177—CARRIAGE BY PUBLIC HIGHWAY

■ 60. The authority citation for part 177 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; sec. 112 of Pub. L. 103–311, 108 Stat. 1673, 1676 (1994); sec. 32509 of Pub. L. 112–141, 126 Stat. 405, 805 (2012); 49 CFR 1.81 and 1.97.

■ 61. In § 177.854, revise paragraph (c)(2) to read as follows:

§ 177.854 Disabled vehicles and broken or leaking packages; repairs.

* * * * *

(c) * * *

(2) Packages of hazardous materials that are damaged or found leaking during transportation, and hazardous materials that have spilled or leaked during transportation, may be forwarded to destination or returned to the shipper in a salvage packaging in accordance with the requirements of § 173.3, as applicable, of this subchapter.

* * * * *

PART 178—SPECIFICATIONS FOR PACKAGINGS

■ 62. The authority citation for part 178 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 63. In § 178.338–10, revise paragraph (c)(2) to read as follows:

§ 178.338–10 Accident damage protection.

* * * * *

(c) * * *

(2) Conform to the requirements of § 178.345–8(d).

* * * * *

■ 64. In § 178.345–8, revise the first sentence of paragraph (b)(1) to read as follows:

§ 178.345–8 Accident damage protection.

* * * * *

(b) * * *

(1) Any bottom damage protection device must be able to withstand a force of 155,000 pounds (based on the ultimate strength of the material), from the front, side, and rear uniformly distributed, applied in each direction of the device, over an area not to exceed 6 square feet, and a width not to exceed 6 feet. * * *

* * * * *

PART 179—SPECIFICATIONS FOR TANK CARS

■ 65. The authority citation for part 179 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 66. Revise § 179.201–6 to read as follows:

§ 179.201–6 Manways and manway closures.

(a) The manway cover for spec. DOT 104W, 111A60ALW1, 111A60W1, 111A100ALW1, 111A100W1, 111A100W3, or 111A100W6 must be designed to make it impossible to remove the cover while the interior of the tank is subjected to pressure.

(b) The manway cover for spec. DOT 111A60W5, or 111A100W5 must be made of a suitable metal. The top, bottom and edge of manway cover must be acid resistant material covered as prescribed in § 179.201–3. Through-bolt holes must be lined with acid resistant material at least one-eighth inch in thickness. A manway cover made of metal not affected by the lading need not be acid resistant material covered.

(c) The manway ring and cover for specifications DOT–103CW, 103DW, 103EW, 111A60W7, or 111A100W6 must be made of the metal and have the same inspection procedures specified in AAR Specifications for Tank Cars, appendix M, M3.03 (IBR, see § 171.7 of this subchapter).

■ 67. Revise § 179.202–13(h)(1) introductory text to read as follows:

§ 179.202–13 Retrofit Standard Requirements (DOT–117R).

* * * * *

(h) *Top fittings protection*—(1) *Protective housing.* Except as provided in §§ 179.202–13(h)(2) and (3) of this paragraph, top fittings on DOT Specification 117R tank cars must be located inside a protective housing not less than 1/2-inch in thickness and constructed of a material having a tensile strength not less than 65 kpsi and must conform to all of the following conditions:

* * * * *

PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

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

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 69. In § 180.407, revise paragraphs (b)(1), (d)(5), (e)(3) and (g)(1)(iv) to read as follows:

§ 180.407 Requirements for test and inspection of specification cargo tanks.

* * * * *

(b) * * *

(1) The cargo tank shows evidence of dents, cuts, gouges, corroded or abraded areas, leakage, or any other condition that might render it unsafe for hazardous materials service. At a minimum, any area of a cargo tank showing evidence of dents, cuts, digs, gouges, or corroded or abraded areas must be thickness tested in accordance with the procedures set forth in paragraphs (i)(2), (i)(3), (i)(5), (i)(6), (i)(9), and (i)(10) of this section and evaluated in accordance with the criteria prescribed in § 180.411. Any signs of leakage must be repaired in accordance with § 180.413. The suitability of any repair affecting the structural integrity of the cargo tank must be determined either by the testing required in the applicable manufacturing specification or in paragraph (g)(1)(iv) of this section.

* * * * *

(d) * * *

* * * * *

(5) Corroded or abraded areas of the cargo tank wall must be thickness tested in accordance with the procedures set forth in paragraphs (i)(2), (i)(3), (i)(5), (i)(6), (i)(9), and (i)(10) of this section.

* * * * *

(e) * * *

* * * * *

(3) Corroded or abraded areas of the cargo tank wall must be thickness tested in accordance with paragraphs (i)(2), (i)(3), (i)(5), (i)(6), (i)(9), and (i)(10) of this section.

* * * * *

(g) * * *

(1) * * *

(iv) Each cargo tank must be tested hydrostatically or pneumatically to the internal pressure specified in the following table. At no time during the pressure test may a cargo tank be subject to pressures that exceed those identified in the following table:

TABLE 1 TO PARAGRAPH (g)(1)(iv)

Specification	Test pressure
MC 300, 301, 302, 303, 305, 306	The test pressure on the name plate or specification plate, 20.7 kPa (3 psig) or design pressure, whichever is greater.
MC 304, 307	The test pressure on the name plate or specification plate, 275.8 kPa (40 psig) or 1.5 times the design pressure, whichever is greater.
MC 310, 311, 312	The test pressure on the name plate or specification plate, 20.7 kPa (3 psig) or 1.5 times the design pressure, whichever is greater.
MC 330, 331	The test pressure on the name plate or specification plate, 1.5 times either the MAWP or the re-rated pressure, whichever is applicable.
MC 338	The test pressure on the name plate or specification plate, 1.25 times either the MAWP or the re-rated pressure, whichever is applicable.
DOT 406	The test pressure on the name plate or specification plate, 34.5 kPa (5 psig) or 1.5 times the MAWP, whichever is greater.
DOT 407	The test pressure on the name plate or specification plate, 275.8 kPa (40 psig) or 1.5 times the MAWP, whichever is greater.
DOT 412	The test pressure on the name plate or specification plate, or 1.5 times the MAWP, whichever is greater.

* * * * *

Issued in Washington, DC, on October 16, 2020, under the authority delegated in 49 CFR 1.97.

Howard R. Elliott

Administrator, Pipeline and Hazardous Materials Safety Administration.

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H.R. 473/P.L. 116–217
To authorize the Every Word We Utter Monument to establish a commemorative work in the District of Columbia and its environs, and for other purposes. (Dec. 17, 2020; 134 Stat. 1052)

H.R. 4975/P.L. 116–218
To designate the facility of the United States Postal Service located at 1201 Sycamore Square Drive in Midlothian, Virginia, as the "Dorothy Braden Bruce Post Office Building". (Dec. 17, 2020; 134 Stat. 1054)

H.R. 5062/P.L. 116–219

To designate the facility of the United States Postal Service located at 9930 Conroy Windermere Road in Windermere, Florida, as the "Officer Robert German Post Office Building". (Dec. 17, 2020; 134 Stat. 1055)

H.R. 5307/P.L. 116–220

To designate the facility of the United States Postal Service located at 115 Nicol Avenue in Thomasville, Alabama, as the "Postmaster Robert Ingram Post Office". (Dec. 17, 2020; 134 Stat. 1056)

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