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FEDERAL REGISTER

Vol. 85 Wednesday,
No. 250 December 30, 2020

Pages 86457–86792

OFFICE OF THE FEDERAL REGISTER

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Contents

Federal Register

Vol. 85, No. 250

Wednesday, December 30, 2020

Agriculture Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86529
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Correction, 86529

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86567–86568
Statement of Organization, Functions, and Delegations of Authority, 86568–86569

Children and Families Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Data Collection for Supporting Youth to be Successful in Life (SYSIL) (New Collection), 86569–86570

Commerce Department
See International Trade Administration
See National Oceanic and Atmospheric Administration
See Patent and Trademark Office

Community Development Financial Institutions Fund
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86648–86650

Education Department
NOTICES
Administrative Priority and Definitions for Discretionary Grant Programs, 86545–86551

Employment and Training Administration
NOTICES
Extended Benefit Program:
Alaska, Connecticut, Kansas, Massachusetts, New Hampshire, Ohio, Oregon, South Carolina, and Washington; Change in Status, 86581
Delaware, Minnesota, Mississippi, and Vermont; Change in Status, 86581–86582

Energy Department
See Federal Energy Regulatory Commission

Environmental Protection Agency
PROPOSED RULES
National Priorities List; Proposed Deletion, 86525–86527
NOTICES
Atrazine, Simazine, and Propazine Registration Review; Draft Endangered Species Act Biological Evaluations, 86556–86557
Final Toxic Substances Control Act Risk Evaluation:
n-Methylpyrrolidone, 86558–86560
Product Cancellation Order:
Certain Pesticide Registrations of Tetrachlorvinphos, 86557–86558

Federal Aviation Administration
RULES
Airworthiness Directives:
Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes, 86462–86464
Airbus SAS Airplanes, 86457–86462
PROPOSED RULES
Airworthiness Directives:
The Boeing Company Airplanes, 86515–86518

Federal Communications Commission
PROPOSED RULES
Television Broadcasting Services:
Columbia, MO, 86527–86528

Federal Energy Regulatory Commission
RULES
Qualifying Facility Rates and Requirements:
Implementation Issues under the Public Utility Regulatory Policies Act, 86656–86754
NOTICES
Application:
Algonquin Gas Transmission, LLC, 86552–86554
Lock 7 Hydro Partners, LLC, 86551–86552
Combined Filings, 86554–86556
Petition for Declaratory Order:
City of Colton, CA, 86551

Federal Motor Carrier Safety Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Generic Clearance of Customer Satisfaction Surveys, 86643–86644
Licensing Applications for Motor Carrier Operating Authority, 86641–86643

Federal Railroad Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86644–86648

Federal Register, Administrative Committee
PROPOSED RULES
Official Subscriptions to the Print Edition of the Federal Register, 86514–86515

Federal Reserve System
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86560–86566
Change in Bank Control:
Acquisitions of Shares of a Bank or Bank Holding Company, 86560
Corporation to do Business under the Federal Reserve Act, 86566
Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities, 86567

Food and Drug Administration
NOTICES
Guidance:
Product Labeling for Laparoscopic Power Morcellators, 86570–86571
Requests for Nominations:
Technical Electronic Product Radiation Safety Standards Committee; Voting Members, 86571–86572

Foreign Assets Control Office
NOTICES
Blocking or Unblocking of Persons and Properties, 86650–86652

Health and Human Services Department
See Centers for Medicare & Medicaid Services
See Children and Families Administration
See Food and Drug Administration
See National Institutes of Health

Homeland Security Department
See Transportation Security Administration
See U.S. Customs and Border Protection

Housing and Urban Development Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Environmental Review Online System, 86576

Interior Department
See National Park Service

Internal Revenue Service
RULES
Certain Employee Remuneration in Excess of $1,000,000 under the Internal Revenue Code, 86481–86511
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Preparer Hardship Waiver Request and Preparer Explanation for Not Filing Electronically, 86652

International Trade Administration
NOTICES
Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
Fine Denier Polyester Staple Fiber from India, 86537–86538
Stainless Steel Bar from India, 86532–86534
Binational Panel Review:
United States-Mexico-Canada Agreement, 86536–86537
Determination of Sales At Less Than Fair Value:
Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China, 86529–86532
Certain Walk-Behind Lawn Mowers and Parts Thereof from the Socialist Republic of Vietnam, 86534–86536

International Trade Commission
NOTICES
Investigations; Determinations, Modifications, and Rulings, etc.:
Certain Motorized Vehicles and Components Thereof, 86580–86581
Silicon Metal from Bosnia and Herzegovina, Iceland, Kazakhstan, and Malaysia, 86578–86580

Labor Department
See Employment and Training Administration
See Wage and Hour Division
See Workers Compensation Programs Office
RULES
Tip Regulations under the Fair Labor Standards Act, 86756–86792

National Institutes of Health
NOTICES
Meetings:
Eunice Kennedy Shriver National Institute of Child Health and Human Development, 86572
National Cancer Institute, 86572–86573
National Center for Advancing Translational Sciences, 86572

National Oceanic and Atmospheric Administration
NOTICES
Takes of Marine Mammals Incidental to Specified Activities:
Service Pier Extension Project on Naval Base Kitsap Bangor, WA, 86538–86544

National Park Service
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Procedures for State, Tribal, and Local Government Historic Preservation Programs, 86577
National Register of Historic Places:
Pending Nominations and Related Actions, 86578

Patent and Trademark Office
PROPOSED RULES
Disclaimer Practice in Patents and Patent Applications, 86518–86525
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Patent Examiner Employment Application, 86544–86545

Personnel Management Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for Deferred Retirement, 86583–86584
Application for Refund of Retirement Deductions, 86583

Securities and Exchange Commission
RULES
Rules of Practice, 86464–86481
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86599–86600
Registration as a National Securities Exchange Pursuant to the Securities Exchange Act of 1934:
Minneapolis Grain Exchange, LLC, 86591
Self-Regulatory Organizations; Proposed Rule Changes:
BOX Exchange, LLC, 86603–86608, 86610–86614
Financial Industry Regulatory Authority, Inc., 86619–86623
Fixed Income Clearing Corp., 86591–86592
ICE Clear Europe, Ltd., 86595–86598
Investors Exchange, LLC, 86617–86619
Long-Term Stock Exchange, Inc., 86623–86625
Nasdaq BX, Inc., 86590–86591
New York Stock Exchange, LLC, 86584–86590, 86608–86610, 86625–86629
NYSE Arca, Inc., 86635–86637

NYSE National, Inc., 86629–86632
The Nasdaq Stock Market, LLC, 86598–86603, 86614–86617, 86632–86635
The Options Clearing Corp., 86592–86595

Social Security Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 86638–86641

State Department
NOTICES
Charter Renewal:
Advisory Committee on Historical Diplomatic Documentation, 86641
Meetings:
Advisory Committee on Historical Diplomatic Documentation, 86641

Transportation Department
See Federal Aviation Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration

Transportation Security Administration
NOTICES
Meetings:
International Civil Aviation Organization standards, 86575–86576

Treasury Department
See Community Development Financial Institutions Fund
See Foreign Assets Control Office
See Internal Revenue Service
RULES
Privacy Act of 1974; Exemption, 86511–86513

U.S. Customs and Border Protection
NOTICES
Quarterly Internal Revenue Service Interest Rates used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties, 86573–86575

Veterans Affairs Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Application for United States Flag for Burial Purposes, 86652–86653

Wage and Hour Division
RULES
Tip Regulations under the Fair Labor Standards Act, 86756–86792

Workers Compensation Programs Office
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Representative Payee Report, Representative Payee Report (Short Form), and Physician's/Medical Officer's Statement, 86582–86583

Separate Parts In This Issue

Part II
Energy Department, Federal Energy Regulatory Commission, 86656–86754

Part III
Labor Department, Wage and Hour Division, 86756–86792
Labor Department, 86756–86792

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

1 CFR
Proposed Rules:
12 86514

14 CFR
39 (3 documents) 86457, 86459, 86462
Proposed Rules:
39 86515

17 CFR
201 86464

18 CFR
292 86656

26 CFR
1 86481

29 CFR
10 86756
516 86756
531 86756
578 86756
579 86756
580 86756

31 CFR
1 86511

37 CFR
Proposed Rules:
1 86518

40 CFR
Proposed Rules:
300 86525

47 CFR
Proposed Rules:
73 86527

Rules and Regulations

Federal Register

Vol. 85, No. 250

Wednesday, December 30, 2020

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

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1135; Project Identifier MCAI–2020–01363–T; Amendment 39–21373; AD 2020–26–18]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A330–243, –343, and –941 airplanes. This AD was prompted by a report that during an inspection of the wing/fuselage fillet interface, evidence of black stains and white oxidation was found on several areas of the fillet fairing adjustable rods due to surface corrosion. This AD requires replacing each affected fillet fairing adjustable rod with a serviceable part, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective January 14, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 14, 2021.

The FAA must receive comments on this AD by February 16, 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 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, 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–2020–1135.

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–2020–1135; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax: 206–231–3229; email *vladimir.ulyanov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0209, dated October 5, 2020 (EASA AD 2020–0209) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Airbus SAS Model A330–243, –343, and –941 airplanes.

This AD was prompted by a report that during an inspection of the wing/fuselage fillet interface, evidence of black stains and white oxidation was found on several areas of the fillet fairing adjustable rods due to surface corrosion. The FAA is issuing this AD to address surface corrosion, which could lead to rod failures and consequent fillet fairing detachment, and possibly result in damage to the tailplane and reduced control of the airplane. See the MCAI for additional background information.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0209 describes procedures for replacing each affected fillet fairing adjustable rod with a serviceable part. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

FAA's Determination

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

Requirements of This AD

This AD requires accomplishing the actions specified in EASA AD 2020–0209 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this 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 2020–0209 is incorporated by reference in this final rule. This AD, therefore, requires compliance with EASA AD 2020–0209 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in the EASA AD. Service information specified in EASA AD 2020–0209 that is required for compliance with EASA AD 2020–0209 is available on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1135.

FAA's Justification and Determination of the Effective Date

There are currently no domestic operators of these products. Therefore, the FAA finds that notice and opportunity for prior public comment are unnecessary and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1135; Project Identifier MCAI–2020–01363–T'' at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, 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 final rule 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 final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax: 206–231–3229; email *vladimir.ulyanov@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.

Regulatory Flexibility Act (RFA)

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

Costs of Compliance

Currently, there are no affected U.S.-registered airplanes. If an affected airplane is imported and placed on the U.S. Register in the future, the FAA provides the following cost estimates to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product
Up to 8 work-hours × $85 per hour = Up to $680	(*)	Up to $680.*

* The FAA has received no definitive data on which to base the parts cost estimates for the replacements specified in this AD.

According to the manufacturer, some or all of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. 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 AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–18 Airbus SAS: Amendment 39–21373; Docket No. FAA–2020–1135; Project Identifier MCAI–2020–01363–T.

(a) Effective Date

This airworthiness directive (AD) becomes effective January 14, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A330–243, –343, and –941 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–0209, dated October 5, 2020 (EASA AD 2020–0209).

(d) Subject

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

(e) Reason

This AD was prompted by a report that during an inspection of the wing/fuselage fillet interface, evidence of black stains and white oxidation was found on several areas of the fillet fairing adjustable rods due to surface corrosion. The FAA is issuing this AD to address surface corrosion, which could lead to rod failures and consequent fillet fairing detachment, and possibly result in damage to the tailplane and reduced control of the airplane.

(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, EASA AD 2020–0209.

(h) Exception to EASA AD 2020–0209

The ''Remarks'' section of EASA AD 2020–0209 does not apply to this AD.

(i) 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 (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the 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, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraph (i)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax: 206–231–3229; email *vladimir.ulyanov@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0209, dated October 5, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0209, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this 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–2020–1135.

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

Issued on December 14, 2020.

Gaetano A. Sciortino,

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

[FR Doc. 2020–28859 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0681; Product Identifier 2020–NM–089–AD; Amendment 39–21376; AD 2020–26–21]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus SAS Model A350–941 airplanes. This AD was prompted by a report that during the assembly of a certain section of the fuselage, the gaps found on self-aligning nuts for eight fasteners were out of tolerance. This AD requires a rotating probe test of all fastener holes located in the affected area for any discrepancies, an eddy current inspection of the surrounding flange for any discrepancies, a detailed inspection of certain frames for any discrepancies, and corrective actions if necessary, as specified in a European Union Aviation Safety Agency (EASA) AD, which is incorporated by reference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 3, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 3, 2021.

ADDRESSES: For material incorporated by reference (IBR) in this AD, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this IBR material on the EASA website at *https://ad.easa.europa.eu.* You may view this IBR material at the FAA,

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–2020–0681.

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–2020–0681; 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: Kathleen Arrigotti, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email *Kathleen.Arrigotti@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020–0109, dated May 15, 2020 (EASA AD 2020–0109) (also referred to as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Airbus SAS Model A350–941 airplanes.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus SAS Model A350–941 airplanes. The NPRM published in the **Federal Register** on August 4, 2020 (85 FR 47122). The NPRM was prompted by a report that during the assembly of the section 19 skin to frame (FR) 98 joint of the fuselage, the gaps found on self-aligning nuts for eight fasteners were out of tolerance. The NPRM proposed to require a rotating probe test of all fastener holes located in the affected area for any discrepancies, an eddy current inspection of the surrounding flange for any discrepancies, a detailed inspection of certain frames for any discrepancies, and corrective actions if necessary, as specified in an EASA AD.

The FAA is issuing this AD to address gaps that are out of tolerance, which could reduce the fatigue and damage tolerance properties of the affected area, and possibly affect the structural integrity of the rear cone of the fuselage. See the MCAI for additional background information.

Comments

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

Request To Revise the Proposed Applicability

Delta Air Lines, Inc. (DAL) requested that the FAA revise the applicability in the NPRM. DAL stated that the applicability should reflect the effectivity specified in Airbus Service Bulletin A350–53–P057, dated February 21, 2020, and not what is specified in the NPRM and in EASA AD 2020–0109. DAL also stated that the NPRM and EASA AD 2020–0109 would require operators the unnecessary burden of reviewing records and updating associated paperwork to ensure and prove that the proper modification status is embodied on all airplanes, including on any Model A350 airplanes delivered in the future, despite the embodiment of the applicable modification in production. DAL commented that Airbus Service Bulletin A350–53–P057, dated February 21, 2020, specifies specific manufacturer serial numbers and describes which airplanes will have the modification embodied in production (manufacturer serial number 0307 and subsequent).

The FAA disagrees with the request. The applicability of this AD (and EASA AD 2020–0109) excludes any airplanes on which the modification has been embodied, whether during or after production. EASA, as the State of Design Authority for Airbus products, has determined that this applicability is appropriate because it includes any airplanes on which the modification was not embodied, while excluding those on which the modification has been embodied. The FAA agrees with this decision because it ensures the unsafe condition is addressed on all applicable airplanes. The FAA has not changed the AD in this regard.

Request To Include Exception To Provide Correct Reference for Installing New Fasteners

DAL requested that the NPRM be revised to address a discrepancy in a manual reference for installing the new fasteners. DAL noted that Airbus Service Bulletin A350–53–P057, dated February 21, 2020, specifies Airbus task A350–A–53–XX–P057–01001–720A–A and task A350–A–53–XX–P057–02001–720A–A for instructions to install the new fasteners, and that the actions in those tasks are considered Required for Compliance (RC). DAL asserted that the instructions in those tasks should refer to the Airbus A350 Aircraft Maintenance Manual (AMM) procedure rather than the aircraft structural repair (ASR) manual. DAL pointed out that there is no existing ASR manual with chapter A350–A–20–51–50–01ZZZ–25BZ–A; however, the AMM reference for standard mechanical torques is maintenance procedure chapter A350–A–20–51–50–01ZZZ–25BZ–A. DAL stated that Airbus has confirmed in Airbus Technical Request Dossier 80808465 that the correct reference is to the AMM. DAL further requested that, if this discrepancy is not addressed in the AD, it will require that a global alternative method of compliance (AMOC) be requested by Airbus.

The FAA agrees that the correct document should be referenced for the reasons provided above. The FAA has added paragraph (h)(3) in this AD to clarify that, where Airbus Service Bulletin A350–53–P057, dated February 21, 2020, specifies Airbus task A350–A–53–XX–P057–01001–720A–A and task A350–A–53–XX–P057–02001–720A–A, for instructions for installing the new fasteners, and those instructions specify to refer to ''Ref. ASR A350–A–20–51–01ZZZ–25BZ–A,'' for the purposes of this AD, the correct reference is ''Ref. AMM Maintenance Procedure A350–A–20–51–01ZZZ–25BZ–A.''

Request To Provide Clarification on the Use of Substitute Fasteners

DAL requested that the FAA provide clarification regarding the use of substitute fasteners. DAL stated that task A350–A–53–XX–P057–01001–720A–A and task A350–A–53–XX–P057–02001–720A–A, specified in Airbus Service Bulletin A350–53–P057, dated February 21, 2020, provide instructions to install new fasteners. DAL also stated that standard notes within these allow for the use of washers or approved substitute fasteners should the installed fasteners not be sufficient per the standards provided in the ASR manual. DAL questioned whether, since Airbus Service Bulletin A350–53–P057, dated February 21, 2020, provides the specific fasteners to use to address the issue in the NPRM, an AMOC will be required for the use of substitute fasteners despite these notes.

The FAA agrees to provide clarification. An AMOC is not needed for the use of washers or approved

substitute fasteners should the installed fasteners not be sufficient. The FAA has not changed this AD 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 with the change 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 this change will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

EASA AD 2020–0109 describes procedures for a rotating probe test of all fastener holes located in the affected area for any discrepancies (*i.e.,* cracking or damage), an eddy current inspection of the surrounding flange for any discrepancies, a detailed inspection of FR 97 to FR 99 for any discrepancies, and corrective actions if necessary. Corrective actions include replacing all fasteners located in the affected area with new bolts and self-aligning nuts, and repair. 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 13 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
1 work-hour × $85 per hour = $85	$0	$85	$1,105

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

ESTIMATED COSTS OF ON-CONDITION ACTIONS *

Labor cost	Parts cost	Cost per product
6 work-hours × $85 per hour = $510	$70	$580

* The FAA has received no definitive data that would enable providing cost estimates for the on-condition repairs specified in this AD.

According to the manufacturer, some or all of the costs of this 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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–21 Airbus SAS: Amendment 39–21376; Docket No. FAA–2020–0681; Product Identifier 2020–NM–089–AD.

(a) Effective Date

This AD is effective February 3, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus SAS Model A350–941 airplanes, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2020–

0109, dated May 15, 2020 (EASA AD 2020–0109).

(d) Subject

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

(e) Reason

This AD was prompted by a report that during the assembly of the section 19 skin to frame (FR) 98 joint of the fuselage, the gaps found on self-aligning nuts for eight fasteners were out of tolerance. The FAA is issuing this AD to address gaps that are out of tolerance, which could reduce the fatigue and damage tolerance properties of the affected area, and possibly affect the structural integrity of the rear cone of the fuselage.

(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, EASA AD 2020–0109.

(h) Exceptions to EASA AD 2020–0109

(1) The ''Remarks'' section of EASA AD 2020–0109 does not apply to this AD.

(2) Where paragraph (2) of EASA AD 2020–0109 specifies actions if ''any discrepancy is detected, as defined in the SB,'' for this AD a discrepancy is defined as any crack or damage.

(3) Where Airbus Service Bulletin A350–53–P057, dated February 21, 2020 (referenced in EASA AD 2020–0109), specifies Airbus task A350–A–53–XX–P057–01001–720A–A and task A350–A–53–XX–P057–02001–720A–A, for instructions for installing the new fasteners, and those instructions specify to refer to ''ASR A350–A–20–51–01ZZZ–25BZ–A,'' for the purposes of this AD, the correct reference is ''AMM Maintenance Procedure A350–A–20–51–01ZZZ–25BZ–A.''

(i) 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 (j) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the 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, Large Aircraft Section, International Validation Branch, FAA; or EASA; or Airbus SAS's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* Except as required by paragraphs (h)(2) and (3) and paragraph (i)(2) of this AD, if any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified 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 procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(j) Related Information

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

(k) Material Incorporated by Reference

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

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

(i) European Union Aviation Safety Agency (EASA) AD 2020–0109, dated May 15, 2020.

(ii) [Reserved]

(3) For EASA AD 2020–0109, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this 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–2020–0681.

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

Issued on December 17, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28861 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–0683; Project Identifier MCAI–2020–01134–T; Amendment 39–21375; AD 2020–26–20]

RIN 2120–AA64

Airworthiness Directives; Airbus Canada Limited Partnership (Type Certificate Previously Held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. This AD was prompted by a report that during installation on the final assembly line, a foreign object damage (FOD) protective end cap was not removed from an extraction duct of the crew oxygen system. The protective end cap must be removed to prevent a build-up of oxygen under the flight deck floor, which is a fire risk. This AD requires inspecting the air extraction duct installation to determine if a protective end cap is installed, and removing any protective end cap found. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective February 3, 2021.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of February 3, 2021.

ADDRESSES: For service information identified in this final rule, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec, J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus*; internet *https://a220world.airbus.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–2020–0683.

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–2020–0683; 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:

Siddeeq Bacchus, Aerospace Engineer, Mechanical Systems and Admin Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7362; fax: 516–794–5531; email: *9-avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian AD CF–2020–19, dated May 26, 2020 (also referred to after this as the Mandatory Continuing Airworthiness Information, or the MCAI), to correct an unsafe condition for certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 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–2020–0683.

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus Canada Limited Partnership Model BD–500–1A10 and BD–500–1A11 airplanes. The NPRM published in the **Federal Register** on August 11, 2020 (85 FR 48480). The NPRM was prompted by a report that during installation on the final assembly line, a FOD protective end cap was not removed from an extraction duct of the crew oxygen system. The protective end cap must be removed to prevent a build-up of oxygen under the flight deck floor, which is a fire risk. The NPRM proposed to require inspecting the air extraction duct installation to determine if a protective end cap is installed, and removing any protective end cap found. The FAA is issuing this AD to address this possible ignition source, which could result in an oxygen-fed fire. See the MCAI for additional background information.

Comments

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

Support for the NPRM

The Air Line Pilots Association, International indicated its support for the NPRM.

Request To Refer to a Specific Service Information Procedure

Delta Air Lines, Inc. (DAL) requested that paragraph (g) of the proposed AD refer to Step 2.2 of the Accomplishment Instructions of Airbus Canada Limited Partnership A220 Service Bulletin BD500–351004, Issue 001, dated April 8, 2020, instead of referring to the entire Accomplishment Instructions. DAL stated that only Step 2.2 of the Accomplishment Instructions of the referenced service information provides the required steps for performing the inspection and corrective action required by the proposed AD. DAL noted that the current language should be more specific when referring to these tasks.

The FAA agrees with the commenter's request. Only Step 2.2 of the Accomplishment Instructions of Airbus Canada Limited Partnership A220 Service Bulletin BD500–351004, Issue 001, dated April 8, 2020, is necessary to correct the specified unsafe condition. The remaining portions of the Accomplishment Instructions contain the access and close procedures, which are not required to address the identified unsafe condition. The FAA has changed paragraph (g) of this AD to reference only Step 2.2 of the Accomplishment Instructions of the referenced service information.

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 with the change 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 this change will not increase the economic burden on any operator or increase the scope of this final rule.

Related Service Information Under 1 CFR Part 51

Airbus Canada Limited Partnership has issued A220 Service Bulletin BD500–351004, Issue 001, dated April 8, 2020. This service information describes procedures for a general visual inspection of the extraction duct of the crew oxygen system to determine if a protective end cap is installed, and removing any protective end cap found. 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 20 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
3 work-hours × $85 per hour = $255	$0	$255	$5,100

Authority for This Rulemaking

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

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

develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2020–26–20 Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.): Amendment 39–21375; Docket No. FAA–2020–0683; Project Identifier MCAI–2020–01134–T.

(a) Effective Date

This airworthiness directive (AD) is effective February 3, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus Canada Limited Partnership (Type Certificate previously held by C Series Aircraft Limited Partnership (CSALP); Bombardier, Inc.) airplanes, certificated in any category, identified in paragraphs (c)(1) and (2) of this AD.

(1) Model BD–500–1A10 airplanes, serial numbers 50010 through 50018 inclusive, and 50020 through 50039 inclusive.

(2) Model BD–500–1A11 airplanes, serial numbers 55003 through 55016 inclusive, and 55018 through 55054 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 35, Oxygen.

(e) Reason

This AD was prompted by a report that during installation on the final assembly line, a foreign object damage (FOD) protective end cap was not removed from an extraction duct of the crew oxygen system. The protective end cap must be removed to prevent a build-up of oxygen under the flight deck floor, which is a fire risk. The FAA is issuing this AD to address this possible ignition source, which could result in an oxygen-fed fire.

(f) Compliance

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

(g) Inspection

Within 1,650 flight hours or 8 months after the effective date of this AD, whichever occurs first: Do a general visual inspection of the air extraction duct installation to determine if a protective end cap is installed, and if installed, remove the protective end cap before further flight, in accordance with Step 2.2 of the Accomplishment Instructions of Airbus Canada Limited Partnership A220 Service Bulletin BD500–351004, Issue 001, dated April 8, 2020.

(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 local 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 local 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 Airbus Canada Limited Partnership'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–2020–19, dated May 26, 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–2020–0683.

(2) For more information about this AD, contact Siddeeq Bacchus, Aerospace Engineer, Mechanical Systems and Admin Services Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 516–228–7362; fax: 516–794–5531; email: *9-avs-nyaco-cos@faa.gov.*

(j) Material Incorporated by Reference

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

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

(i) Airbus Canada Limited Partnership A220 Service Bulletin BD500–351004, Issue 001, dated April 8, 2020.

(ii) [Reserved].

(3) For service information identified in this AD, contact Airbus Canada Limited Partnership, 13100 Henri-Fabre Boulevard, Mirabel, Québec, J7N 3C6, Canada; telephone 450–476–7676; email *a220_crc@abc.airbus*; internet *https://a220world.airbus.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 16, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28860 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 201

[Release No. 34–90442; File No. S7–18–15]

RIN 3235–AL87

Amendments to the Commission's Rules of Practice

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to its Rules of Practice to require persons involved in Commission administrative proceedings to file and serve documents electronically.

DATES: *Effective Date:* The final rules are effective January 29, 2021, except for Instruction 8 which is effective July 12, 2021.

Compliance Date: Compliance with the amended rules is required on April 12, 2021 (''Compliance Date''). The Compliance Date is discussed further at Section III below.

FOR FURTHER INFORMATION CONTACT: J. Matthew DeLesDernier, Office of the Secretary (202) 551–5400, and Benjamin Schiffrin, Office of the General Counsel, (202) 551–5150, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to 17 CFR 201.102, 201.140, 201.141, 201.150, 201.151, 201.152, 201.193, 201.322, 201.351, 201.420 and 201.440 (''Commission Rules of Practice 102, 140, 141, 150, 151, 152, 193, 322, 351, 420 and 440'').

I. Introduction

On September 24, 2015, the Commission proposed amendments to its Rules of Practice to automate and modernize aspects of the filing process in administrative proceedings through electronic filing and service in such proceedings.[1] The proposed amendments sought to enhance the accessibility and transparency of administrative proceedings and to facilitate the prompt distribution of public information regarding these proceedings by enabling the Commission to more efficiently process filings and make them more readily available to the public. As discussed in the proposing release, the proposed amendments coincided with the Commission's development of an internet-based electronic filing system for its administrative proceedings.

The Electronic Filings in Administrative Proceedings (''eFAP'') system will be accessible via the Commission's website beginning on the Compliance Date of these rules. A link on the website at *www.sec.gov* will route the user to *login.gov* (a General Services Administration service) for multifactor authentication; *login.gov* will then route the user back to the eFAP system. In addition, contemporaneously with the issuance of this release, the Commission's Office of the Secretary has posted on the Commission's website Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications (''Instructions''),[2] as well as an eFAP User Manual (''User Manual'') for participants using the eFAP system.[3] The Instructions describe in ''question and answer'' format the technical requirements for electronic filing, including the mechanics of uploading documents, acceptable file formats, file size limitations, and naming conventions, among other things. They also address electronic service of documents by the Office of the Secretary of the Commission upon the parties to the proceeding, which will occur through the eFAP system, and electronic service by the parties upon other participants in the proceeding, which will be effectuated by email outside of the eFAP system. The User Manual addresses the technical requirements of registration and login and includes various screenshots that users will encounter in navigating the eFAP system.

The proposal involved three primary components. First, persons involved in administrative proceedings who currently are required to file documents under Rules 151 and 152 of the Commission's Rules of Practice would be required to file such documents electronically. Second, persons filing documents in the new eFAP system would be required to redact or omit sensitive personal information and could seek a protective order for any unredacted sensitive personal information that the person believes is necessary to the proceeding. As a corollary to these electronic filing requirements, the proposal also would require electronic filing and redaction of records under Rule 420 and Rule 440 in administrative proceedings involving determinations by self-regulatory organizations (''SROs'') and the Public Company Accounting Oversight Board (''PCAOB''), respectively, and electronic submission and redaction of records under Rule 351 in proceedings before hearing officers. Third, parties would be required to serve each other electronically in the form and manner that is prescribed in the materials posted on the Commission's website.

After carefully considering the comments we received on the proposal, we are adopting the proposal with certain modifications. Under the final rules, pleadings and pleading attachments filed with the Commission under Final Rules 151 and 152 must redact sensitive personal information, but, as discussed below, the redaction requirements are modified from the proposal to eliminate the redaction of records submitted after a hearing before a hearing officer under Final Rule 351(c), records certified and filed by an SRO under Final Rule 420(e), and records certified and filed by the PCAOB under Final Rule 440(d). We have decided to modify the redaction requirements for records submitted or filed under Rules 351, 420 and 440 because, as discussed below, the records received by the Commission under these rules are not posted to the Commission's website. Persons seeking access to such records in administrative proceedings may, consistent with current practice, submit a request to the Commission under the Freedom of Information Act (''FOIA'') or under any other applicable law and, if disclosure is required, then any documents would be redacted by Commission staff as appropriate.

II. Description of the Final Rules

A. Rule 151 (Procedure for Filing Papers With the Commission)

1. Proposed Rules

Rule 151(a) currently sets forth the procedural requirements for filing papers with the Commission. The rule amendments, as proposed, would require all filings and documents that are attached to filings to be submitted electronically in accordance with the requirements of Proposed Rule 152(a). Documents or items not attached to filings, such as hearing exhibits, generally would be submitted in accordance with Proposed Rule 351.[4]

Proposed Rule 151(d) would make amendments to the procedure for filing papers with the Commission that are consistent with the transition to electronic filing, and would require that parties include in the certificate of service the email address to which service was made, if personal service was not effectuated. The proposed rule also would eliminate the requirement in current Rule 151(d) to state in the certificate of service why a different method of service or filing was used, when applicable.

Proposed Rule 151(e) would require persons to omit or redact sensitive personal information from filings. Sensitive personal information would include a Social Security number,

[1] *Amendments to the Commission's Rules of Practice,* Exchange Act Release No. 75977 (Sept. 24, 2015), 80 FR 60082 (Oct. 5, 2015), available at *http://www.govinfo.gov/content/pkg/FR-2015-10-05/pdf/2015-24705.pdf* (last visited Nov. 17, 2020).

[2] *See Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications,* available at *https://www.sec.gov/efapdocs/instructions.pdf.*

[3] *See eFAP User Manual—Registered User and eFAP User Manual—SEC Filer,* available at *https://www.sec.gov/efapdocs/registered-user-manual.pdf* and *https://www.sec.gov/efapdocs/sec-filer-manual.pdf.*

[4] Rule 351 governs, among other things, the submission of exhibits to the Office of the Secretary.

taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, state-issued identification number, home address (other than city and state), telephone number, date of birth (other than year), names and initials of minor children, as well as any sensitive health information identifiable by individual, such as an individual's medical records. We proposed four exceptions to the redaction requirement. Under the proposal, persons would not be required to redact: (1) The last four digits of a taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, and state-issued identification number; (2) home addresses and telephone numbers of parties and persons filing documents with the Commission; (3) business telephone numbers; and (4) any information that is available on the Commission's public website from copies of filings by regulated entities or registrants. Under the proposal, if the person making a filing believes that sensitive personal information contained in the filing is necessary to the proceeding, the person would need to file a motion for a protective order in accordance with Rule 322 [5] to limit disclosure of unredacted sensitive personal information.

Under Proposed Rule 151(e), all filings would need to include a certification that any sensitive personal information has been excluded or redacted from the filing or, if necessary to the filing, has been filed under seal pursuant to Rule 322.

2. Comments Received

Two commenters asserted that in requiring parties to undertake the redaction of sensitive personal information, the Commission was ''attempting to devolve its Privacy Act [of 1974] responsibilities on private parties'' and shift the costs of compliance to parties in administrative proceedings.[6] These commenters also asserted that the Commission is barred by the Privacy Act from disclosing home addresses of parties to administrative proceedings.[7] One of these commenters objected to the term ''sensitive health information'' to describe a category of information subject to the redaction requirement, arguing, among other things, that the proposal fails to define this term or provide standards for what would constitute ''sensitive'' health information. The commenter also asserted that the Privacy Act bars ''disclosure of all medical information'' and that such information must not be disclosed by the Commission because ''disclosure of medical files (whether sensitive or not) would not advance FOIA's objective of permitting public scrutiny of agency action.'' [8]

3. Final Rules

We are adopting Rule 151(a) substantially as proposed, with one revision. As adopted, Final Rule 151(a) requires parties to proceedings to submit electronically all filings and documents that are attached to filings in accordance with the requirements of Rule 152(a). Final Rule 151(a) does not include the last sentence of Proposed Rule 151(a), which provided that ''[d]ocuments or items that are not attached to filings . . . shall be submitted in accordance with Rule 351.'' We are deleting this sentence of the proposed language from the final rule to avoid suggesting that Rules 151 and 351 are the only rules governing the submission of documents to the Commission. For example, while Rule 351 governs the filing of records from hearings, Rule 420(e) and Rule 440(d), respectively, govern the submission of SRO and PCAOB records to the Commission.

We did not receive any comments on the proposed amendments to Rule 151(d) and are adopting these amendments as proposed. Final Rule 151(d) provides that papers filed with the Commission must include in the certificate of service the email address to which service was made, if not made in person.

In light of the concerns raised by commenters, we are adopting Rule 151(e) with a modification from the proposal to the definition of sensitive personal information. Specifically, we are modifying the proposed phrase ''sensitive health information'' to address the concerns raised by a commenter who argued that FOIA Exemption 6 [9] protects health information that is not ''sensitive'' and that the Commission did not provide a basis for determining what information constitutes ''sensitive health information.'' [10] Although this commenter suggested that any information that would be protected by FOIA Exemption 6 must be omitted or redacted in papers filed with the Commission to satisfy the Privacy Act,[11] that is not the case. An agency may disclose information protected by the Privacy Act in connection with the agency's ''routine uses'' regardless of whether the information is exempt under FOIA.[12] The Commission's System of Records Notice (''SORN'') for administrative proceeding files includes, as one of the routine uses, making records available to the public in matters involving administrative proceedings.[13] Thus, as appropriate, the Commission can release information in administrative proceeding filings that could be protected by FOIA in other contexts without violating the Privacy Act.

Nonetheless, we take seriously the commenter's concerns regarding Exemption 6's protection of health information. Our staff will continue to review filings before posting them. And although the Commission is not required to protect all information that FOIA Exemption 6 protects when releasing filings in administrative proceedings, the policy behind FOIA Exemption 6 is relevant to a determination of what redactions are appropriate. To address these considerations, we are substituting the term ''unnecessary'' for the term ''sensitive,'' so that the standard for redaction or omission under the final rules is ''unnecessary'' health information. Under Final Rule 151(e), a party is required to redact or omit health information that is not necessary to the proceeding. We believe that parties to a proceeding will be in the best position to know what health information is necessary to a proceeding. We believe that health information that is discussed in a brief, motion, or other filing will

[5] 17 CFR 201.322. *See infra* at II.C. for a discussion of amendments to Rule 322.

[6] *See* Keith Paul Bishop letter dated October 6, 2015 (''Bishop letter'') at 2–3; Anonymous letter dated October 18, 2015 (''Anonymous letter'') at 2.

[7] Bishop letter at 2; Anonymous letter at 2.

[8] Bishop letter at 3.

[9] 5 U.S.C. 552(b)(6) (protecting information about individuals when disclosure of the information ''would constitute a clearly unwarranted invasion of personal privacy''); *see also* 5 U.S.C. 552(b)(7)(C) (protecting law enforcement information when its disclosure ''could reasonably be expected to constitute an unwarranted invasion of personal privacy'').

[10] Bishop letter at 3.

[11] Bishop letter at 2 (citing 5 U.S.C. 552a(b)(2) (allowing disclosure of information protected by the Privacy Act when the FOIA requires disclosure)).

[12] 5 U.S.C. 552a(b)(3), (e)(4)(D); *see also, e.g., Dep't of the Air Force, Scott Air Force Base* v. *Fed. Labor Rels. Auth.,* 104 F.3d 1396, 1401–02 (D.C. Cir. 1997) (discussing routine use exception).

[13] *See System of Records Notice SEC–36* (Administrative Proceeding Files) available at *https://www.sec.gov/about/privacy/sorn/secsorn36.pdf; see also Privacy Act of 1974: Systems of Records,* Release No. PA–52, 79 FR 69894, 69896 (2014) (Routine Use No. 18 authorizing disclosure ''[t]o members of Congress, the press and the public in response to inquiries relating to particular Registrants and their activities, and other matters under the Commission's jurisdiction. In matters involving public proceedings, most of the records are available to the public.'').

likely be necessary to an issue in the proceeding—for example, if a respondent's health condition served as a basis for a defense against liability in the proceeding, or if the health of counsel is proffered as a basis for an extension of a filing deadline—while health matters that may be referenced only in transcripts or other documents attached to filings generally are not likely to be necessary.

We recognize that by requiring the omission or redaction only of unnecessary health information, we are allowing parties to file, without redaction, sensitive health information that is necessary to a proceeding. Such an approach is similar to the balancing that courts have applied in the FOIA context. Under FOIA, to determine whether an invasion of privacy is unwarranted, agencies balance privacy interests and the public interest in understanding the activities of the agency. Disclosure of information in which an individual has a privacy interest is warranted when that public interest outweighs any privacy interests.[14] When health information is necessary to a proceeding, it may shed light on the basis for decisions in administrative proceedings, and provide valuable information to the public.

However, we recognize that there may be situations in which a person has a privacy interest in necessary information that outweighs the value in providing that information to the public. We believe that those situations can be better handled through a motion for a protective order under Rule 322 to limit disclosure of the unredacted health information because it requires a facts and circumstances determination on a case-by-case basis.

Under Final Rule 322(b), filing a motion for a protective order allows for a case-by-case determination as to whether ''the harm resulting from disclosure would outweigh the benefits of disclosure.'' Any party may file a motion for a protective order regarding health information either to protect information it anticipates including in filings or to protect information it anticipates another party may include in filings. We recognize that this approach may leave open the possibility that health information about a victim or other third party may not be protected from disclosure where such protection may be warranted, but we think the possibility of any clearly unwarranted disclosure is unlikely because filers have an obligation to redact unnecessary information, and health information in which victims or other similarly situated persons have a strong privacy interest is rarely necessary in administrative proceedings. In addition, where health information about victims is necessary, the Division of Enforcement will have an interest in protecting victims from unwarranted disclosures of sensitive health information both because it will be seeking to protect victims generally and because taking steps to protect and help victims would, in most instances, make the victims more likely to cooperate in an investigation. We encourage all parties to exercise caution when including health information in their filings. Of course, as noted above, our staff will also continue to review filings before posting them.[15]

In addition to the comment on the disclosure of health information, two commenters argued that the Commission is barred by the Privacy Act from disclosing home addresses of parties and persons filing documents with the Commission and therefore the Commission should modify the rule to require redaction of this information. We are adopting Rule 151(e) as proposed to not require redaction of home addresses of parties to administrative proceedings and of persons filing documents with the Commission in administrative proceedings. As noted above, one of the Commission's routine uses for records in administrative proceedings is making them available to the public, so disclosure of home addresses does not violate the Privacy Act. We also believe that individuals often have only a minimal privacy interest in home addresses because home addresses are often readily available to the public. In contrast, requiring redaction of home addresses could place a burden on the Commission and on filers. Because certificates of service and filings in cases with *pro se* respondents regularly contain the respondents' home addresses, it would be necessary to redact the addresses and then file unredacted certificates of service under seal. We also note that redacting home addresses is not required in civil proceedings in federal court.[16] Based on this, the Commission believes that keeping the exception as proposed is appropriate and consistent with the goal of promoting transparency. As discussed above, a motion for a protective order to limit the disclosure of the information may be filed under Rule 322.

Although we are not requiring redaction of home addresses of parties to administrative proceedings and of persons filing documents in those proceedings, upon further consideration we are adopting Rule 151(e) to require the full redaction of taxpayer identification numbers, including social security numbers, given the sensitive nature of that information. If a person making a filing believes that sensitive personal information is necessary to the proceeding, Rule 151(e)(2) allows for the filing of an unredacted document along with a motion for a protective order to limit the disclosure of the information under Rule 322. We are adopting Rule 151(e)(2) substantially as proposed with a minor modification to make clear that a redacted version of the document should be filed along with the motion for a protective order under Rule 322.

Final Rule 151(e)(3) requires that all filings include a certification that any sensitive personal information has been omitted or redacted from the filing or, if necessary to the filing, has been filed under seal pursuant to Rule 322. Final Rule 151(e)(3) modifies the language of the certification in the proposed rule to substitute the word ''omitted'' for the proposed word ''excluded.'' We are making this technical correction to conform the language of the certification to the prefatory language in paragraph (e), which requires that sensitive personal information be redacted or ''omitted'' from all filings. We are also modifying in the Final Rule the language of the certification from the language used in the proposed rule to replace ''any sensitive personal information'' with ''any information described in paragraph (e) of this rule'' to clarify that the certification does not cover sensitive personal information that is exempted from the redaction requirement.

We do not agree with the commenter who suggested the Commission was ''attempting to devolve'' its Privacy Act responsibilities on private parties by requiring parties to undertake the redactions in administrative proceedings. Requiring private parties to redact certain information that is not necessary to a proceeding is consistent with the Privacy Act requirement that each agency ''maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the

[14] *See Dep't of Justice* v. *Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773–73 (1989).

[15] *See* 5 U.S.C. 552a (setting forth what personal information the federal government collects and how it uses or discloses that information).

[16] *See* Fed. R. Civ. P. 5.2.

President.'' [17] And two commenters supported the idea that the parties filing documents are well positioned to undertake redaction and initially draft documents to avoid the use of sensitive personal information.[18] One of these commenters explained that this was because they ''have the most knowledge, and control over the creation, of the documents.'' [19] We therefore continue to believe that parties filing documents are well positioned to undertake the redaction requirement. In addition, the final rules do not obviate the Commission's obligations under the Privacy Act because, even if the parties redact information, the Commission maintains ultimate responsibility for complying with the Privacy Act. We note that other federal agencies also require parties making filings to redact or exclude certain sensitive personal information.[20]

B. Rule 152 (Filing of Papers: Form)

1. Proposed Rule

Current Rule 152 specifies the requirements for filing papers in administrative proceedings. The proposed amendments to Rule 152(a) would direct persons to submit all filings electronically in the form and manner that is posted in the materials on the Commission's website. Under Proposed Rule 152(a), papers filed electronically would need to be received by the Commission by midnight Eastern Time, as opposed to 5:30 p.m. Eastern Time, the current deadline for filing papers.

Proposed Rule 152(a)(1) would provide further requirements if a person could not reasonably comply with the electronic filing requirements due to lack of access to electronic transmission devices (as a result, for example, of incarceration). The person would file a certification explaining why he or she reasonably cannot comply and indicating the expected duration of the person's reasonable inability to comply. The certification would be immediately effective and, upon filing such certification, the person could file paper documents by any other methods listed in the rule. Under Proposed Rule 152(a)(2), such non-electronic methods would include hand delivery though a commercial courier service or express delivery service, to be received by the Commission by 5:30 p.m. Eastern Time; mailing through the U.S. Postal Service, to be received by the Commission by 5:30 p.m. Eastern Time; or transmittal by facsimile, to be received by the Commission by midnight Eastern Time.

Proposed Rule 152(b) would make amendments to the form of papers required to be filed with the Commission that would be consistent with the transition to electronic filing, such as the deletion of references to typewritten copies and the requirement to staple or otherwise fasten papers. Likewise, the proposal would eliminate the requirement in current Rule 152(d) to file an original and three copies of all papers filed with the Commission, and would delete the reference to microfilming in current Rule 152(c).

Proposed Rule 152(c) would provide that electronic filings that require a signature pursuant to Rule 153 (Filing of Papers: Signature Requirement and Effect) [21] may be signed with an ''/s/'' notation, which would be deemed the signature of the person making the filing for purposes of Rule 153.

The proposing release stated that, for the first 90 days after the proposed amendments become effective, the Commission would administer a phase-in period that would require all filings to be made both electronically and in paper format. Our preliminary view was that a 90-day phase-in period would constitute a reasonable amount of time for persons to become proficient in the electronic filing procedures while ensuring that the Commission receives the filing should there be an electronic transmission failure. The proposal also suggested that a longer phase-in period might be appropriate in case of substantial difficulties with electronic filing.

2. Comments Received

Commenters generally supported electronic filing,[22] but one thought the Commission should further increase transparency in its administrative proceedings by adopting an electronic filing system akin to the PACER system in the federal courts, and make the docket and documents filed in administrative proceedings directly accessible to the public upon filing.[23]

Another commenter asserted that the Commission should describe the form or manner of electronic filing that will be required, such as the acceptable electronic formats, file size requirements, naming conventions, and encryption requirements.[24]

3. Final Rule

We are adopting the amendments to Rule 152 as proposed to require electronic filing in Commission administrative proceedings, with certain revisions as described below. Although the eFAP system will not allow for immediate and direct public access to the docket and filings in administrative proceedings as one commenter urged, it will facilitate the public's access to filings in the Commission's administrative proceedings and provide the parties and the Commission with access to the filings more quickly. Electronic filing under the amended rules will enable the Commission to more efficiently process and post filings. Electronic filing will make administrative proceedings more efficient, as it will eliminate delays that result from filing paper documents through the mail and routing paper filings internally throughout the Commission. At this point in time, the eFAP system will not generate an automatic public docket, but we anticipate that electronic filing could facilitate the development of such a public docket in the future and that Commission staff will work toward that objective. While we are allowing, as proposed, an ''/s/'' signature for electronic filings, upon further consideration we are clarifying that, in those situations, the filer's login and password into the eFAP system will be deemed the signature for each filing.

As noted above, one commenter stated that the proposal did not specify the technical requirements for electronic filing; the Office of the Secretary is posting on the Commission's website contemporaneously with the issuance of this release instructions for electronic filing and service. As set forth in the Instructions, parties are advised that documents filed electronically should, where possible, be filed in native portable document format (pdf). The Instructions include additional details, including the mechanics of uploading documents, acceptable file formats, file

[17] 5 U.S.C. 552a(e)(1).

[18] *See* Financial Industry Regulatory Authority letter dated November 24, 2015 (''FINRA letter'') and Public Company Accounting Oversight Board letter dated December 3, 2015 (''PCAOB letter'').

[19] *See* PCAOB letter.

[20] *See, e.g.,* National Labor Relations Board, E-Filing Terms and Conditions, *available at http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1673/electronic_filings.pdf* (last visited Nov. 17, 2020) (directing filers to ''redact (remove) any non-essential personally identifiable information before uploading an E-filing''); Federal Maritime Commission, Rules of Practice and Procedure, 46 CFR 502.13(a) (requiring parties to exclude information such as social security numbers in electronic or paper filings); Department of Labor, Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 CFR 18.31(a) (same).

[21] 17 CFR 201.153.

[22] Financial Services Roundtable letter dated December 4, 2015 (''FSR letter'') at 3,10; New York Stock Exchange letter dated December 3, 2015 (''NYSE letter'') at 1; PCAOB letter at 1; FINRA letter at 1; Better Markets letter dated December 4, 2015 (''Better Markets letter'') at 1.

[23] Better Markets letter at 1, 2–3.

[24] *See, e.g.,* FINRA letter n.3 & 15.

size limitations, and naming conventions, among other things. The User Manual includes various screenshots from the registration and filing process and provides detailed instructions for navigating the system. The Commission believes that providing filers with this information now, coupled with a longer compliance period than was proposed (discussed *infra*),[25] will provide filers with the necessary information and time to prepare for electronic filing under the Final Rules. The Instructions are intended to assist filers in complying with the Final Rules. We expect that the Instructions and User Manual will be updated periodically to reflect changes in technology and the Commission's experience with the new electronic filing system, and we have accordingly revised Rules 152(a) and 152(d) to make clear that proper use of the electronic filings system will be as specified by the Office of the Secretary in materials posted on the Commission's website.

We did not receive comments addressing the requirement for both electronic and paper copies during the proposed 90-day phase-in period. To help facilitate compliance with this provision, we are amending Rule 152 to add a new paragraph (g) entitled ''Interim Procedures for Filing Papers with the Commission in Both Electronic and Paper Format.'' Final Rule 152(g) requires that, for the initial 90-day period beginning on April 12, 2021, papers filed in connection with any proceeding as defined in Rule 101(a) shall be filed both electronically in accordance with section (a) and, in addition, in either paper format or by email.[26] If filed in paper format, an original and three copies of all paper filings must be submitted to the Office of the Secretary in accordance with any of the delivery methods set forth in section (a)(2). Final Rule 152(g) will be removed from the Final Rules on July 12, 2021, when the rule is no longer relevant.

C. Rule 322 (Protective Orders)

1. Proposed Rule

Rule 322 currently provides a process for seeking a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. We proposed to amend the rule to articulate requirements for requesting a protective order when review of the documents that are the subject of the request is necessary to a ruling on the motion. In such instances, proposed Rule 322(b) would require the movant to file an unredacted version of the submission to be used by the hearing officer and the Commission for purposes of the proceeding and a redacted version to be used for distribution to the public. All confidential information in the unredacted version would need to be marked as such and the first page of the document would need to be labeled ''Under Seal.'' The redacted version would be required to be identical in all other respects to the unredacted version. A person would not be required to file a redacted version if the submission would be redacted in its entirety.

2. Comments Received

We received one comment requesting a streamlined protective order process under Rule 322 for records from SRO proceedings.[27] The commenter urged that, in the event that the Commission required SROs to redact exhibits and transcripts from SRO proceedings upon filing with the Commission under proposed Rule 420, the Commission should streamline the protective order process for those exhibits and transcripts. Because, as discussed below, the final rules do not require SROs to redact exhibits and transcripts submitted under Rule 420, the comment is moot.[28]

3. Final Rule

We are adopting Rule 322(b) as proposed. Final Rule 322(b) applies to all motions for protective orders under Rule 322, *i.e.,* not just motions regarding sensitive personal information.

D. Rule 420 (Appeal of Determinations by Self-Regulatory Organizations)

1. Proposed Rule

Current Rule 420 sets forth the requirements regarding appeals of determinations by self-regulatory organizations.[29] Currently, Rule 420(e) requires a self-regulatory organization to certify and file with the Commission one copy of the record upon which the action complained of was taken, to file with the Commission three copies of an index to such record, and to serve upon each party one copy of the index within fourteen days after receiving an application for review or a Commission order for review. The proposed amendments to Rule 420(e) would require an SRO to certify and electronically file with the Commission, in the form and manner that is prescribed in the materials on the Commission's website, one unredacted copy of the record upon which the action complained of was taken. If such record contains any sensitive personal information, the SRO would also need to file electronically with the Commission one redacted copy of such record. The definition of sensitive personal information in proposed amendments to Rule 420(e) would mirror the definition in Proposed Rule 151. The proposed amendments to Rule 420(e)(2) also would require an SRO to file electronically with the Commission one copy of a record index and to serve the index upon each party. The proposed amendments would provide that, if such record index contains any sensitive personal information, the SRO would be required to file electronically a copy of the record and index that omits or redacts the sensitive personal information. The proposed amendments would also require persons making a filing pursuant to Rule 420 to certify that any sensitive personal information has been excluded or redacted from the filing under Proposed Rule 420(e)(3).

2. Comments Received

The two comments we received on this aspect of the proposal generally supported the Commission's efforts to create an electronic filing system and modernize aspects of the filing process in appeals from SRO proceedings.[30] But the commenters expressed concern that the redaction requirement as proposed would impose a ''substantial burden.''[31] One SRO noted that because it does not currently have rules that mandate exclusion or redaction of sensitive information for parties filing documents in its disciplinary and appealable proceedings, it would potentially be required to spend hundreds of hours a year redacting exhibits and other filings that contain sensitive personal information.[32] This commenter urged

[25] *See infra* discussion at Section III (Compliance Date and Phase-In Period for the Final Rules).

[26] *See Pending Administrative Proceedings,* Exchange Act Release No. 88415, *https://www.sec.gov/litigation/opinions/2020/33-10767.pdf* (providing that pending further order of the Commission parties to the extent possible shall submit all filings electronically at *apfilings@sec.gov*).

[27] *See* FINRA letter at 6.

[28] *See* discussion of amendments to Rule 420, *infra* at Section D.

[29] 17 CFR 201.420.

[30] *See* FINRA letter at 9; NYSE letter at 1.

[31] FINRA letter at 9; *see also* NYSE letter at 1 (describing proposed redaction requirement as ''unduly burdensome'').

[32] FINRA letter at 2; *see also id.* at 4 (''FINRA's experience shows that redaction will be a highly costly endeavor that intensively consumes time and labor. During the first nine months of 2015, FINRA filed approximately 85,622 record pages in 11 appeals to the Commission. The costs involved in redacting a large record are dramatic. When recently redacting a record with 39,266 pages, FINRA expended 201.5 man hours. Based on the first nine months of 2015, FINRA projects that it

Continued

the Commission to exempt from the redaction requirement exhibits and transcripts contained in the record of the SRO.[33] As an alternative, the commenter suggested a streamlined process for an SRO to obtain a protective order for exhibits in the record.[34] Another commenter requested that the Commission clarify the types of documents that it intends to post on its website in connection with appeals of SRO disciplinary proceedings.[35]

Another SRO requested additional time to file the redacted certified record.[36] With respect to the certification requirement in Proposed Rule 420(e), the SRO asserted that such a requirement would be onerous because of the large number of pages contained in the records of its proceedings and the potential for human error in the redaction process. The commenter suggested that an SRO be allowed to certify instead that it has undertaken ''reasonable efforts'' to exclude or redact any sensitive personal information.[37]

3. Final Rule

We are adopting the proposed amendments to Rule 420 with certain modifications in response to the comments. Final Rule 420(e) adopts the proposed requirement for SRO certification and electronic filing of the record fourteen days after receipt of an application for review or a Commission order for review, but the Final Rule limits the proposed redaction requirements to the record index required to be filed pursuant to Rule 420(e). As a result, SROs need not redact the certified record filed pursuant to the Rule. We are adopting this approach because we are persuaded by the commenters who emphasized that such a requirement would be burdensome because of ''the large number of pages contained in the records of its proceedings and the potential for human error in the redaction process.'' [38] We believe that any potential transparency benefits from requiring redaction of such records under this rule do not justify the costs and burdens associated with requiring the redaction of these often-voluminous records, many of which may contain large amounts of sensitive personal information. While we recognize the benefits of transparency in our proceedings and intend to continue to post significant pleadings such as substantive motions and merits briefs on the Commission's website—which will be facilitated by the electronic submission of those documents—the Commission does not post on its website the record underlying an SRO appeal. We thus have decided to modify from the proposal the redaction requirements for those records under Final Rule 420.

By contrast, under the final rule, if any such SRO records (including exhibits or transcripts) are attached to a filing pursuant to Final Rule 151 (Filing of Papers with the Commission; Procedure), the attachment must comply with the Final Rule 151 redaction requirements.[39] This distinction recognizes the difference between the often voluminous records underlying an SRO appeal, which the Commission currently does not—and under the final rule will not—post to its website, and exhibits filed as attachments to significant filings, which typically are less voluminous and which are posted—and will continue to be posted—together with the filing.

Persons who wish to obtain records certified and filed by an SRO pursuant to Rule 420(e) may, consistent with current practice, submit a request to the Commission under FOIA and, if disclosure is required under FOIA, then any documents produced would be redacted by Commission staff as appropriate under FOIA.

Final Rule 420(e) retains the requirement from the proposal that the SRO electronically file an index to the record, and retains, from the proposal, the redaction requirement for the record index. The Final Rule requires redaction of sensitive personal information from the record index because the record index will be made available on the Commission's website, and we expect the burden to SROs of redacting the record index will be minimal. Accordingly, as was proposed, Final Rule 420(e) provides that if the index contains any sensitive personal information, the SRO must file electronically an unredacted copy of the record index and a redacted copy of the index. The record index should assist the public in identifying what documents are not publicly available and thereby inform any requests that the public may wish to make pursuant to FOIA, because it will list each of the documents filed in the underlying SRO proceeding.[40]

The final rule renumbers proposed paragraph (e)(2) as paragraph (e)(1), and proposed paragraph (e)(1) as paragraph (e)(2). This conforming change aligns with the final amendments to this rule because it first sets forth the document that must be redacted in paragraph (e)(1) (*i.e.,* the record index) and then follows with the specific redaction requirements in paragraph (e)(2).

Final Rule 420(e)(2) articulates the definition of sensitive personal information that must be redacted from the record index. As with the amendments to Rule 151(e), Final Rule 420(e)(2) modifies the proposed definition of ''sensitive health information'' to substitute the term ''unnecessary'' for the term ''sensitive,'' so that the standard for health information required to be redacted or omitted is ''unnecessary'' health information.[41] Also like Rule 151(e), Final Rule 420(e)(2) requires the full redaction of taxpayer identification numbers.

We are adopting the certification requirement substantially as proposed, but in response to a comment we are revising the language to clarify that the certification requirement does not apply to the record.[42] The final rule also renumbers the certification in proposed paragraph (e)(3) as paragraph (f) in Final Rule 420 to clarify that the certification requirement applies to an application for review filed under Rule 420(a). As we did in Final Rule 151, we are modifying the certification in the proposed rule to substitute the word ''omitted'' for the proposed word ''excluded'' to conform the language of the certification to the prefatory language in paragraph (c). We are also modifying the language of the certification in the proposed rule to replace ''any sensitive personal information'' with ''any information described in paragraph (e)(2) of this rule'' to clarify that the certification does not cover sensitive personal information that is exempted from the redaction requirement. As adopted, Final Rule 420(f) states that ''[a]ny filing made pursuant to this rule, other than the record upon which the action

will file 114,160 pages of certified records this year.'').

[33] *Id.* at 3 (''FINRA urges the Commission to exclude SROs from the requirements to redact and certify that the exhibits and Trial-Level Transcripts contained in records submitted pursuant to SEC Rule of Practice 420(e) do not contain sensitive personal information.'').

[34] *Id.* at 6–7.

[35] NYSE letter at 2.

[36] FINRA letter at 7.

[37] *Id.* at 9.

[38] FINRA letter at 9.

[39] *See* 17 CFR 201.322(c) (''Documents and testimony introduced in a public hearing are presumed to be public'').

[40] Since Final Rule 420 will not require redaction of exhibits and transcripts, the comment seeking a streamlined process for an SRO to obtain a protective order for such portions of the record on appeal is moot. For the same reasons, the final amendments obviate the need for additional time to file redacted copies of the certified record.

[41] *See* discussion *supra* at Section II.A.3.

[42] *See* PCAOB Letter at 3 n.3.

complained of was taken, must include a certification that any information described in paragraph (e)(2) of this rule has been omitted or redacted from the filing.'' This certification mirrors the filer's obligation to either not include sensitive personal information in filings or redact any sensitive personal information included in the filings.

In response to the comment urging the Commission to revise the certification requirement to substitute a ''reasonable efforts'' standard, we believe that the language of the certification in the final rule is appropriate because it creates a clear standard that is easily applied. We also note that the ''reasonable efforts'' standard was suggested by the commenter in response to the proposed rule that would have required the entire SRO record to be redacted, rather than only the record index. Because the final rule limits the redaction requirement to the record index, the potential for human error in the redaction process should be significantly reduced. Finally, the language of the certification in the Final Rule is generally consistent with the certification requirements of many federal courts.[43] As with Rule 152(a), we have also modified Rule 420(e) to clarify that electronic filing of the record will be done in the form and manner as specified by the Office of the Secretary in materials posted on the Commission's website.

E. Rule 440 (Appeal of Determinations by the Public Company Accounting Oversight Board)

1. Proposed Rule

Current Rule 440[44] largely tracks Current Rule 420 and sets forth similar requirements regarding appeals of determinations by the PCAOB. Like Proposed Rule 420, the proposed amendments to Rule 440(d) would require the PCAOB to electronically file with the Commission in the form and manner that is prescribed in the materials on the Commission's website one unredacted copy of the record upon which the action complained of was taken. If such record contains any sensitive personal information, the PCAOB would also need to file electronically with the Commission one redacted copy of such record. The definition of sensitive personal information under the proposed amendments also would mirror the definition in Proposed Rules 151 and 420. Proposed Rule 440(d)(2) would require the PCAOB to file electronically with the Commission one copy of a record index and to serve the index upon each party. The proposed amendments would also provide that, if such index contains sensitive personal information, the PCAOB would be required to file electronically a copy of the record and index that omits or redacts the sensitive personal information and to certify that any sensitive personal information has been excluded or redacted from the filing.

2. Comments Received

We received one comment on the proposed amendments to Rule 440.[45] The commenter noted that PCAOB disciplinary proceedings can generate voluminous records, and asserted that it could better achieve the objectives sought in the proposed rules by implementing processes designed to prevent the parties' introduction of sensitive personal information from the initiation of the disciplinary proceeding and to require the parties to redact sensitive personal information as necessary, and by certifying that the PCAOB has processes in place that are ''reasonably designed to ensure compliance with requirements for protecting sensitive personal information.''[46]

3. Final Rule

We are adopting amendments to Rule 440 that are consistent with the modifications to Final Rule 420. Like Final Rule 420, Final Rule 440(d) adopts the proposed requirement for PCAOB certification and electronic filing of the record fourteen days after receipt of an application for review or a Commission order for review, but clarifies that such filing will be done in form and manner as specified by the Office of the Secretary in materials posted on the Commission's website. The redaction requirements in Final Rule 440(d), consistent with Final Rule 420, do not include the underlying records. The Commission recognizes that, like SRO proceedings, PCAOB disciplinary proceedings can generate voluminous records, many of which may contain sensitive personal information. In response to the comment received on this aspect of the proposal, and for the reasons discussed above with respect to Rule 420, we believe that any potential benefits from requiring redaction of PCAOB disciplinary proceeding records under Rule 440 do not justify the potential costs and burdens associated with such redaction requirements.[47] However, for the same reasons discussed above with respect to Rule 420, any filing and any record attached to a filing pursuant to Final Rule 151 must comply with the redaction requirements of that rule. This distinction recognizes the difference between the often voluminous records underlying a PCAOB appeal, which the Commission does not—and under the final rule will not—post to its website, and exhibits filed as attachments to filings, which typically are less voluminous and will continue to be posted with the filing.

Final Rule 440(d) retains the requirement that the PCAOB electronically file an index to the record, and retains, from the proposal, the redaction requirement for the record index. If such index contains any sensitive personal information, the PCAOB shall, in addition to filing electronically an unredacted copy of the record index, also electronically file one redacted copy of the index. As with Rule 420(e), the record index filed pursuant to Rule 440(d) will be made available on the Commission's website, and we expect the burden on the PCAOB of redacting the record index will be minimal. Moreover, we believe the record index will assist the public in identifying what documents are not publicly available and thereby inform any requests that the public may wish to make pursuant to FOIA, because it will list each of the documents filed in the underlying PCAOB proceeding.

The final rule renumbers proposed paragraph (d)(2) as paragraph (d)(1), and proposed paragraph (d)(1) as paragraph (d)(2). This non-substantive change mirrors the amendments we are making to Final Rule 420(e) by first identifying the documents that must be redacted (*i.e.,* the record index) and then describing the specific redaction requirements.

Final Rule 440(d)(2) articulates the definition of sensitive personal information that must be redacted from the record index. Consistent with the definition of sensitive personal information we are adopting in Final Rules 151(e) and 420(e), Final Rule 440(d)(2) modifies from the proposal the definition of sensitive health

[43] *See, e.g.,* U.S. Court of Appeals for the Third Circuit, *CM/ECF Public User Manual* 8 (Jan. 2017); U.S. Court of Appeals for the Ninth Circuit, *CM/ECF User Manual* 11 (Nov. 2016); U.S. Court of Appeals for the Tenth Circuit, *CM/ECF User's Manual* 11 (7th ed. May 2017); U.S. Court of Appeals for the Federal Circuit, *CM/ECF User Manual* 21 (Aug. 2015).

[44] 17 CFR 201.440.

[45] PCAOB letter at 2–2.

[46] *Id.*

[47] As with SRO records filed under Rule 420, persons who wish to obtain PCAOB records that are filed pursuant to Rule 440 could, consistent with current practice, submit a request to the Commission under FOIA and if disclosure is required, any documents produced would be redacted by Commission staff as appropriate under FOIA.

information to substitute the term ''unnecessary'' for the term ''sensitive,'' so that the standard for health information required to be redacted or omitted is ''unnecessary'' health information.[48] As with Rules 151(e) and 420(e), Final Rule 440(d)(2) also now requires the full redaction of taxpayer identification numbers.

As we did in Final Rules 151 and 420, we are modifying the certification in the proposed rule to substitute the word ''omitted'' for the proposed word ''excluded'' to conform the language of the certification to the prefatory language in paragraph (d). As in Final Rule 420, Final Rule 440 also renumbers the certification in proposed paragraph (d)(3) as paragraph (e) to clarify that the certification requirement applies to an application for review filed under Rule 440(a). Likewise, we are modifying Final Rule 440(e) to state that ''any filing made pursuant to this rule, other than the record upon which the action complained of was taken, must include a certification that any information described in paragraph (d)(2) of this rule has been omitted or redacted from the filing,'' to clarify that the certification requirement does not apply to the underlying record and that the certification does not cover sensitive personal information that is exempted from the redaction requirement As discussed above, we believe that the language of the certification is appropriate because it creates a clear standard that is easily applied. It is also generally consistent with the certification requirements of many federal courts.[49] We note that the alternative certification standard suggested by the commenter was in response to the proposed rule that would have required the entire record on appeal from a PCAOB proceeding to be redacted. Accordingly, the commenter's concerns should be mitigated by the Final Rule, which limits the redaction requirements to the record index.

F. Rule 351 (Transmittal of Documents to Secretary; Record Index; Electronic Copy of Exhibits; Certification)

1. Proposed Rule

Current Rule 351[50] governs the requirements regarding the transmittal of documents by a hearing officer to the Secretary of the Commission, as well as the preparation, issuance, and certification of a record index in such administrative proceedings. We proposed to amend Rule 351(b) to reduce from fifteen days to three days the length of time a party may file proposed corrections to the record index. We also proposed to amend the rule to provide persons who oppose the proposed corrections three days to file an opposition.

Proposed new Rule 351(c) would require the parties to submit electronically copies of all exhibits admitted during the hearing, exhibits offered but not admitted during the hearing, and post-hearing exhibits.[51] Such evidence would be submitted in the form and manner prescribed in the materials posted on the Commission's website.

Proposed Rule 351(c) would set forth the same definition of ''sensitive personal information'' contained in Proposed Rule 151(e) and would require its redaction or omission from all documents submitted under Rule 351(c). Proposed Rule 351(c)(1)(ii) would provide that if the person submitting record exhibits and other documents or items that are not attached to filings believes that sensitive personal information contained therein is necessary to the proceeding, the person would file unredacted documents, along with a motion for a protective order under Rule 322 to limit disclosure of unredacted sensitive personal information. Proposed Rule 351(c)(2) would provide that a person who reasonably cannot submit exhibits electronically must file a certification explaining why the person cannot comply, and indicate the expected duration of the person's reasonable inability to comply. Upon filing the certification, the person would submit originals of any exhibits that have not already been submitted to the Secretary of the Commission by other means.

Proposed Rule 351(c)(3) would state that electronic submissions that require a signature pursuant to Rule 153 may be signed with an ''/s/'' notation, which would be deemed the signature of the person making the filing for purposes of Rule 153.[52]

Under Proposed Rule 351(c)(4), the parties would need to certify that exhibits and other documents or items submitted to the Secretary under the rule: (i) Are true and accurate copies of exhibits that were admitted or offered and not admitted during the hearing; and (ii) that any sensitive personal information as defined in Rule 351(c) has been excluded or redacted, or, if necessary to the proceeding, has been filed under seal pursuant to Rule 322.

2. Comments Received

We did not receive any comments specifically addressing the proposed amendments to Rule 351. But, as discussed above, two commenters generally objected to the Commission's proposed definition of ''sensitive personal information.''[53]

3. Final Rule

We are adopting the amendments to Rule 351 substantially as proposed, but with certain modifications to Final Rule 351(c) that are designed to conform with other modifications that we are adopting today. Consistent with the modifications to the proposed SRO and PCAOB record redaction requirements under Final Rules 420 and 440, and for the same reasons, we are modifying the redaction requirements under proposed Rule 351(c). We are similarly revising Rule 351(c) to make clear that electronic filing of the record will be done in form and manner as specified by the Office of the Secretary in materials posted on the Commission's website. Under Final Rule 351(c), parties will not be required to exclude or redact sensitive personal information from exhibits before submitting them to the Office of the Secretary because the exhibits will not be posted to the Commission's website.[54] Because the redaction of sensitive personal information will not be required under the amended rule, the final rule eliminates the definition of sensitive personal information in Proposed Rule 351(c)(1) and the redaction certification in Proposed Rule 351(c)(4)(ii).

Final Rule 351(c) requires the parties to submit electronic copies of all exhibits within five days after the Secretary serves a final record index. We did not receive any comments on this aspect of the proposal, but we acknowledge that the proposing release erroneously contained two different calculations of the deadline. Section II.D. of the proposing release stated that electronic submissions of exhibits would be required ''no later than five days after the Secretary serves a final

[48] *See* discussion *supra* at Sections II.A.3 and II.D.3.

[49] *See supra* n.43.

[50] 17 CFR 201.351.

[51] As discussed *infra* in Section II.F.3, there was a discrepancy in the proposing release regarding the deadline for the post-hearing submission of exhibits. Section II.D. stated that submissions would be required ''no later than five days after the Secretary serves a final record index'' but the proposed rule text in Section VI. erroneously stated that submissions would be required ''[w]ithin two weeks after the close of a hearing.''

[52] 17 CFR 201.153 (Filing of Papers: Signature Requirement and Effect).

[53] *See supra* at II.A.2.

[54] Nothing in Final Rule 351 should be construed as limiting or precluding the redaction or omission of sensitive personal information under other Rules of Practice or by order of the Commission or hearing officers. *See, e.g.,* 17 CFR 201.230(b), 17 CFR 201.322.

record index,'' and thereby incorporated the process for finalizing the record index under Proposed Rule 351(b). But the rule text proposed in Section VI. stated that such electronic submissions would be required ''[w]ithin two weeks after the close of a hearing,'' which potentially could have required parties to submit exhibits before receiving and reviewing the final record index under Proposed Rule 351(b). We believe that Final Rule 351(b) and Final Rule 351(c) will encourage an orderly and efficient post-hearing process for the parties to assemble and organize the exhibits, then review and if necessary correct the record index prepared by the Secretary, and then appropriately submit and certify copies of exhibits for Commission review.

We are also modifying Final Rule 351(c)(4) to clarify that the certification applies to exhibits that were admitted during the hearing, exhibits that were offered but not admitted during the hearing, ''or any other exhibits that were admitted after the hearing.'' The final certification language conforms with the electronic submission requirements in Final Rule 351(c), which requires the parties to submit to the Office of the Secretary a copy of ''all exhibits that were admitted, or offered and not admitted, during the hearing, and any other exhibits that were admitted after the hearing.''

We are adopting the remaining amendments to Rule 351 as proposed, except that while we are allowing, as proposed, an ''/s/'' signature for electronic filings, upon further consideration we are clarifying that, in those situations, the filer's login and password into the eFAP system will be deemed the signature for each filing. We further note that we did not receive any comments to the proposed amendments to Rule 351(b) about the time in which parties can file proposed corrections to the index and an opposition to the proposed corrections, and we continue to believe such deadlines are appropriate given the increased speed and efficiency of electronic transmission of documents such as the record index.

G. Rule 150 (Service of Papers by Parties)

Rule 150 currently governs service of papers by parties in administrative proceedings. Under Rule 150(a), each paper, including each notice of appearance, written motion, brief, or other written communication shall be served upon each party in the proceeding in accordance with the rule. Current Rule 150(c) [55] prescribes the various methods of service permitted under the rule, which include personal service, mailing by U.S. Postal Service, sending the papers through a commercial courier service or express delivery service, or transmitting the papers by facsimile, where certain conditions are satisfied. We proposed to amend Rule 150(c) to require parties to serve each other electronically in the form and manner that is prescribed in the materials posted on the Commission's website. As we noted in the proposing release, electronic service by email is a practice that already appears to occur in Commission administrative proceedings. The Instructions issued by the Office of the Secretary today therefore reflect current electronic service practice in our administrative proceedings.

The proposal also provided that a party who reasonably could not comply with the electronic service requirement would need to file a certification under new Rule 150(c)(1) that explains why the person reasonably could not comply and indicating the expected duration of the person's reasonable inability to comply (such as whether the certification is intended to apply to a single instance of service or all instances of service made during the proceeding). The certification would be effective immediately and become part of the record of the proceeding upon filing, and upon filing such certification the person could then serve paper documents by any additional method listed in Rule 150(d).

We also proposed to amend Rule 150(d) to provide for additional methods of service if a person reasonably cannot comply with the electronic service requirements, or if service is of an investigative subpoena pursuant to 17 CFR 203.8. The methods of service would be those permitted under current Rule 150(c), but the provision for service by facsimile would be amended to eliminate certain outdated or unnecessary conditions, such as the requirement to provide the Commission and other parties with notice of the hours of facsimile machine operation. The proposal also would eliminate the requirement that facsimile transmissions be received during the Commission's business hours. Under Proposed Rule 150(e),[56] electronic service would be deemed complete upon transmission.

We did not receive any comments on our proposed amendments to Rule 150 and are adopting the rule as proposed with minor modifications to account for situations where a party has not provided a valid email address or is unable to file documents electronically. As noted in the Instructions posted on the Commission's website, participants in administrative proceedings should serve their documents upon each party in the proceeding by email, contemporaneously with the filing of the documents in the eFAP system.[57] Filing a document electronically in the eFAP system will not effectuate service upon the parties to the proceeding (including the Division of Enforcement) as required by Rule 150(a). As with several other rules as described above, we have also revised Rule 150(c) to make clear that electronic filing of documents are to be done in the form and manner as specified by the Office of the Secretary in materials posted on the Commission's website

Service of documents by the Office of the Secretary of the Commission upon participants in the proceeding will be done through the eFAP system and routed to the participant's email address of record. As explained in the Instructions, the eFAP system will generate an email notifying the participant of service of the document and the email will include link(s) to the document(s) served by the Office of the Secretary.

Pursuant to Final Rule 150(e), electronic service is complete upon transmission. Thus, failure to open the email or download the documents served will not render service ineffective. But electronic service is not effective if the sender learns that the transmission failed.

H. Additional Amendments

1. Rule 102 (Appearance and Practice Before the Commission)

Rule 102(d) [58] requires a person appearing in an administrative proceeding either on his own behalf or in a representative capacity to provide to the Commission, and keep current, certain contact information, such as address and telephone number that may be used during the proceeding. Consistent with the introduction of electronic filing and service, we proposed to amend Rule 102(d) to require that both a mailing address and an email address must be provided under paragraphs (d)(1), (d)(2), and (d)(4). We did not receive any comments on the proposed amendments and are adopting the rule as proposed, with one implementing change.

[55] 17 CFR 201.150(c).

[56] 17 CFR 201.150(e).

[57] 17 CFR 201.151(a). Service is contemporaneous if it is completed reasonably promptly after a document is filed.

[58] 17 CFR 201.102(d).

Specifically, we are amending Rule 102(d) to require that, within ten days of the Compliance Date, any individual appearing on his or her own behalf before the Commission or hearing officer in a proceeding as defined in Rule 101(a) that is ongoing on that date shall electronically file a notice that complies with section (d)(1). Likewise, any person appearing in a representative capacity before the Commission or hearing officer in a proceeding as defined in Rule 101(a) that is ongoing on that date shall electronically file a notice that complies with section (d)(2). The notices shall be served in accordance with Rule 150(a).[59] Participants are directed to electronically file a Rule 102(d) compliant notice in their ongoing proceedings even if a prior Rule 102(d) paper filing included the participant's email address. This will enable the Office of the Secretary to begin electronically serving documents upon participants in administrative proceedings after the Compliance Date.[60]

2. Rule 140 (Commission Orders and Decisions; Signature and Availability)

Rule 140(a)[61] requires the Secretary or other authorized person to sign Commission orders and decisions. We proposed to amend the rule to provide that the signature may be an electronic signature that consists of an ''/s/'' notation or any other digital signature. The Commission did not receive any comments on this aspect of the proposal. We are adopting the amendment as proposed.

3. Rule 141 (Orders and Decisions: Service of Orders Instituting Proceedings and Other Orders and Decisions)

Rule 141 governs service of Orders Instituting Proceedings (''OIPs'') and other orders and decisions issued by the Commission or a hearing officer in administrative proceedings. We proposed to amend Rule 141(b) relating to service of orders other than OIPs or decisions[62] to allow the Secretary to serve such orders and decisions electronically or by any of the additional methods of service authorized by Proposed Rule 150(d). These methods would be in addition to the means of service permitted under current Rule 141(a). We did not receive any comments on the proposed amendments to Rule 141 and are adopting the amendments as proposed.[63]

4. Rule 193 (Applications by Barred Individuals for Consent to Associate)

Rule 193[64] governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies, or transfer agents, for consent to become so associated. Rule 193 currently provides that an original and three copies of an application shall be filed under Rules 151, 152, and 153, and that such application shall be supported by a manually signed affidavit. Consistent with the transition to electronic filing and service, we proposed to delete the term ''manually,'' delete the reference to one original and three copies, and leave the cross reference to Rules 151, 152, and 153 to account for electronic filing. We did not receive any comments on this aspect of the proposal and are adopting these amendments as proposed with minor modifications to move a preliminary note in current Rule 193 into the text of the rule as a new paragraph (a), without otherwise modifiying the preliminary note's text, and to redesignate the other paragraphs accordingly.

III. Compliance Date for the Final Rules

As proposed, persons subject to the electronic filing requirements would have been required to comply with the final rules on the effective date. Commenters sought an extended implementation period for compliance with the final rules.[65] Two commenters sought a one-year implementation period for the electronic filing requirement to take effect.[66] According to one of the commenters, a longer implementation period would allow it to prepare for electronic filing by converting its own case processing to an all-electronic system.[67] The second commenter requested a one-year implementation period to allow it to ''develop, test, and improve responsive processes for managing any sensitive personal information in [its] administrative proceedings.''[68] A third commenter advocated for a compliance period of ''six months or more.''[69]

The amended rules will become effective 30 days after publication in the **Federal Register** (Effective Date). After considering the comments, the Commission has decided to require compliance with the amended rules on April 12, 2021 (Compliance Date). The requirements of the amended rules will apply to all filings, transmissions or submissions to the Commission that are required to be made on or after the Compliance Date.[70]

The Commission believes this compliance period will provide an appropriate period of time that balances the interests of parties in administrative proceedings to prepare for electronic filing, while continuing to advance the Commission's goal of enhancing accessibility of its administrative proceedings. Moreover, in light of the current Commission guidance encouraging parties to submit by email and our decision to modify, from the proposal, the redaction requirements for records submitted under Rules 351, 420 and 440, we do not believe a longer implementation period is necessary because the universe of records subject to redaction should be significantly reduced and parties have already been submitting documents electronically.

IV. Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act

The Commission finds, in accordance with Section 553(b)(3)(A) of the Administrative Procedure Act,[71] that these revisions relate solely to agency organization, procedure, or practice. They are therefore not subject to the provisions of the Administrative Procedure Act requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility

[59] The Commission is extending Rule 102(d) to ongoing proceedings because it is a purely a procedural requirement that the Commission deems necessary to implement our electronic filing system in an orderly and timely fashion. *See James V. Hurson Ass'n* v. *Glickman,* 229 F.3d 277, 280 (D.C. Cir. 2002) (citing *JEM Broadcasting Co.* v. *FCC,* 22 F.3d 320 (D.C. Cir. 1994)) (a procedural rule that an agency need not adopt through notice-and-comment rulemaking, in contrast to a substantive rule that must be adopted through notice-and-comment rulemaking, ''covers agency actions that do not themselves alter rights or interest of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency'').

[60] Additionally, as noted in the Instructions, participants should make a new Rule 102(d) filing whenever they wish to change their email address used for service.

[61] 17 CFR 201.140.

[62] 17 CFR 201.141(b).

[63] As proposed, we are adopting one ministerial change to Rule 141(a) to refer generically to ''express mail'' rather than a particular U.S. Postal Service product.

[64] 17 CFR 201.193.

[65] FINRA letter; NYSE letter; PCAOB letter; FSR letter.

[66] FINRA letter; PCAOB letter.

[67] FINRA letter at 7.

[68] PCAOB letter at 3.

[69] FSR letter at 10–11.

[70] The eFAP system will not be accessible to filers prior to the Compliance Date.

[71] 5 U.S.C. 553(b)(3)(A).

Act[72] therefore does not apply.[73] Nonetheless, the Commission previously determined that it would be useful to publish the proposed rules for notice and comment before adoption. The Commission has considered all comments received. Because these rules relate to ''agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties,'' they are not subject to the Small Business Regulatory Enforcement Fairness Act.[74] To the extent these rules relate to agency information collections during the conduct of administrative proceedings, they are exempt from review under the Paperwork Reduction Act.[75]

I. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Economic Analysis

The Commission is sensitive to the costs and benefits of its rules. The current processes and filing requirements for administrative proceedings serve as the baseline against which the economic impacts of the adopted rules are measured. At present, submissions are permitted to be filed with the Commission in paper format or by facsimile followed by a paper submission.[76] The Commission's current Rules of Practice do not identify sensitive personal information that must be redacted from these documents by those who file them. Instead, such redaction is undertaken by the Commission when necessary in responding to document requests from the public or posting documents on the Commission's public website. Service by email is already generally an accepted practice by parties to administrative proceedings who mutually agree to it, although it is not expressly permitted by rule.

We continue to believe that the scope of the benefits and costs of the adopted rules will depend on the expected volume of administrative proceedings and the number of filed documents and document requests associated with these proceedings. New proceedings initiated and not immediately settled in fiscal years 2018 and 2019 totaled 206 and 223 respectively, similar to the number of litigated proceedings reported for previous years in the proposing release.

In fiscal years 2018 and 2019, an average of approximately 2,700 filings were submitted per year in relation to litigated proceedings, including filings by outside parties as well as Commission staff. These filings consist of one or more documents, such as motions, briefs, and record exhibits, and the length of the filings generally ranges from one page to a few thousand pages. It is difficult to predict whether the number of filings in future years will increase or decrease relative to these levels. A degree of volatility in the volume of filings is expected as the number, types, and complexity of proceedings varies over time. The frequency of litigated proceedings and volume of filings hereafter may also either increase or decrease as a result of recent amendments to the Commission's Rules of Practice that, for example, extended the potential length of the prehearing period, provided parties to proceedings with additional opportunities to conduct depositions, and clarified the ability of both sides to a proceeding to make certain dispositive motions in certain types of proceedings.[77]

The Commission receives numerous requests from the public to release documents related to administrative proceedings. Requests for records related to administrative proceedings (both settled and litigated) numbered 46 and 26 for fiscal years 2018 and 2019 respectively.[78] In 2014, the Commission also began regularly making certain substantive filings such as significant pleadings and motions by outside parties in administrative proceedings available to the public by posting them on its public website.[79] In fiscal years 2018 and 2019, filings posted to SEC.gov were accessed 542,811 and 633,763 times, respectively, further demonstrating public interest in documents related to administrative proceedings.

The implementation of electronic filing and the related adopted rules are intended to improve the efficiency and transparency of the Commission's operations and to modernize the document management process to be consistent with common practice in other tribunals. Benefits of the adopted rules are anticipated to accrue to the public and outside parties to administrative proceedings as well as the Commission.

Specifically, the adopted rules may benefit members of the public with an interest in the Commission's administrative proceedings by permitting the Commission to more quickly make public the documents relating to these proceedings, both when posting documents directly to the Commission's public website and when responding to requests. One commenter described the proposed rules as ''an important first step to improve the public's access to filings in administrative proceedings.''[80] The Commission's response to document requests and public posting of documents is expected to be more time- and cost-effective due to the efficiency of electronic retrieval and the fact that the Commission's own review and redaction of documents may be expedited because sensitive information will have been redacted in advance. As discussed below, the modifications made to the redaction requirement relative to the proposal may reduce these expected benefits.

The adopted rules may increase the speed at which information from administrative proceedings is transmitted amongst parties to the proceeding as well as the broader public, and enhance the overall transparency of these proceedings. Several commenters noted that parties to administrative proceedings would likely benefit from the proposed rules.[81]

[72] 5 U.S.C. 601–612.

[73] *See* 5 U.S.C. 603.

[74] 5 U.S.C. 804(3)(C).

[75] *See* 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4 (exempting collections during the conduct of administrative proceedings or investigations).

[76] In addition, materials for which a paper format is not possible or not appropriate, such as audio files, are submitted on electronic media such as compact disks or thumb drives. The processes and requirements for the submission of such materials in administrative proceedings will not be affected by the adopted rules, except for the requirement that an associated Notice of Manual Filing be filed and served electronically as described in the Instructions.

[77] *See, e.g., Amendments to the Commission's Rules of Practice,* Exchange Act Release No. 78319, 81 FR 50211, 50230–31 (July 13, 2016), available at *https://www.sec.gov/rules/final/2016/34-78319.pdf* (last visited Nov. 17, 2020) (stating that the Commission is ''unable to precisely predict the economic effect of the final rules on administrative proceedings, as the number and type of proceedings can vary based on many factors unrelated to the Rules of Practice'').

[78] These numbers reflect the number of requests that reached the Office of the Secretary, but there might be other requests to the Commission that did not reach the Office of the Secretary.

[79] These documents are currently available at *www.sec.gov/litigation/apdocuments/ap-closed-fileno-asc.xml* for closed proceedings and *www.sec.gov/litigation/apdocuments/ap-open-fileno-asc.xml* for open proceedings.

[80] *See* Better Markets letter.

[81] *See, e.g.,* FINRA letter (stating that the ''electronic filing of materials will lower reproduction and delivery costs'') and Better Markets letter (stating that the proposed rules

Continued

Parties to administrative proceedings may benefit from the increased flexibility enabled by the changes, such as the Commission's acceptance of electronic submissions until midnight rather than the close of business on a given day. These parties may also benefit from savings on printing and mailing costs because, after the phase-in period, filing paper copies generally will not be required. In addition, the changes expressly require service by electronic means, which may increase further the savings in printing and mailing and benefit filers who telework.

The magnitude of the expected benefits of the adopted rules is difficult to quantify due to the limitations of existing data. Although commenters generally supported the idea that the proposed rules would be beneficial,[82] they also did not provide data that would allow us to quantify these benefits.

The costs of the proposal will be borne by the Commission as well as the outside parties to administrative proceedings. The adopted rules place the primary burden of redacting sensitive personal and unnecessary health information on the parties submitting documents in administrative proceedings—either outside parties or Commission staff—following common practice in federal courts. When sensitive personal or health information is necessary to the proceedings, outside parties or the Commission staff may expend additional resources filing a motion for a protective order in accordance with Rule 322 to limit disclosure of the sensitive information and to separately prepare both a redacted and unredacted version of the documents.

Commenters raised several concerns about the costs of the proposed redaction requirement. One commenter expressed concern that the redaction requirement would allow the Commission to shift its redaction costs onto other parties.[83] Another commenter claimed that the Commission failed to consider litigation costs that could arise if the Commission were to make public any documents that had not been properly redacted by a party to a proceeding.[84] Commission staff will continue to review any documents the Commission makes public, and to make redactions where necessary, though this review may be more efficient than in the past because of the prior redaction undertaken by the parties to a proceeding. Two commenters supported the idea that the parties filing documents are well positioned to undertake redaction and initially draft documents to avoid the use of sensitive personal information.[85] One of these commenters explained that this was because they ''have the most knowledge, and control over the creation, of the documents.'' [86] We therefore continue to believe that parties filing documents are well positioned to undertake this requirement and that the narrow definition of sensitive personal information in the adopted rules will limit the burden on parties required to redact documents.

The Commission recognizes, however, that the costs of reviewing and editing all filings to protect sensitive personal information and unnecessary health information would be significant for some parties. Three commenters highlighted challenges associated with redaction in cases on appeal to the Commission.[87] One of these commenters projected that it would file 114,160 pages of certified records of proceedings on appeal to the Commission in 2015. Another commenter similarly noted that its proceedings could generate ''voluminous records,'' providing examples of records with 7,000, 30,000, and 69,000 pages.[88]

In response to these concerns, we are limiting the redaction requirement to filings other than (1) any set of exhibits offered and/or admitted at a hearing (*i.e.,* filed pursuant to Rule 351) and (2) records of proceedings on appeal from SROs or the PCAOB to the Commission. In fiscal years 2018 and 2019, there were approximately 390 and 992 filings, respectively, that would have would have been subject to the redaction requirement as so limited. The exception to the redaction requirement may reduce the expected benefits of the adopted rules relative to the proposal, in that more filings will not require redaction and thus parties to the associated proceedings may file protective orders under Rule 322 for these filings. At the same time, we expect this change to significantly lower the expected burden of the electronic filing requirements on parties to administrative proceedings because, based on our experience, these documents are, on average, significantly longer and thus more burdensome to redact than other filings.[89] That said, we cannot quantitatively estimate the total remaining burden of redaction under the adopted rules because we do not have systematic data on length of filings and, as discussed above, the expected future volume of filings difficult to predict.

Parties to administrative proceedings will also bear any incremental burden of electronic filings over the current practice of facsimile or paper transmissions. The magnitude of costs will depend primarily on whether the original format of the documents to be submitted is electronic or whether they must be scanned or otherwise converted to an electronic format. The costs will also be affected by the nature of the documents relative to the logistical requirements of the electronic filing system. For example, electronic files may need to be renamed and large files may need to be broken down into separate files to be compliant with the system requirements.[90] Other factors that may affect these costs include the ease of access the party has to the internet and to any hardware and software that may be involved in processing the documents. We did not receive comments on these costs and continue to expect that, for most parties, these costs will not be significant because, among other things, most parties already are subject to similar requirements in other kinds of legal proceedings or have access to the internet and conversion programs at a reasonable cost. Further, these potential burdens may be mitigated for some parties as the adopted rules provide for relief from the electronic filing requirements in situations in which a party certifies a reasonable inability to comply with the electronic filing requirement.

As discussed above, the Commission has considered alternatives to the adopted rules, including alternative treatment of records of proceedings on appeal to the Commission. Commenters suggested alternatives based on their concerns about the burden of redacting

would ''benefit parties who are familiar with electronic-filing systems'').

[82] *See supra* notes 80 and 81. *See* also PCAOB letter (stating that they support the objective of ''making the administrative appeals process more accessible to the public and increasingly efficient''); FSR letter (stating that the proposed rules were ''commendable.''

[83] *See* Bishop letter.

[84] *See* Anonymous letter.

[85] *See* FINRA and PCAOB letters.

[86] *See* PCAOB Letter.

[87] *See* FINRA, NYSE, and PCAOB letters.

[88] *See* PCAOB letter.

[89] We acknowledge that SROs that use automated redaction might experience a smaller decrease in the expected burden.

[90] For files larger than 500 megabytes that cannot be broken down into smaller files or filings that cannot be provided in PDF format, parties may incur additional costs to submit these documents on other electronic media, such as compact disks or thumb drives. We expect the incremental costs of this requirement to be minimal as, based on our experience, such filings are typically already submitted using electronic media under the baseline. *See supra* n.76.

these records. For example, two commenters discussed the possibility of permitting additional time for the filing of the redacted copy of the record as compared to the deadline for filing the unredacted version.[91] We believe that the modification of the adopted rules to exclude these records as well as exhibits submitted under Rule 351 from the redaction requirement will allow for reduced costs of compliance relative to the proposal, but might also reduce the benefits of the proposal.

We have also considered alternatives with respect to the timing of implementation of the new filing requirements. Several commenters suggested an extended transition period or implementation delay of six months to one year.[92] Such a delay would, for example, permit individuals and entities that are regularly parties to administrative proceedings to adapt their own processes and systems to most efficiently comply with the adopted rules. While we are sensitive to the efforts that may be required to adapt to the electronic filing requirements, we believe that the modification in the adopted rules to not require the filing parties to redact records of proceedings on appeal to the Commission and exhibits submitted under Rule 351 should substantially ease this transition.

Additional alternatives to the adopted rules could involve the implementation of electronic filing with different requirements. In particular, the Commission could permit electronic filing on a voluntary, rather than mandatory, basis. While these changes might permit parties to choose the method of filing that best suits their objectives and potentially reduce the costs associated with filing, this alternative could undermine the consistency of public disclosure by establishing multiple sets of filing requirements and standards and reduce the benefits that result from efficiencies associated with electronic filing. Alternatively, the Commission could continue to allow the filing of unredacted documents, either requiring, as one commenter suggested, that the party that filed a document provide a redacted version if necessary to respond to a public request for a document[93] or that redaction be undertaken by Commission staff when necessary. Relative to these alternatives, or to the existing paper format and facsimile document submission and management system for administrative proceedings, the Commission believes that the adopted changes achieve the benefits described above in a time- and cost-efficient manner.

The Commission does not expect significant effects on efficiency, competition, or capital formation to result from the adopted changes. And to the extent that the changes impose any burden on competition, the Commission believes that such burden would be necessary and appropriate in furtherance of the purposes of the Exchange Act.[94]

V. Statutory Basis

These amendments to the Rules of Practice are being adopted pursuant to statutory authority granted to the Commission, including section 3 of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7202; section 19 of the Securities Act, 15 U.S.C. 77s; sections 4A, 19, and 23 of the Exchange Act, 15 U.S.C. 78d–1, 78s, and 78w; section 319 of the Trust Indenture Act of 1939, 15 U.S.C. 77sss; sections 38 and 40 of the Investment Company Act, 15 U.S.C. 80a–37 and 80a–39; and section 211 of the Investment Advisers Act, 15 U.S.C. 80b–11.

List of Subjects in 17 CFR Part 201

Administrative practice and procedure.

For the reasons set forth in the preamble, the Commission is amending title 17, part 201 of the Code of Federal Regulations as follows:

PART 201—RULES OF PRACTICE

■ 1. The authority citation for Part 201, subpart D, is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 78c(b), 78d–1, 78d–2, 78l, 78m, 78n, 78o(d), 78o–3, 78s, 78u–2, 78u–3, 78v, 78w, 77sss, 77ttt, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

■ 2. Section 201.102 is amended by revising paragraphs (d)(1), (2), and (4) to read as follows:

§ 201.102 Appearance and practice before the Commission.

* * * * *

(d) * * *

(1) *Representing oneself.* When an individual first makes any filing or otherwise appears on his or her own behalf before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), he or she shall file with the Commission, or otherwise state on the record, and keep current, a mailing address and email address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours. Within ten days of April 12, 2021, any individual appearing on his or her own behalf before the Commission or hearing officer in a proceeding as defined in § 201.101(a) that is ongoing on that date shall electronically file a notice that complies with this paragraph. Notices required by this section shall be served in accordance with § 201.150(a). Individuals shall electronically file a § 201.102(d) compliant notice in their ongoing proceedings even if a prior § 201.102(d) paper filing included the participant's email address.

(2) *Representing others.* When a person first makes any filing or otherwise appears in a representative capacity before the Commission or a hearing officer in a proceeding as defined in § 201.101(a), that person shall file with the Commission, and keep current, a written notice stating the name of the proceeding; the representative's name, business address, email address, and telephone number; and the name, email address, and address of the person or persons represented. Within ten days of April 12, 2021, any person appearing in a representative capacity before the Commission or hearing officer in a proceeding as defined in § 201.101(a) that is ongoing on that date shall electronically file a notice that complies with paragraph (d)(2) of this section. Notices required by this section shall be served in accordance with § 201.150(a). Participants are directed to electronically file a § 201.102(d) compliant notice in their ongoing proceedings even if a prior § 201.102(d) paper filing included the participant's email address.

* * * * *

(4) *Withdrawal.* Any person seeking to withdraw his or her appearance in a representative capacity shall file a notice of withdrawal with the Commission or the hearing officer. The notice shall state the name, mailing address, email address, and telephone number of the withdrawing representative; the name, email address, address, and telephone number of the person for whom the appearance was made; and the effective date of the withdrawal. If the person seeking to withdraw knows the name, mailing address, email address, and telephone number of the new representative, or knows that the person for whom the

[91] *See* FINRA and PCAOB letters.

[92] *See* FINRA, FSR, NYSE and PCAOB letters.

[93] *See* PCAOB letter (suggesting that this alternative could be used, for a limited trial period, for records in proceedings on appeal to the Commission).

[94] *See* 15 U.S.C. 78w(a)(2).

appearance was made intends to represent him- or herself, that information shall be included in the notice. The notice must be served on the parties in accordance with § 201.150. The notice shall be filed at least five days before the proposed effective date of the withdrawal.

* * * * *

■ 3. Section 201.140 is amended by revising paragraph (a) to read as follows:

§ 201.140 Commission orders and decisions: Signature and availability.

(a) *Signature required.* All orders and decisions of the Commission shall be signed by the Secretary or any other person duly authorized by the Commission. The signature may be an electronic signature that consists of an ''/s/'' notation or any other digital signature.

* * * * *

■ 4. Section 201.141 is amended by:

■ a. Removing the words ''Express Mail'' wherever they appear and adding in their place the words ''express mail''; and

■ b. Revising the first sentence of paragraph (b).

The revision reads as follows:

§ 201.141 Orders and decisions: Service of orders instituting proceedings and other orders and decisions.

* * * * *

(b) * * * Written orders or decisions issued by the Commission or by a hearing officer shall be served promptly on each party pursuant to any method of service authorized under paragraph (a) of this section or § 201.150(c) and (d). * * *

■ 5. Section 201.150 is amended by:

■ a. Redesignating paragraphs (c) and (d) as paragraphs (d) and (e);

■ b. Adding new paragraph (c);

■ c. Revising newly redesignated paragraphs (d) introductory text and (d)(4);

■ d. Revising newly redesignated paragraph (e); and

■ e. Removing the words ''Express Mail'' wherever they appear and adding in their place the words ''express mail''.

The revisions and addition read as follows:

§ 201.150 Service of papers by parties.

* * * * *

(c) *How made.* Service shall be made electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website. Persons serving each other shall have provided the Commission and the parties with notice of an email address.

(1) *Certification of inability to serve electronically.* If a person reasonably cannot serve electronically (due, for example, to a failure to have a functional email address or a lack of access to electronic transmission devices due to incarceration or otherwise), the person promptly shall file a certification under this paragraph that explains why the person reasonably cannot comply using any additional method of service listed in § 201.150(d). The filing also must indicate the expected duration of the person's reasonable inability to comply, such as whether the certification is intended to apply to a solitary instance of service or all instances of service made during the proceeding. The certification is immediately effective. Upon filing the certification, it will be part of the record of the proceeding, and the person may serve paper documents by any additional method listed in § 201.150(d).

(2) [Reserved].

(d) *Additional methods of service.* If a person reasonably cannot serve electronically, or if service is of an investigative subpoena pursuant to 17 CFR 203.8, service may be made by delivering a copy of the filing. *Delivery* means:

* * * * *

(4) Transmitting the papers by facsimile transmission to the person required to be served. The persons so serving each other shall have provided the Commission and the parties with notice of a facsimile machine telephone number.

(e) *When service is complete.* Electronic service is complete upon transmission, but is not effective if the sender learns that the transmission failed. Personal service, service by U.S. Postal Service express mail or service by a commercial courier or express delivery service is complete upon delivery. Service by mail is complete upon mailing. Service by facsimile is complete upon confirmation of transmission.

■ 6. Section 201.151 is amended by revising paragraphs (a) and (d) and adding paragraph (e) to read as follows:

§ 201.151 Filing of papers with the Commission: Procedure.

(a) *When to file.* All papers required to be served upon any person shall also be filed contemporaneously with the Commission electronically pursuant to the requirements of § 201.152(a). The person making such filing is responsible for ensuring that the Commission receives a complete and legible filing within the time limit set for such filing. Documents that are attached to filings shall be filed in accordance with this section.

* * * * *

(d) *Certificate of service.* Papers filed with the Commission or a hearing officer shall be accompanied by a certificate stating the name of the person or persons served, the date of service, the method of service, and the mailing address or email address to which service was made, if not made in person.

(e) *Sensitive personal information.* Sensitive personal information is defined as a Social Security number, taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, state-issued identification number, home address (other than city and state), telephone number, date of birth (other than year), names and initials of minor children, as well as any unnecessary health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, all filings subject to:

(1) *Exceptions.* The following information may be included and is not required to be redacted from filings:

(i) The last four digits of a financial account number, credit card or debit card number, passport number, driver's license number, and state-issued identification number;

(ii) Home addresses and telephone numbers of parties and persons filing documents with the Commission;

(iii) Business telephone numbers; and

(iv) Copies of unredacted filings by regulated entities or registrants that are available on the Commission's public website.

(2) *Confidential treatment of information.* If the person making any filing believes that sensitive personal information (as defined above) contained therein is necessary to the proceeding, the person shall file unredacted documents, along with a motion for a protective order with redacted documents, in accordance with § 201.322 to limit disclosure of unredacted sensitive personal information.

(3) *Certification.* Any filing must include a certification that any information described in paragraph (e) of this section has been omitted or redacted from the filing or, if necessary to the filing, has been filed under seal pursuant to § 201.322.

■ 7. Section 201.152 is amended by:

■ a. Removing paragraph (d);

■ b. Redesignating paragraphs (a), (b), and (c) as paragraphs (b), (c), and (d);

■ c. Adding new paragraph (a);
■ d. Revising newly redesignated paragraphs (b), (c), and (d); and
■ e. Adding new paragraph (g).

The revisions and addition read as follows:

§ 201.152 Filing of papers: Form.

(a) *Electronic filing.* Papers filed in connection with any proceeding as defined in § 201.101(a) shall be filed electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website. Papers filed electronically must be received by the Commission by midnight Eastern Time on the date the filing is due.

(1) *Certification of Inability to File Electronically.* If a person reasonably cannot comply with the requirements of this section, due to a lack of access to electronic transmission devices (due to incarceration or otherwise), the person promptly shall file a certification under this paragraph that explains why the person reasonably cannot comply using any additional method of filing listed in § 201.152(a)(2). The filing also must indicate the expected duration of the person's reasonable inability to comply, such as whether the certification is intended to apply to a solitary filing or all filings made during the proceeding. The certification is immediately effective. Upon filing the certification, it will be part of the record of the proceeding, and the person may file paper documents by any additional method listed in § 201.152(a)(2).

(2) *Additional methods of filing.* If a person reasonably cannot file electronically, filing may be made by hand delivering the filing by 5:30 p.m. Eastern Time through a commercial courier service or express delivery service; mailing the filing through the U.S. Postal Service by first class, certified, registered, or express mail delivery so that it is received by the Commission by 5:30 p.m. Eastern Time; or transmitting the filing by facsimile transmission so that it is received by the Commission by midnight Eastern Time.

(b) *Form.* Papers filed in connection with any proceeding as defined in § 201.101(a) shall:

(1) Reflect a page, electronically or otherwise, that measures 8½ x 11 inches when printed, except that, to the extent that the reduction of larger documents would render them illegible when printed, such documents may be filed on larger paper;

(2) Use 12-point or larger typeface;

(3) Include at the head of the paper, or on a title page, the name of the Commission, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(4) Be paginated with left hand margins at least 1 inch wide, and other margins of at least 1 inch; and

(5) Be double-spaced, with single-spaced footnotes and single-spaced indented quotations.

(c) *Signature required.* All papers must be dated and signed as provided in § 201.153. Electronic filings that require a signature pursuant to § 201.153 may be signed with an ''/s/'' notation, but in that event, the use of the filer's log in and password to file a document shall be deemed the signature of the person making the filing for purposes of § 201.153.

(d) *Suitability for recordkeeping.* Documents which, in the opinion of the Office of the Secretary, are not suitable for computer scanning may be rejected.

* * * * *

(g) *Interim Procedures for Filing Papers with the Commission in Both Electronic and Paper Format.* For the initial 90-day period beginning on April 12, 2021, papers filed in connection with any proceeding as defined in § 201.101(a) shall be filed both electronically in accordance with paragraph (a) of this section and, in addition, in paper format or by email at *apfilings@sec.gov.* If filed in paper format, an original and three copies of all paper filings must be submitted to the Office of the Secretary in accordance with any of the delivery methods set forth in paragraph (a)(2) of this section.

§ 201.152 [Amended]

■ 8. Effective, July 12, 2021, amend § 201.152 by removing paragraph (g).9. Section 201.193 is amended by:
■ a. Redesignating paragraphs (a) through (f) as (b) through (g);
■ b. Revising the Preliminary Note; and
■ c. Revising newly redesignated paragraph (c) introductory text.

The revisions read as follows:

§ 201.193 Applications by barred individuals for consent to associate.

(a) *Preliminary note.* This section governs applications to the Commission by certain persons, barred by Commission order from association with brokers, dealers, municipal securities dealers, government securities brokers, government securities dealers, investment advisers, investment companies or transfer agents, for consent to become so associated. Applications made pursuant to this section must show that the proposed association would be consistent with the public interest. In addition to the information specifically required by the section, applications should be supplemented, where appropriate, by written statements of individuals (other than the applicant) who are competent to attest to the applicant's character, employment performance, and other relevant information. Intentional misstatements or omissions of fact may constitute criminal violations of 18 U.S.C. 1001 *et seq.* and other provisions of law.

(1) The nature of the supervision that an applicant will receive or exercise as an associated person with a registered entity is an important matter bearing upon the public interest. In meeting the burden of showing that the proposed association is consistent with the public interest, the application and supporting documentation must demonstrate that the proposed supervision, procedures, or terms and conditions of employment are reasonably designed to prevent a recurrence of the conduct that led to imposition of the bar. As an associated person, the applicant will be limited to association in a specified capacity with a particular registered entity and may also be subject to specific terms and conditions.

(2) Normally, the applicant's burden of demonstrating that the proposed association is consistent with the public interest will be difficult to meet where the applicant is to be supervised by, or is to supervise, another barred individual. In addition, where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet.

(3) In addition to the factors set forth in paragraph (d) of this section, the Commission will consider the nature of the findings that resulted in the bar when making its determination as to whether the proposed association is consistent with the public interest. In this regard, attention is directed to § 202.5(e) of the Commission's Rules on Informal and Other Procedures, 17 CFR 202.5(e). Among other things, § 202.5(e) sets forth the Commission's policy ''not to permit a * * * respondent [in an administrative proceeding] to consent to * * * [an] order that imposes a sanction while denying the allegations in the * * * order for proceedings.'' Consistent with the rationale underlying that policy, and in order to avoid the appearance that an application made pursuant to this section was granted on the basis of such denial, the Commission will not consider any application that attempts to reargue or

collaterally attack the findings that resulted in the Commission's bar order.

* * * * *

(c) *Form of application.* Each application shall be supported by an affidavit, signed by the applicant, that addresses the factors set forth in paragraph (d) of this section. The application shall be filed pursuant to §§ 201.151, 152 and 153. Each application shall include as exhibits:

* * * * *

■ 10. Section 201.322 is amended by:

■ a. Revising paragraph (a);

■ b. Redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e); and

■ c. Adding new paragraph (b).

The revision and addition read as follows:

§ 201.322 Evidence: Confidential information, protective orders.

(a) *Procedure.* In any proceeding as defined in § 201.101(a), a party, any person who is the owner, subject or creator of a document subject to subpoena or which may be introduced as evidence, or any witness who testifies at a hearing may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents without revealing confidential details.

(b) *Submission of confidential information.* If review of the documents that are the subject of a request for a protective order is necessary to a ruling on the motion and the information as to which a protective order is sought is available to the movant, the motion shall be accompanied by:

(1) A complete, sealed copy of the materials containing the information as to which a protective order is sought, with the allegedly confidential information marked as such, and with the first page of the document labeled ''Under Seal.'' If the movant seeks a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties; and

(2) A redacted copy of the materials containing the information as to which a protective order is sought, with the allegedly confidential information redacted. The redacted version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the sealed version. A redacted copy need not accompany a motion requesting a protective order if the materials would be redacted in their entirety.

* * * * *

■ 11. Section 201.351 is amended by:

■ a. Revising the section heading;

■ b. Revising paragraph (b);

■ c. Redesignating paragraph (c) as paragraph (d); and

■ d. Adding new paragraph (c).

The revisions and addition read as follows:

§ 201.351 Transmittal of documents to Secretary; record index; electronic copy of exhibits; certification.

* * * * *

(b) *Preparation, certification of record index.* Promptly after the close of the hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index with the hearing officer within three days of service of the record index. Any opposition to the proposed corrections shall be filed within three days of service of the proposed corrections. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. If an initial decision is to be issued, the initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

(c) *Electronic exhibits.* No later than five days after the Secretary serves a final record index, the parties shall submit electronically to the Secretary a copy of all exhibits that were admitted, or offered and not admitted, during the hearing, and any other exhibits that were admitted after the hearing. The parties shall submit such evidence in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website.

(1) *Certification of Inability to Submit Exhibits Electronically.* A person who reasonably cannot submit exhibits electronically must file a certification under § 201.351(c)(1) that explains why the person reasonably cannot comply. The filing also must indicate the expected duration of the person's reasonable inability to comply, such as whether the certification is intended to apply to a solitary submission or all submissions made during the proceeding. The certification is immediately effective. Upon filing the certification, it will be part of the record of the proceeding, and the person shall submit originals of any exhibits that have not already been submitted to the Secretary by other means.

(2) *Signature requirement.* Electronic submissions that require a signature pursuant to § 201.153 may be signed with an ''/s/'' notation, but in that event, the use of the filer's login and password to file a document shall be deemed the signature of the person making the submission for purposes of § 201.153.

(3) *Certification.* The parties shall certify that exhibits and other documents or items submitted to the Secretary under this section are true and accurate copies of exhibits that were admitted, or offered and not admitted, during the hearing, or any other exhibits that were admitted after the hearing.

* * * * *

■ 12. Section 201.420 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 201.420 Appeal of determinations by self-regulatory organizations.

* * * * *

(e) *Certification of the record; service of the index.* Fourteen days after receipt of an application for review or a Commission order for review, the self-regulatory organization shall certify and file electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website one unredacted copy of the record upon which the action complained of was taken.

(1) The self-regulatory organization also shall file electronically with the Commission one copy of an index to such record, and shall serve upon each party one copy of the index. If such index contains any sensitive personal information, as defined in paragraph (e)(2) of this section, the self-regulatory organization also shall file electronically with the Commission one redacted copy of such index, subject to the requirements of paragraph (e)(2) of this section.

(2) *Sensitive personal information.* Sensitive personal information is defined as a Social Security number, taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, state-issued identification number, home address

(other than city and state), telephone number, date of birth (other than year), names and initials of minor children, as well as any unnecessary health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, all filings subject to:

(i) *Exceptions.* The following information may be included and is not required to be redacted from filings:

(A) The last four digits of a financial account number, credit card or debit card number, passport number, driver's license number, and state-issued identification number;

(B) Home addresses and telephone numbers of parties and persons filing documents with the Commission;

(C) Business telephone numbers; and

(D) Copies of unredacted filings by regulated entities or registrants that are available on the Commission's public website.

(f) *Certification.* Any filing made pursuant to this section, other than the record upon which the action complained of was taken, must include a certification that any information described in paragraph (e)(2) of this section has been omitted or redacted from the filing.

■ 13. Section 201.440 is amended by revising paragraph (d) and adding paragraph (e) to read as follows:

§ 201.440 Appeal of determinations by the Public Company Accounting Oversight Board.

* * * * *

(d) *Certification of the record; service of the index.* Within fourteen days after receipt of an application for review, the Board shall certify and file electronically in the form and manner to be specified by the Office of the Secretary in the materials posted on the Commission's website one unredacted copy of the record upon which it took the complained-of action.

(1) The Board shall file electronically with the Commission one copy of an index of such record, and shall serve one copy of the index on each party. If such index contains any sensitive personal information, as defined in paragraph (d)(2) of this section, the Board also shall file electronically with the Commission one redacted copy of such index, subject to the requirements of paragraphs (d)(2) of this section.

(2) *Sensitive personal information.* Sensitive personal information is defined as a Social Security number, taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, state-issued identification number, home address (other than city and state), telephone number, date of birth (other than year), names and initials of minor children, as well as any unnecessary health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, all filings subject to:

(i) *Exceptions.* The following information may be included and is not required to be redacted from filings:

(A) The last four digits of a financial account number, credit card or debit card number, passport number, driver's license number, and state-issued identification number;

(B) Home addresses and telephone numbers of parties and persons filing documents with the Commission;

(C) Business telephone numbers; and

(D) Copies of unredacted filings by regulated entities or registrants that are available on the Commission's public website.

(e) *Certification.* Any filing made pursuant to this section, other than the record upon which the action complained of was taken, must include a certification that any information described in paragraph (d)(2) of this section has been omitted or redacted from the filing.

By the Commission.

Dated: November 17, 2020.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–25747 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9932]

RIN 1545–BO95

Certain Employee Remuneration in Excess of $1,000,000 Under Internal Revenue Code Section 162(m)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth final regulations under section 162(m) of the Internal Revenue Code (Code), which for Federal income tax purposes limits the deduction for certain employee remuneration in excess of $1,000,000. These final regulations implement the amendments made to section 162(m) by the Tax Cuts and Jobs Act and finalize the proposed regulations published on December 20, 2019. These final regulations affect publicly held corporations.

DATES:

Effective Date: These regulations are effective on December 30, 2020.

Applicability Dates: For dates of applicability, see § 1.162–33(h).

FOR FURTHER INFORMATION CONTACT: Ilya Enkishev at (202) 317–5600 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document amends the Income Tax Regulations (''Treasury regulations'' (26 CFR part 1) under section 162(m)). Section 162(m)(1) disallows a deduction by any publicly held corporation for applicable employee remuneration paid or otherwise deductible with respect to any covered employee to the extent that such remuneration for the taxable year exceeds $1,000,000. Section 162(m) was added to the Code by section 13211(a) of the Omnibus Budget Reconciliation Act of 1993, Public Law 103–66. Proposed regulations under section 162(m) were published in the **Federal Register** on December 20, 1993 (58 FR 66310) (1993 proposed regulations). On December 2, 1994, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) issued amendments to the proposed regulations (59 FR 61884) (1994 proposed regulations). On December 20, 1995, the Treasury Department and the IRS issued final regulations under section 162(m) (TD 8650) (60 FR 65534) (1995 regulations).

Section 162(m) was amended by section 13601 of the Tax Cuts and Jobs Act (TCJA) (Pub. L. 115–97, 131 Stat. 2054, 2155 (2017)). Section 13601 of TCJA amended the definitions of covered employee, publicly held corporation, and applicable employee remuneration in section 162(m). Section 13601 also provided a transition rule applicable to certain outstanding compensatory arrangements (commonly referred to as the grandfather rule). On August 21, 2018, the Treasury Department and the IRS released Notice 2018–68 (2018–36 I.R.B. 418), which provides guidance on certain issues under section 162(m).

On December 20, 2019, the Treasury Department and the IRS published proposed regulations (REG–122180–18) relating to the amendments TCJA made to section 162(m) in the **Federal Register** (84 FR 70356) (the proposed regulations). The changes to section 162(m) made by section 13601 of TCJA and the initial guidance provided by

Notice 2018–68 are described in detail in the preamble to the proposed regulations.

A public hearing was held on March 9, 2020. The Treasury Department and the IRS also received written comments with respect to the proposed regulations. All written comments received in response to the proposed regulations are available at *www.regulations.gov* or upon request. After full consideration of the comments received on the proposed regulations and the testimony heard at the public hearing, this Treasury decision adopts the proposed regulations with modifications in response to certain comments and testimony, as described in the Summary of Comments and Explanation of Revisions section. Comments outside of the scope of the proposed regulations generally are not addressed in this preamble but may be considered in connection with future guidance projects.

Summary of Comments and Explanation of Revisions

I. Overview

Section 13601 of TCJA significantly amended section 162(m). Consistent with the proposed regulations, these final regulations add a section to the Treasury regulations to reflect these amendments. Amended section 162(m) applies to taxable years beginning after December 31, 2017, except to the extent transition and grandfather rules described in section VI of this preamble apply. Because the 1995 regulations continue to apply to deductions related to amounts of remuneration to which the grandfather rule applies, the 1995 regulations are retained as a separate section in the Treasury regulations under section 162(m).

These final regulations retain the basic approach and structure of the proposed regulations, with certain revisions (including revised examples). This Summary of Comments and Explanation of Revisions discusses those revisions, as well as comments received in response to the proposed regulations.

II. Publicly Held Corporation

A. In General

As amended by TCJA, section 162(m)(2) defines the term ''publicly held corporation'' as any corporation that is an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (Exchange Act)) of securities that are required to be registered under section 12 of the Exchange Act, or that is required to file reports under section 15(d) of the Exchange Act. These final regulations adopt the rule in the proposed regulations providing that, for ease of administration, a corporation is a publicly held corporation if, as of the last day of its taxable year, its securities are required to be registered under section 12 of the Exchange Act or it is required to file reports under section 15(d) of the Exchange Act.

These final regulations also adopt the rules set forth in the proposed regulations for determining whether a publicly traded partnership, a corporation that owns an entity that is disregarded as an entity separate from its owner within the meaning of § 301.7701–2(c)(2)(i), or an S corporation (including an S corporation parent of a qualified subchapter S subsidiary (as defined in section 1361(b)(3)(B)) (QSub) is a publicly held corporation as defined in section 162(m)(2). Consistent with the proposed rules, these final regulations also provide that a real estate investment trust (REIT), as defined in section 856(a), that owns a qualified real estate investment trust subsidiary as defined in section 856(i)(2) (QRS), is a publicly held corporation if the QRS issues securities required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act.

B. Affiliated Groups

These final regulations adopt the rules set forth in the 1995 regulations and the proposed regulations providing that the term ''publicly held corporation'' includes an affiliated group of corporations (affiliated group), as defined in section 1504 (determined without regard to section 1504(b)), that includes one or more publicly held corporations, and that a subsidiary corporation that meets the definition of publicly held corporation is separately subject to section 162(m). These final regulations also adopt the rules set forth in the proposed regulations providing that an affiliated group includes a parent corporation that is privately held if one or more of its subsidiary corporations is a publicly held corporation, and that an affiliated group may include more than one publicly held corporation as defined in section 162(m)(2).

In response to the proposed regulations, a commenter suggested that an affiliated group with more than one publicly held corporation should have only one set of covered employees for the affiliated group (instead of one set of covered employees for each separate publicly held corporation that is a member of the affiliated group). These final regulations do not adopt this suggestion because each corporation in an affiliated group is a separate taxpayer and section 162(m)(3) provides that each taxpayer that is a publicly held corporation has its own set of covered employees. Instead, as provided in the 1995 regulations and in the proposed regulations, these final regulations provide that, in an affiliated group, each corporation that is a publicly held corporation is separately subject to section 162(m) and, therefore, has its own set of covered employees.

These final regulations adopt the rules set forth in the 1995 regulations and the proposed regulations addressing situations in which a covered employee of a publicly held corporation that is a member of an affiliated group performs services for another member of the affiliated group. These final regulations provide that compensation [1] paid by all members of the affiliated group is aggregated and that any amount disallowed as a deduction by section 162(m) is prorated among the payor corporations in proportion to the amount of compensation paid to the covered employee by each corporation in the taxable year. For situations in which a covered employee is paid compensation during a taxable year by more than one publicly held corporation that are members of the same affiliated group, these final regulations adopt the rules set forth in the proposed regulations providing that the amount of the deduction that is disallowed for compensation paid to a covered employee is determined separately with respect to each payor corporation that is a publicly held corporation. These final regulations clarify that compensation paid by a member of an affiliated group that is not a publicly held corporation to an employee who is a covered employee of two or more other members of the affiliated group is prorated for purposes of the determining the deduction disallowance among the members that are publicly held corporations of which the employee is a covered employee.

C. Foreign Private Issuers

Pursuant to the amended definition of publicly held corporation in section 162(m)(2), the proposed regulations provide that a foreign private issuer [2] (FPI) is a publicly held corporation if it is required to register securities under section 12 of the Exchange Act or file reports under section 15(d) of the

[1] For simplicity, where possible, these final regulations use the term ''compensation'' instead of ''applicable employee remuneration.'' These terms have the same meaning in these final regulations.

[2] The term ''foreign private issuer'' is defined in 21 CFR 240.3b–4(c).

Exchange Act. The legislative history to TCJA indicates that Congress intended section 162(m) to apply to FPIs.[3]

In response to Notice 2018–68, commenters suggested that the proposed regulations provide that section 162(m) does not apply to FPIs because FPIs are not required to disclose compensation of their officers on an individual basis under the Exchange Act, unless similar disclosure is required by their home country.[4] The commenters asserted that determining compensation on an individual basis (in order to determine the three most highly compensated executive officers) would require the FPIs to expend significant time and money in adopting the necessary internal procedures to make the determination consistent with Exchange Act requirements that are inapplicable to them. The proposed regulations do not adopt these suggestions.

However, the preamble to the proposed regulations requested comments as to whether a safe harbor exemption from the definition of a publicly held corporation under section 162(m) was appropriate for FPIs that are not required to disclose compensation of their officers on an individual basis in their home countries and, if so, how such a safe harbor could be designed. In response to this request for comments a commenter suggested that these final regulations should exempt any FPI from the definition of publicly held corporation, unless the FPI is required to disclose compensation of its officers on an individual basis in its home country. Another commenter suggested that these final regulations should exclude FPIs from the definition of publicly held corporation because determining compensation on an individual basis (in order to determine the three most highly compensated executive officers) requires extensive calculations consistent with executive compensation disclosure rules under the Exchange Act that are not applicable to FPIs. The commenters did not provide any analysis in support of a safe harbor rule or address how a safe harbor could be designed and administered. These final regulations do not adopt these suggestions because the scope of the exemption suggested for FPIs from the definition of publicly held corporation is inconsistent with the statutory language and the legislative history. Rather, these final regulations adopt the rules set forth in the proposed regulations providing that a FPI is a publicly held corporation if it is required to register securities under section 12 of the Exchange Act or file reports under section 15(d) of the Exchange Act.

III. Covered Employee

A. In General

As amended by TCJA, section 162(m)(3) defines the term ''covered employee'' as an employee of the taxpayer if (1) the employee is the principal executive officer (PEO) or principal financial officer (PFO) of the taxpayer at any time during the taxable year, or was an individual acting in such a capacity, (2) the total compensation of the employee for the taxable year is required to be reported to shareholders under the Exchange Act by reason of the employee being among the three highest compensated officers for the taxable year (other than the PEO and PFO), or (3) the individual was a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016. TCJA also added flush language to provide that a covered employee includes any employee of the taxpayer whose total compensation for the taxable year places the individual among the three highest compensated officers for the taxable year (other than any individual who is the PEO or PFO of the taxpayer at any time during the taxable year, or was an individual acting in such a capacity) even if the compensation of the officer is not required to be reported to shareholders under the Exchange Act.

These final regulations adopt the rules set forth in the proposed regulations providing that a covered employee for any taxable year means any employee of the publicly held corporation who is among the three highest compensated executive officers for the taxable year, regardless of whether the executive officer is serving as an executive officer at the end of the publicly held corporation's taxable year, and regardless of whether the executive officer's compensation is subject to disclosure for the publicly held corporation's last completed fiscal year under the applicable SEC rules. The determination that an officer is a covered employee because the officer is one of the three highest compensated executive officers, even if the officer's compensation is not required to be disclosed under the SEC rules, is based on the flush language to section 162(m)(3), the legislative history,[5] and the SEC executive compensation disclosure rules.[6] These final regulations also adopt the rule in the proposed regulations providing that the amount of compensation used to identify the three most highly compensated executive officers is determined pursuant to the executive compensation disclosure rules under the Exchange Act, substituting the publicly held corporation's taxable year for references to the corporation's fiscal year for purposes of applying the disclosure rules under the Exchange Act.

In response to the proposed regulations, a commenter suggested that, with respect to the three highest compensated executive officers (other than the PEO and PFO), the term ''covered employee'' should include only executive officers whose compensation is required to be disclosed pursuant to the SEC executive compensation disclosure rules. These final regulations do not adopt this suggestion because it is inconsistent with the flush language of section 162(m)(3) providing that, even if the compensation of an executive officer is not required to be reported to shareholders under the Exchange Act, the officer is a covered employee if the officer's total compensation for the taxable year, determined in accordance with the SEC disclosure rules, places the officer among the three highest compensated officers for the taxable year (other than the PEO and PFO).

Section 162(m)(3)(C) provides that the term ''covered employee'' includes any employee who was a covered employee of any predecessor of the publicly held corporation for any preceding taxable year beginning after December 31, 2016. The proposed regulations provide rules for determining the predecessor of a publicly held corporation for various corporate transactions. With respect to asset acquisitions, the proposed regulations provide that, if an acquiror

[3] The legislative history to TCJA provides that the amendment to the definition of publicly held corporation under section 162(m) ''extends the applicability of section 162(m) to include . . . all foreign companies publicly traded through ADRs.'' House Conf. Rpt. 115–466, 489 (2017). The Blue Book similarly states that ''the provision extends the applicability of section 162(m) to include all foreign companies publicly traded through ADRs.'' Staff of the Joint Committee on Taxation, General Explanation of Public Law 115–97 (Blue Book), at 261 (December 20, 2018).

[4] Before TCJA, the IRS ruled in several private letter rulings that section 162(m), as in effect at that time, did not apply to FPIs because FPIs are not required to disclose compensation of their officers on an individual basis under the Exchange Act, and, therefore, did not have covered employees. A private letter ruling may be relied upon only by the taxpayer to whom the ruling was issued and does not constitute generally applicable guidance. See section 11.02 of Revenue Procedure 2020–1, 2020–01 I.R.B. 144. TCJA amended section 162(m) to provide that a requirement to disclose compensation is not determinative of whether an officer is a covered employee.

[5] See House Conf. Rpt. 115–466, 489 (2017).

[6] 17 CFR 229.402(a)(3) (Item 402 of Regulation S–K).

corporation acquires at least 80% of the operating assets (determined by fair market value on the date of acquisition) of a publicly held target corporation, then the target corporation is a predecessor of the acquiror corporation. A commenter suggested that these final regulations clarify that the operating assets refer to gross operating assets instead of net operating assets. These final regulations adopt this suggestion.

The proposed regulations also provide rules for determining the covered employees of an owner of a disregarded entity, and an S corporation that owns a QSub. No comments were received with respect to these provisions of the proposed regulations. Accordingly, these final regulations adopt the rules set forth in the proposed regulations and, consistent with those rules, provide additional rules for purposes of determining the covered employees of a REIT that owns a QRS.

B. Covered Employees Limited to Executive Officers

Under the definition of covered employee in section 162(m)(3) as amended by TCJA, a PEO and PFO are covered employees by virtue of holding those positions or acting in those capacities. The three highest compensated officers (other than the PEO or PFO) are covered employees by reason of their compensation. Pursuant to section 162(m)(3)(B), the three highest compensated officers are determined based on the methods by which these officers are identified for purposes of the executive compensation disclosure rules under the Exchange Act. With respect to the three highest compensated officers for a taxable year, consistent with the disclosure rules under the Exchange Act, the proposed regulations provide that only an executive officer, as defined in 17 CFR 240.3b–7 (Rule 3b–7), may qualify as a covered employee. In relevant part, Rule 3b–7 provides that ''[e]xecutive officers of subsidiaries may be deemed executive officers of the registrant if they perform . . . policy making functions for the registrant.'' A commenter suggested that these final regulations provide that an executive officer of a subsidiary may be a covered employee of the publicly held corporation that is the registrant only if the officer is also an officer of that publicly held corporation. These final regulations do not adopt this suggestion because it is inconsistent with Rule 3b–7.

C. Covered Employees After Separation From Service

Section 162(m)(3)(C), as amended by TCJA, provides that a covered employee includes ''a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016.'' The legislative history to TCJA provides that:

> if an individual is a covered employee with respect to a corporation for a taxable year beginning after December 31, 2016, the individual remains a covered employee for all future years. Thus, an individual remains a covered employee with respect to compensation otherwise deductible for subsequent years, including for years during which the individual is no longer employed by the corporation and years after the individual has died.

(House Conf. Rpt. 115–466, 489 (2017)). The Blue Book reiterated the legislative history in explaining the amended definition of covered employee. See Blue Book at page 260.

Consistent with section 162(m)(3)(C), as amended by TCJA, and the legislative history, the proposed regulations provide that a covered employee identified for taxable years beginning after December 31, 2016, will continue to be a covered employee for all subsequent taxable years, including years during which the individual is no longer employed by the corporation and years after the individual has died. A commenter suggested that, based on the statutory text of both section 162(m) and section 4960, which was enacted by TCJA, Congress intended the term ''employee'' in section 162(m) to be limited to a current employee. The commenter pointed out that section 4960(c)(2) provides, in relevant part, that ''the term 'covered employee' means any employee (including any former employee)'' and noted that the words ''including any former employee'' are absent from the definition of covered employee in section 162(m)(3). The commenter reasoned that, because Congress enacted section 4960 and amended the definition of covered employee in section 162(m) in the same legislation (TCJA), the absence of these words limits the definition of covered employee to a current employee for purposes of section 162(m).

The Treasury Department and the IRS have concluded that the better analysis is that Congress intended to apply both section 162(m) and section 4960 to current and former employees. Congress may accomplish the same objective in two separate legislative provisions without using identical statutory language. As explained in section III.D of the preamble to the proposed regulations, the reference to an employee in section 162(m) provides no indication that the term ''employee'' is limited to a current employee, since a reference in the Code to an ''employee'' has frequently been interpreted in regulations as a reference to both a current and a former employee.[7] In addition, as previously noted, the legislative history to section 162(m) makes clear that Congress intended the term ''covered employee'' to include a former employee.[8] Accordingly, these final regulations adopt the proposed regulations without change.

IV. Applicable Employee Remuneration

A. In General

Section 162(m)(4)(A) defines the term ''applicable employee remuneration'' with respect to any covered employee for any taxable year as the aggregate amount allowable as a deduction for the taxable year (determined without regard to section 162(m)) for remuneration for services performed by such employee (whether or not during the taxable year). Section 162(m)(4)(F) provides that remuneration shall not fail to be applicable employee remuneration merely because it is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee. For simplicity, the proposed regulations and these final regulations use the term ''compensation'' instead of ''applicable employee remuneration'' wherever possible. Like the proposed regulations, these final regulations provide that compensation means the aggregate amount allowable as a deduction under chapter 1 of the Code for the taxable year (determined without regard to section 162(m)) for remuneration for services performed by a covered employee, whether or not the services were performed during the taxable year, and that compensation includes an amount that is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee

B. Compensation Paid by a Partnership to a Covered Employee

Section 162(m)(1) provides that ''[i]n the case of any publicly held corporation, no deduction shall be allowed under this chapter for applicable employee remuneration with respect to any covered employee.'' As

[7] See section III.D of the preamble to the proposed regulations. For example, under § 1.105–11(c)(3)(iii), the nondiscrimination rules of section 105(h)(3) apply to former employees even though the Code uses only the term ''employees.''

[8] House Conf. Rpt. 115–466, *supra,* at 489.

explained in section IV.B of the preamble to the proposed regulations, this statutory provision serves as the basis for the rule in the proposed regulations that a publicly held corporation that holds a partnership interest must take into account its distributive share of the partnership's deduction for compensation paid to the publicly held corporation's covered employee and aggregate that distributive share with the corporation's otherwise allowable deduction for compensation paid directly to that employee in applying the deduction limitation under section 162(m).

In response to this provision of the proposed regulations, commenters suggested that remuneration paid by a partnership is not compensation for purposes of section 162(m) because the partnership is neither a publicly held corporation nor a member of an affiliated group. Section 162(m) does not limit the application of section 162(m) in that manner. Rather, section 162(m) applies to all compensation, which includes ''all amounts allowable as a deduction . . . for remuneration for services performed by such employee (whether or not during the taxable year).'' While the comments suggest a reading of section 162(m)(1) that services must be performed in the employee's capacity as an employee and must be performed for the publicly held corporation, neither of these requirements appear in the statute. In addition, adoption of the commenters' suggestion could lead to the use of partnerships as a method of avoiding application of section 162(m), a result that the Treasury Department and IRS conclude is not intended by the statute.

Commenters also suggested that remuneration paid by a partnership should be compensation for purposes of section 162(m) only if the publicly held corporation has an 80% or greater interest in the partnership because the definition of an affiliated group requires 80% ownership by vote and value among the members of the affiliated group. The Treasury Department and the IRS did not adopt this rule because the analogy to the affiliated group proffered by the commenters does not take into account that the tax treatment of a partner in a partnership differs from the tax treatment of a corporation that owns stock in another corporation. Although a consolidated group of corporations may obtain a tax result similar to a deduction flow through, a subsidiary's compensation deduction does not flow through to the parent corporation in a non-consolidated group of corporations. In contrast, when a publicly held corporation is a partner in a partnership, a share of the partnership's items of income, gain, loss, and deduction generally is allocated to the publicly held corporation in accordance with partnership agreement, subject to section 704. Furthermore, that allocation may occur regardless of the level of ownership by the publicly held corporation.

These final regulations adopt the provisions of the proposed regulations and provide that a publicly held corporation must take into account its distributive share of a partnership's deduction for compensation paid to the publicly held corporation's covered employee in determining the amount allowable to the corporation as a deduction for compensation under section 162(m). Consistent with an example in the proposed regulations and incorporated into these final regulations, these final regulations clarify that the publicly held corporation's distributive share of the partnership's deduction for compensation paid by the partnership to a covered employee in connection with the performance of services includes the partnership's deduction for a payment to the covered employee for services under section 707(a) or section 707(c).

In response to a commenter's request for clarification on the application of the rule that a publicly held corporation must take into account its distributive share of a partnership's compensation payment to the publicly held corporation's covered employee, the Treasury Department and the IRS confirm that these final regulations address only application of the section 162(m) compensation deduction limitation to the publicly held corporation's distributive share of the payment. The commenter also noted that this partnership rule results in a different application of section 162(m) depending on whether a publicly held corporation's covered employee receives compensation for services from a partnership in which the publicly held corporation is a partner or from a corporate subsidiary of the partnership. Assuming the partnership is respected for U.S. Federal income tax purposes, section 162(m) generally would not apply to compensation paid to a publicly held corporation's covered employee by a corporate subsidiary of a partnership for services performed as an employee of the subsidiary because, in this circumstance, the corporate subsidiary would not be a member of the publicly held corporation's affiliated group.

In recognition of the prior lack of clarity in this area, the proposed regulations provide a special applicability date for this rule, as well as limited transition relief applicable to arrangements in which a publicly held corporation holds a partnership interest. Specifically, to ensure that compensation agreements were not formed or otherwise structured to circumvent the rule regarding partnerships after publication of the proposed regulations and prior to the publication of these final regulations, the proposed regulations set forth a special applicability date that would apply the rule to any deduction for compensation paid by a partnership that is otherwise allowable for a taxable year ending on or after December 20, 2019 (the publication date of the proposed regulations), but would not apply the rule to compensation paid pursuant to a written binding contract in effect on December 20, 2019 that is not materially modified after that date.

Commenters requested additional transition relief for this rule. A commenter suggested a transition relief period of 7 years from the date of publication of these final regulations.[9] Other commenters suggested that transition relief should apply for taxable years beginning before the publication of these final regulations. In the alternative, these commenters suggested transition relief for compensation arrangements in effect on December 22, 2017 (the date of TJCA enactment), regardless of whether the partnership is obligated to pay the amount of compensation under applicable law, which would provide for more expansive transition relief than set forth in the proposed regulations.

As the preamble to the proposed regulations explains, the transition relief for this definition of compensation must be designed to ensure that compensation agreements are not formed or otherwise structured to circumvent the proposed rules after publication of the proposed regulations and prior to the publication of these

[9] This commenter also suggested a transition relief period of 10 years for taxpayers that, prior to the IRS first announcing the no-rule position on this issue in Revenue Procedure 2010–3, received private letter rulings providing that section 162(m) did not limit the deduction of the publicly held corporation for compensation paid to a covered employee by a partnership in which the publicly held corporation held a partnership interest. The IRS announced the no-rule position in 2010 in section 5.06 of Revenue Procedure 2010–3, 2010–1 I.R.B. 110, which provided that ''[w]hether the deduction limit under § 162(m) applies to compensation attributable to services performed for a related partnership'' was an area under study in which rulings or determination letters will not be issued until the IRS resolves the issue through publication of a revenue ruling, revenue procedure, regulations, or otherwise.

final regulations. In consideration of commenters' requests for additional transition relief, these final regulations modify the applicability date of the definition of compensation under § 1.162–33(c)(3)(ii) to provide additional limited transition relief. Under these final regulations, the definition of compensation under § 1.162–33(c)(3)(ii) includes an amount equal to a publicly held corporation's distributive share of a partnership's deduction for compensation expense attributable to the compensation paid by the partnership after December 18, 2020, the date on which these final regulations were made publicly available on the IRS website at *http://www.irs.gov.* Because the date that these final regulations are made publicly available is prior to the date that they are published in the **Federal Register**, using the earlier date for the expiration of the additional transition relief is appropriate to ensure that compensation is not paid to circumvent these final regulations. In addition, these final regulations continue to provide that this aspect of the definition of compensation does not apply to compensation paid after December 30, 2020 if the compensation is paid pursuant to a written binding contract that is in effect on December 20, 2019, and that is not materially modified after that date.

C. Compensation for Services in a Capacity Other Than as a Common Law Employee

The proposed regulations provide that compensation subject to section 162(m) includes remuneration for services performed by a covered employee in any capacity, including as a common law employee, a director, or an independent contractor. As explained in section IV. C of the preamble to the proposed regulations, this rule is based on the lack of a specific limitation in the statutory language regarding the capacity in which the covered employee must perform the services for which remuneration is paid, and it is supported by the legislative history to the enactment of section 162(m) in 1993 [10] and the preamble to the 1993 proposed regulations.[11]

In response to the proposed regulations, commenters suggested that, based on the language of section 162(m)(4)(A), compensation subject to section 162(m) should include only compensation for services performed by a covered employee as an employee of the publicly held corporation. The commenters reasoned that, because section 162(m)(4)(A) uses the phrase ''for remuneration for services performed by such *employee*'' (emphasis added) in defining compensation subject to section 162(m), only compensation for services provided as an employee is subject to section 162(m).[12]

While the statute may be read in the manner suggested by the commenters, there is nothing in the language that compels this reading, nor does the legislative history to the enactment of section 162(m) suggest that compensation subject to section 162(m) was intended to include only compensation for services as an employee. Section 162(m)(4)(A), which was not amended by TCJA, provides that ''the term 'applicable employee remuneration' means, with respect to any covered employee for any taxable year, the aggregate amount allowable as a deduction under this chapter for such taxable year . . . for remuneration for services performed by such employee (whether or not during the taxable year).'' The legislative history provides that section 162(m) ''applies to all compensation . . . regardless of whether the compensation is for services as a covered employee and regardless of when the compensation was earned.'' [13] Consistent with this legislative history, the 1995 regulations defined the term compensation as ''the aggregate amount allowable as a deduction . . . for remuneration for services performed by a covered employee, whether or not the services were performed during the taxable year.'' [14] Thus, neither the statute nor the 1995 regulations specifically limit the compensation subject to section 162(m) to remuneration paid to the covered employee for services as an employee.

Commenters also suggested that section 162(m) does not apply to compensation for services as an independent contractor because by excluding from the definition of compensation payments that may be made only to an employee, section 162(m)(4)(C) indicates that compensation subject to section 162(m) is limited to compensation for services as an employee. Section 162(m)(4)(C) excludes from the definition of compensation: ''(i) any payment referred to in so much of section 3121(a)(5) as precedes subparagraph (E) thereof, and (ii) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from gross income under this chapter.''

Section 162(m)(4)(i), by cross-referencing sections 3121(a)(5)(A)–(D), generally excludes from compensation contributions by an employer on an employee's behalf to certain types of qualified retirement plans and payments from those types of plans to the employee. Thus, contributions to these arrangements for which an employer would otherwise have a deduction available will not be treated as compensation and the deduction will not be limited by section 162(m). Section 162(m)(4)(C)(ii) serves a similar function by excluding from compensation (and thus not limiting the compensation deduction) certain employee benefits that would be excludible from the employee's income. These exclusions of benefit payments from the definition of ''applicable employee remuneration'' reflect only that an individual must be an active employee of the publicly held corporation (or a predecessor) at some

[10] The legislative history to the enactment of section 162(m) provides that:

Unless specifically excluded, the deduction limitation applies to all remuneration for services, including cash and the cash value of all remuneration (including benefits) paid in a medium other than cash. If an individual is a covered employee for a taxable year, the deduction limitation applies to all compensation not explicitly excluded from the deduction limitation, regardless of whether the compensation is for services as a covered employee and regardless of when the compensation was earned.

House Conf. Rpt. 103–213, 585 (1993).

[11] The preamble to the 1993 proposed regulations provides that, ''[t]he deduction limit of section 162(m) applies to any compensation that could otherwise be deducted in a taxable year, except for enumerated types of payments set forth in section 162(m)(4)'' (58 FR 66310, 66310).

[12] In suggesting that the statute should be read to exclude payments for services performed as an independent contractor from compensation subject to section 162(m), commenters point to a private letter ruling issued in 1997 (PLR 9745002). In the letter ruling, based on the facts presented, the IRS ruled that, for purposes of section 162(m), compensation excludes consulting fees for services performed by a covered employee as an independent contractor. A private letter ruling may be relied upon only by the taxpayer to whom the ruling was issued and does not constitute generally applicable guidance. See section 11.02 of Revenue Procedure 2020–1, 2020–01 I.R.B. 144.

[13] House Conf. Rpt. 103–213, 585 (1993).

[14] Section 1.162–27(c)(3)(i). The preamble to the 1993 proposed regulations reiterates this principle, as quoted earlier.

point in order to become a covered employee, and that the individual typically would participate in these types of employee benefit arrangements as an employee (often continuing participation that started before the individual became a covered employee).

Importantly, the TCJA amendments to section 162(m) changed the context in which the question as to whether non-employee compensation is subject to the deduction limitation is analyzed. Prior to TCJA, the section 162(m) deduction limitation could be avoided by ensuring that any compensation in excess of $1,000,000 paid to a covered employee qualified as performance-based compensation or was paid to the covered employee after separation from service or after termination of the individual's status as a covered employee. For example, if a PEO ceased serving as PEO or as an executive officer but continued as an employee of the publicly held corporation for later taxable years, the former PEO could be compensated without taking into account the potential for a limitation on the deduction due to section 162(m).

The TCJA amendment of section 162(m) eliminates the exclusion from the deduction limitation for compensation paid after the individual is no longer a covered employee. Under the amended section 162(m) rules, once an individual is identified as a covered employee, the individual continues to be a covered employee, and all compensation paid to that individual is subject to the deduction limitation, even after the individual is no longer employed by the publicly held corporation. As explained in the legislative history, this result was intended.[15]

The commenters' suggestion that section 162(m) does not apply to compensation for services as an independent contractor would lead to uncertainty and administrative burdens for both the taxpayer and the IRS, as well as to the potential for abusive arrangements structured to avoid the application of section 162(m) to covered employees who have terminated employment (or who have purportedly terminated employment). Given that the amendments to section 162(m) no longer limit the deduction disallowance to taxable years in which a covered employee is employed on the last day of the taxable year, and the lack of statutory language or legislative history specifically indicating an intent to restrict the deduction limitation to compensation earned by the individual in the capacity as an employee, the Treasury Department and the IRS have determined that the more appropriate construction of the statutory language defining ''applicable employee remuneration'' is to include all compensation paid to a covered employee regardless of the capacity in which the covered employee performed services to earn that compensation.

[15] House Conf. Rpt. 115–466, 489 (2017).

V. Privately Held Corporations That Become Publicly Held

These final regulations adopt the rules set forth in the proposed regulations providing that, in the case of a privately held corporation that becomes a publicly held corporation, section 162(m) limits the deduction for any compensation that is otherwise deductible for the taxable year ending on or after the date that the corporation becomes a publicly held corporation, and that a corporation is considered to become publicly held on the date that its registration statement becomes effective under the Securities Act or the Exchange Act. These final regulations also adopt the transition relief set forth in the proposed regulations providing that a privately held corporation that becomes a publicly held corporation on or before December 20, 2019, generally may rely on the transition rules provided in § 1.162–27(f)(1) and (2) of the 1995 regulations.[16] In response to a question from a commenter, these final regulations clarify that a subsidiary that is a member of an affiliated group may rely on transition relief provided in § 1.162–27(f)(4) of the 1995 regulations if it becomes a separate publicly held corporation (for example, in a spin-off transaction) on or before December 20, 2019.

Consistent with comments received prior to issuance of the proposed regulations, a commenter suggested that these final regulations should continue to provide transition relief similar to that provided in § 1.162–27(f)(1) and (2) of the 1995 regulations for privately held corporations that become publicly held after December 20, 2019. Those sections of the 1995 regulations were formulated based on the legislative history to the enactment of section 162(m) and were intended to permit a transition period to meet the shareholder approval requirement for qualified performance-based compensation so that the resulting compensation would not be subject to the deduction limitation under section 162(m). TCJA eliminated the exclusion from the definition of compensation for qualified performance-based compensation. Thus, a transition period to accommodate a shareholder approval process is no longer needed. There is no indication in the language of the amended section 162(m) or the legislative history to the amendments that the transition period was intended be extended even though the original basis for its adoption no longer exists. Accordingly, the suggestion is not adopted in these final regulations.

[16] Specifically, a privately held corporation that becomes a publicly held corporation before December 20, 2019, may rely on the transition rules provided in § 1.162–27(f)(1) until the earliest of the events described in § 1.162–27(f)(2). As provided in the 1995 regulations, a corporation that is a member of an affiliated group that includes a publicly held corporation is considered publicly held and, thus, may not rely on the transition relief provided in § 1.162–27(f)(1).

VI. Grandfather Rule

A. In General

Section 13601(e) of TCJA generally provides that the amendments to section 162(m) apply to taxable years beginning after December 31, 2017. However, it further provides that those amendments do not apply to compensation that is payable pursuant to a written binding contract that was in effect on November 2, 2017, and that was not modified in any material respect on or after that date (the grandfather rule).

As discussed in section VI. A of the preamble to the proposed regulations, the text of section 13601(e) of TJCA is almost identical to the text of pre-TCJA section 162(m)(4)(D), which provided a transition rule in connection with the enactment of section 162(m) in 1993 (the 1993 grandfather rule). Under the 1993 grandfather rule, section 162(m) did not apply to compensation payable under a written binding contract that was in effect on February 17, 1993, and that was not modified thereafter in any material respect before the compensation was paid. Section 1.162–27(h) provides guidance on the definitions of written binding contract and material modification for purposes of applying the 1993 grandfather rule. The proposed regulations adopt those definitions for purposes of the grandfather rule under section 13601(e) of TCJA. These final regulations adopt the provisions of the proposed regulations and retain these definitions, including that compensation is payable under a written binding contract that was in effect on November 2, 2017, only to the extent that the corporation is obligated under applicable law to pay the compensation if the employee performs services or satisfies the applicable vesting conditions. Section 162(m), as amended, applies to any amount of compensation that exceeds the amount that applicable law obligates the corporation to pay under a written

binding contract that was in effect on November 2, 2017.

In response to the proposed regulations, a commenter requested that these final regulations adopt a safe harbor based on Generally Acceptable Accounting Principles (GAAP). The same suggestion had been made prior to issuance of the proposed regulations, and section VI. A of the preamble to the proposed regulations describes a number of issues with a GAAP safe harbor and asks for comments on how and whether these issues could be addressed. The commenter did not address any of these issues related to the formulation and application of a GAAP safe harbor. Accordingly, these final regulations do not adopt a GAAP safe harbor rule.

Another commenter suggested a safe harbor that would grandfather an amount of compensation paid pursuant to a compensation arrangement that satisfied three requirements on or before November 2, 2017: (1) The arrangement was memorialized in some form of media (for example, presentation slides or spreadsheet); (2) the arrangement was communicated to its participants (for example, disseminated in hard copy, electronically, or via presentation format); and (3) participants in the arrangement had a reasonable expectation that they were eligible to receive compensation pursuant to the arrangement. This suggested safe harbor would require an intensive facts and circumstances analysis and raise administrability issues about how to determine the participants' expectations regarding the compensation arrangement and whether those expectations were reasonable. Furthermore, the suggested safe harbor arguably is inconsistent with the statutory language that grandfathers an amount of compensation only if the corporation was obligated to pay it under applicable law pursuant to a written binding contract in effect on November 2, 2017, and not, for example, if an employee merely had a reasonable expectation of payment (without regard to the corporation's obligation under applicable law). For these reasons, these final regulations do not adopt this safe harbor.

B. Compensation Subject to Negative Discretion

These final regulations adopt the rule set forth in the proposed regulations providing that a provision in a compensation agreement that purports to provide the employer with the discretion to reduce or eliminate a compensation payment (negative discretion) is taken into account only to the extent the corporation has the right to exercise the negative discretion under applicable law (for example, applicable state contract law). If a compensation arrangement allows the corporation to exercise negative discretion, compensation payable under the arrangement is not grandfathered to the extent the corporation is not obligated to pay it under applicable law.

In response to the proposed regulations, a commenter suggested that negative discretion provisions should be disregarded in determining whether compensation is grandfathered because numerous performance-based compensation arrangements provide corporations with such discretion. However, the practice of including negative discretion provisions in compensation arrangements is based on a well-known and longstanding regulatory provision, and Congress could have provided for a grandfather rule that addressed performance-based compensation arrangements that include a negative discretion provision, but it did not. Instead, the grandfather rule refers only to compensation paid pursuant to a legally binding contract in effect on the transition date. Thus, whether a performance-based compensation arrangement that includes a negative discretion provision is a legally binding contract is determined based on applicable law.

Another commenter suggested that a corporation should be deemed not to have a right to exercise negative discretion if the terms of the agreement provide that the corporation may not exercise this discretion if doing so would result in the payment of compensation that would not be deductible by reason of section 162(m). Whether a compensation agreement that includes a negative discretion provision of this sort would be a written binding contract that permitted the exercise of the negative discretion after the amendments to section 162(m) or rather obligated the employer to pay the compensation because the section 162(m) amendments negated the employer's ability to exercise the negative discretion must be determined based on applicable law. Accordingly, these final regulations do not provide a separate standard for purposes of applying the grandfather rule to compensation agreements that include this type of negative discretion provision (or any other type of negative discretion provision).

C. Recovery of Compensation

The proposed regulations provide that, if the corporation is obligated or has discretion to recover compensation paid in a taxable year only upon the future occurrence of a condition that is objectively outside of the corporation's control, then the corporation's right to recovery is disregarded for purposes of determining the grandfathered amount for the taxable year. The proposed regulations also provide that, if the condition occurs, then only the amount the corporation is obligated to pay under applicable law remains grandfathered, taking into account the occurrence of the condition. After further consideration, the Treasury Department and the IRS recognize that the corporation's right to recover compensation is a contractual right that is separate from the corporation's binding obligation under the contract (as of November 2, 2017) to pay the compensation. Accordingly, these final regulations provide that the corporation's right to recover compensation does not affect the determination of the amount of compensation the corporation has a written binding contract to pay under applicable law as of November 2, 2017, whether or not the corporation exercises its discretion to recover any compensation in the event the condition arises in the future.

D. Account and Nonaccount Balance Plans

The proposed regulations include examples illustrating the application of the grandfather rule to account and nonaccount balance nonqualified deferred compensation (NQDC) plans. In response to comments, these final regulations clarify the application of the grandfather rule to compensation payable under these plans by providing detailed rules and thus eliminate the need to retain certain examples in these final regulations. Specifically, with respect to an account balance plan, these final regulations provide that the grandfathered amount under an account balance plan is the amount that the corporation is obligated to pay pursuant to the terms of the plan as of November 2, 2017, as determined under applicable law. If the corporation is obligated to pay the employee the account balance that is credited with earnings and losses and has no right to terminate or materially amend the contract, then the grandfathered amount would be the account balance as of November 2, 2017, plus any additional contributions and earnings and losses that the corporation is obligated to credit under the plan, through the date of payment. These final regulations provide an analogous rule for nonaccount balance plans.

If the terms of the account balance plan that is a written binding contract

as of November 2, 2017, provide that the corporation may terminate the plan and distribute the account balance to the employee, then the grandfathered amount is the account balance determined as if the corporation had terminated the plan on November 2, 2017, or, if later, the earliest possible date the plan could be terminated (termination date). Furthermore, whether additional contributions and earnings and losses credited to the account balance after the termination date, through the earliest possible date the account balance could have been distributed to the employee, are grandfathered depends on whether the terms of the plan require the corporation to make those contributions or credit those earnings and losses through the earliest possible date the account balance could be distributed if it were terminated as of the termination date. These final regulations provide an analogous rule for nonaccount balance plans.

If the terms of the account balance plan provide that the corporation may not terminate the contract, but may discontinue future contributions to the account balance and distribute the account balance in accordance with the terms of the plan, then the grandfathered amount is the account balance determined as if the corporation had exercised the right to discontinue contributions on November 2, 2017 or, if later, the earliest permissible date the corporation could exercise that right in accordance with the terms of the plan (the freeze date). Furthermore, if the plan required the crediting of earnings and losses on the account balance after the freeze date through the payment date, then those earnings and losses credited to the grandfathered account balance are also grandfathered. These final regulations provide an analogous rule for nonaccount balance plans.

Alternatively, whether the terms of the account balance plan provide that the corporation may terminate the plan or, instead, may discontinue future contributions, the corporation may elect to treat the account balance as of the termination date (or freeze date, if applicable) as the grandfathered amount regardless of when the amount is paid and regardless of whether it has been credited with earnings or losses prior to payment. These final regulations provide an analogous rule for nonaccount balance plans. These final regulations adopt this alternative grandfather rule that disregards earnings and losses in order to minimize the administrative burden of tracking the earnings, losses and new contributions (if made) on an account balance plan or the increase or decrease in a nonaccount balance benefit after November 2, 2017. With respect to an account balance plan, the Treasury Department and IRS understand that this grandfather rule may result in contributions made after November 2, 2017, not being subject to the section 162(m) limitation if the contributions offset losses; however, the Treasury Department and IRS concluded that under many common arrangements the continuous separate tracking of earnings, losses, and contributions on the November 2, 2017, account balance through the payment date would be burdensome to administer while having a limited, if any, impact on the available deduction.

E. Ordering Rule for Payments Consisting of Grandfathered and Non-Grandfathered Amounts Deductible for Taxable Years Ending Prior to December 20, 2019

These final regulations adopt the ordering rule set forth in the proposed regulations for identifying the grandfathered amount when payment under a grandfathered arrangement is made in a series of payments. Pursuant to the ordering rule, the grandfathered amount is allocated to the first otherwise deductible payment paid under the arrangement. If the grandfathered amount exceeds the payment, then the excess is allocated to the next otherwise deductible payment paid under the arrangement. This process is repeated until the entire grandfathered amount has been paid.

For example, assume an employer maintains a nonaccount balance NQDC plan (payable as an annuity) as of November 2, 2017, and that the grandfathered amount is $2,000,000. Further assume that additional benefits accrue under the plan after November 2, 2017, with the result that the employee's benefit is payable as an annual annuity of $1,500,000 commencing at the employee's retirement for the employee's life. Under these final regulations, the entire $1,500,000 paid in the first year is grandfathered. In the second year, only $500,000 of the $1,500,000 payment is grandfathered; the remaining $1,000,000 paid in the second year is not grandfathered. For subsequent taxable years, none of the $1,500,000 payments are grandfathered.

A commenter suggested that for payments otherwise deductible for taxable years ending prior to the date the proposed regulations were published (December 20, 2019), it would be a reasonable good faith interpretation of the statute if the grandfathered amount were allocated to the last otherwise deductible payment or to each payment on a pro rata basis. The Treasury Department and the IRS agree and these final regulations permit the grandfathered amount to be allocated to the last otherwise deductible payment or to each payment on a pro rata basis for taxable years ending before December 20, 2019. However, these final regulations provide that the ordering rule requiring the grandfathered amount to be allocated to the first otherwise deductible payment paid under the arrangement must be used for taxable years ending on or after December 20, 2019, regardless of the method used to allocate the grandfathered amount for taxable years ending prior to that date.

F. Grandfathered Amount Limited to a Particular Plan or Arrangement

These final regulations provide that the grandfathered amount payable under a plan or arrangement applies solely to the amounts paid under that plan or arrangement. Regardless of whether all of the grandfathered amount is paid to the employee, no portion of that grandfathered amount may be treated as a grandfathered amount under any other separate plan or arrangement in which the employee is a participant. If, for example, all or a portion of a grandfathered amount is forfeited because the employee died before being paid the entire amount, then any unpaid portion of the grandfathered amount may not be applied as a grandfathered amount to payments under any other separate plan or arrangement in which the employee participated.

G. Material Modification

1. In General

These final regulations adopt the rules set forth in the proposed regulations related to material modifications. A material modification occurs when a contract is amended to increase the amount of compensation payable to the employee. If a written binding contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Accordingly, if a contract is materially modified, amounts received by an employee under the contract before the material modification are not affected, but amounts received after the material modification are treated as paid pursuant to a new contract, rather than as grandfathered. The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, results in a material modification if the facts and

circumstances demonstrate that the compensation under the supplement is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract.

If a written binding contract in effect on November 2, 2017, is subsequently modified to defer the payment of compensation, any compensation paid or to be paid that is in excess of the amount that was originally payable to the employee under the contract will not be treated as resulting in a material modification if the additional amount is based on either a reasonable rate of interest or a predetermined actual investment (whether or not assets associated with the original amount are actually invested therein) such that the amount payable by the employer at the later date will be based on the rate of interest or the actual rate of return on the investment (including any decrease, as well as any increase, in the value of the investment). However, the additional amount paid will not be treated as a grandfathered amount. Additionally, a modification of the contract after November 2, 2017, to offer an additional or substitute a predetermined actual investment as an investment alternative under the arrangement is not a material modification.

A commenter suggested that these final regulations provide that the deferral of a grandfathered amount after November 2, 2017, but prior to September 10, 2018 (the publication date of Notice 2018–68), is not a material modification even if the earnings on the deferred amount are not based on either a reasonable rate of interest or a predetermined actual investment because taxpayers were not aware prior to the publication of the notice that this deferral would constitute a material modification. The grandfather rule described in section 13601(e) of TCJA and its legislative history, including the definition and the resulting impact of a material modification, is almost identical to the statutory language and legislative history to the grandfather rule provided when section 162(m) was enacted in 1993. The 1995 final regulations interpreting the original grandfather rule in the 1993 legislation provided that a deferral of payment of compensation will not be treated as a material modification if any additional amount paid were determined based on a reasonable rate of interest or one or more predetermined actual investments, and there is no indication in the grandfather rule in section 13601 of TCJA or its legislative history of an intent to adopt a different grandfather rule.[17] Therefore, these final regulations do not adopt the commenter's suggestion.

2. Extension of an Exercise Period for a Non-Statutory Stock Option

Commenters asked if extending the exercise period for a non-statutory stock option [18] is a material modification. The grandfather rule in the proposed regulations provides that compensation attributable to the exercise of an option is grandfathered only if, as of November 2, 2017, pursuant to terms of the option and under applicable law, the employer is obligated to transfer the option's underlying shares of stock to the employee upon exercise of the option.

The Treasury Department and the IRS recognize that, for bona fide business reasons, an employer may want to extend an exercise period of a stock option or a stock appreciation right (SAR). This often occurs when a stock option or SAR grant agreement provides that the exercise period will terminate immediately or within a short period following the employee's separation from service, but the employer later decides to waive that termination or otherwise extend the exercise period for some period of time upon the employee's separation from service. These concerns led to treating certain extensions of stock options or SARs as not being material modifications in the regulations under section 409A. For the same reasons, these final regulations incorporate the section 409A regulatory provisions and provide that, if compensation attributable to the exercise of a non-statutory stock option or a SAR is grandfathered and the exercise period of the option or SAR is extended, then all compensation attributable to the exercise of the option or the SAR is grandfathered if the extension complies with § 1.409A–1(b)(5)(v)(C)(*1*).[19]

VII. Coordination With Section 409A

Section 409A addresses NQDC arrangements and sets forth certain requirements that must be met to avoid current income inclusion, a 20% additional income tax on the amount includible in income per section 409A(a)(1)(B)(i)(II), and a second additional income tax based on the tax benefit received due to the deferral per section 409A(a)(1)(B)(i)(I). Recognizing that the TCJA amendments to section 162(m) required coordination with the section 409A rules in certain circumstances, the preamble to the proposed regulations provided that certain modifications would be made to the regulations under section 409A and that taxpayers may rely on the preamble until this guidance is issued. Commenters suggested additional modifications to the rules and regulations under section 409A to provide further coordination between sections 162(m) and 409A. Until guidance under section 409A is issued, taxpayers may continue to rely on the preamble to the proposed regulations. The Treasury Department and the IRS will continue to consider whether additional guidance under section 409A is appropriate.

VIII. Applicability Dates

A. General Applicability Date

Generally, these final regulations apply to taxable years beginning on or after December 30, 2020. However, taxpayers may choose to apply these final regulations to a taxable year beginning after December 31, 2017, provided the taxpayer applies these final regulations in their entirety and in a consistent manner to that taxable year and all subsequent taxable years. See section 7805(b)(7). Like the proposed regulations, these final regulations generally do not expand the definition of ''covered employee'' as provided in Notice 2018–68 and do not narrow the application of the definition of ''written binding contract'' as provided in Notice 2018–68. With respect to the limited number of changes that do affect these definitions, a special applicability date has been provided as described in section VIII.B of this preamble. Accordingly, taxpayers may not rely on Notice 2018–68 for taxable years ending on or after December 20, 2019, the publication date of the proposed regulations.

[17] Section 1.162–27(h)(iii)(B) provides that if the contract is modified to defer the payment of compensation, any compensation paid in excess of the amount that was originally payable to the employee under the contract will not be treated as a material modification if the additional amount is based on either a reasonable rate of interest or one or more predetermined actual investments (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the actual rate of return of the specific investment (including any decrease as well as any increase in the value of the investment).

[18] A non-statutory stock option is an option other than an incentive stock option described in section 422 or a stock option granted under an employee stock purchase plan described in section 423.

[19] Section 1.409A–1(b)(5)(v)(C)(*1*) describes the following requirements for an extension: (1) At the time of the extension, the exercise price is greater than the underlying stock's fair market value and (2) the exercise period is extended to a date no later than the earlier of the latest date upon which the stock right could have expired by its original terms or the 10th anniversary of the original date of grant.

B. Special Applicability Dates

These final regulations include special applicability dates covering certain aspects of the following provisions of these final regulations:

1. Definition of covered employee.
2. Definition of predecessor of a publicly held corporation.
3. Definition of compensation.
4. Application of section 162(m) to a deduction for compensation otherwise deductible for a taxable year ending on or after a privately held corporation becomes a publicly held corporation.
5. Definitions of written binding contract and material modification.

First, the definition of covered employee applies to taxable years ending on or after September 10, 2018, the publication date of Notice 2018–68, which provided guidance on the definition of covered employee. Notice 2018–68 also provided that the Treasury Department and the IRS anticipate that the guidance in the notice will be incorporated into future regulations that, with respect to the issues addressed in the notice, will apply to any taxable year ending on or after September 10, 2018. These final regulations adopt the definition of covered employee in Notice 2018–68 as anticipated, and accordingly the definition of covered employee in these final regulations applies to taxable years ending on or after September 10, 2018. The Treasury Department and the IRS recognize, however, that the rules under § 1.162–33(c)(2)(i)(B), related to a corporation whose fiscal year and taxable year do not end on the same date, were not addressed in Notice 2018–68 but were discussed initially in the proposed regulations. Accordingly, these final regulations provide that, for a corporation the fiscal and taxable years of which do not end on the same date, the rule requiring the determination of the three most highly compensated executive officers to be made pursuant to the rules under the Exchange Act applies to taxable years ending on or after December 20, 2019.

Second, the provisions defining a predecessor corporation of a publicly held corporation apply to corporate transactions that occur on or after December 30, 2020. These final regulations also include a special applicability date for corporations that change from being a publicly held corporation to a privately held corporation, and, later, back to a publicly held corporation on or after December 30, 2020.

If a corporate transaction occurs before December 30, 2020, then taxpayers may apply either the definition of predecessor of a publicly held corporation in § 1.162–33(c)(2)(ii) of these final regulations or a reasonable good faith interpretation of the term ''predecessor'' in section 162(m)(3)(C) with respect to such transaction. However, with respect to any of the following corporate transactions occurring after December 20, 2019, and before December 30, 2020, excluding target corporations from the definition of the term ''predecessor'' is not a reasonable good faith interpretation of the statute: (1) A publicly held target corporation the stock or assets of which are acquired by another publicly held corporation in a transaction to which section 381(a) applies, and (2) a publicly held target corporation, at least 80% of the total voting power of the stock of which, and at least 80% of the total value of the stock of which, are acquired by a publicly held acquiring corporation (including an affiliated group). No inference is intended regarding whether the treatment of a target corporation as other than a ''predecessor'' in any other situation is a reasonable good faith interpretation of the statute.

Third, as discussed in section IV.B. of this preamble, these final regulations modify the proposed applicability date for the definition of compensation under § 1.162–33(c)(3)(ii). Under these final regulations, the definition of compensation under § 1.162–33(c)(3)(ii) includes an amount equal to the publicly held corporation's distributive share of a partnership's deduction for compensation expense only if the deduction is attributable to compensation paid by the partnership after December 18, 2020 (the date that these final regulations were made publicly available on the IRS website at *http://www.irs.gov*). However, these final regulations continue to provide a transition rule so that this aspect of the definition of compensation related to the distributive share of a partnership's deduction for compensation expense does not apply to compensation paid after December 30, 2020 if the compensation is paid pursuant to a written binding contract that is in effect on December 20, 2019, and that is not materially modified after that date.

Fourth, the guidance on the applicability of section 162(m)(1) to the deduction for any compensation otherwise deductible for a taxable year ending on or after the date when a corporation becomes a publicly held corporation applies to corporations that become publicly held after December 20, 2019. A corporation that was not a publicly held corporation and then becomes a publicly held corporation on or before December 20, 2019, may rely on the transition relief provided in § 1.162–27(f)(1) until the earliest of the events provided in § 1.162–27(f)(2). Furthermore, a subsidiary corporation that is a member of an affiliated group (as defined in § 1.162–27(c)(1)(ii)) may rely on the transition relief provided in § 1.162–27(f)(4) if it becomes a separate publicly held corporation (whether in a spin-off transaction or otherwise) on or before December 20, 2019.

Fifth, the definitions of written binding contract and material modification in these final regulations apply to taxable years ending on or after September 10, 2018, the publication date of Notice 2018–68, which provided guidance defining these terms. Notice 2018–68 also provided that the Treasury Department and IRS anticipated that the guidance in the notice would be incorporated into future regulations that, with respect to the issues addressed in the notice, would apply to any taxable year ending on or after September 10, 2018. Because these final regulations adopt the definitions of the terms ''written binding contract'' and ''material modification'' that were included in Notice 2018–68, the guidance on these definitions in these final regulations applies to taxable years ending on or after September 10, 2018.

Effect on Other Documents

Section 4.01(13) of Revenue Procedure 2020–3, 2020–1 I.R.B. 131 (providing that ''[w]hether the deduction limit under § 162(m) applies to compensation attributable to services performed for a related partnership'' is an area in which rulings or determination letters will not ordinarily be issued) is obsolete as of December 30, 2020.

Statement of Availability of IRS Documents

The IRS Notices, Revenue Rulings, and Revenue Procedures cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov.*

Special Analyses

I. Regulatory Planning and Review

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that these final regulations would not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that section 162(m)(1) applies only to publicly held corporations (for example, corporations that list securities on a national securities exchange and are rarely small entities) and only impacts those publicly held corporations that compensate certain executive officers in excess of $1 million in a taxable year. Pursuant to section 7805(f), the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private section, of $100 million in 1995 dollars, update annually for inflation. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private section in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Drafting Information

The principal author of these regulations is Ilya Enkishev, Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the Treasury Department and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.162–27 is amended by revising the section heading and paragraphs (a) and (j)(1) to read as follows:

§ 1.162–27 Certain employee remuneration in excess of $1,000,000 not deductible for taxable years beginning on or after January 1, 1994, and for taxable years beginning prior to January 1, 2018.

(a) *Scope.* This section provides rules for the application of the $1 million deduction limitation under section 162(m)(1) for taxable years beginning on or after January 1, 1994, and beginning prior to January 1, 2018, and, as provided in paragraph (j) of this section, for taxable years beginning after December 31, 2017. For rules concerning the applicability of section 162(m)(1) to taxable years beginning after December 31, 2017, see § 1.162–33. Paragraph (b) of this section provides the general rule limiting deductions under section 162(m)(1). Paragraph (c) of this section provides definitions of generally applicable terms. Paragraph (d) of this section provides an exception from the deduction limitation for compensation payable on a commission basis. Paragraph (e) of this section provides an exception for qualified performance-based compensation. Paragraphs (f) and (g) of this section provide special rules for corporations that become publicly held corporations and payments that are subject to section 280G, respectively. Paragraph (h) of this section provides transition rules, including the rules for contracts that are grandfathered and not subject to section 162(m)(1). Paragraph (j) of this section contains the effective date provisions, which also specify when these rules apply to the deduction for compensation otherwise deductible in a taxable year beginning after December 31, 2017. For rules concerning the deductibility of compensation for services that are not covered by section 162(m)(1) and this section, see section 162(a)(1) and § 1.162–7. This section is not determinative as to whether compensation meets the requirements of section 162(a)(1). For rules concerning the deduction limitation under section 162(m)(6) applicable to certain health insurance providers, see § 1.162–31.

* * * * *

(j) * * *

(1) *In general.* Section 162(m) and this section apply to the deduction for compensation that is otherwise deductible by the corporation in taxable years beginning on or after January 1, 1994, and beginning prior to January 1, 2018. Section 162(m) and this section also apply to compensation that is a grandfathered amount (as defined in § 1.162–33(g)) at the time it is paid to the covered employee or otherwise deductible. For examples of the application of the rules of this section to grandfathered amounts paid during or otherwise deductible for taxable years beginning after December 31, 2017, see § 1.162–33(g).

* * * * *

■ **Par. 3.** Section 1.162–33 is added to read as follows:

§ 1.162–33 Certain employee remuneration in excess of $1,000,000 not deductible for taxable years beginning after December 31, 2017.

(a) *Scope.* This section provides rules for the application of the $1 million deduction limitation under section 162(m)(1) for taxable years beginning after December 31, 2017. For rules concerning the applicability of section 162(m)(1) to taxable years beginning on or after January 1, 1994, and prior to January 1, 2018, see § 1.162–27. Paragraph (b) of this section provides the general rule limiting deductions under section 162(m)(1). Paragraph (c) of this section provides definitions of generally applicable terms. Paragraph (d) of this section provides rules for determining when a corporation becomes a publicly held corporation. Paragraph (e) of this section provides rules for payments that are subject to section 280G (golden parachute payments). Paragraph (f) of this section provides a special rule for coordination with section 4985 (stock compensation of insiders in expatriated corporations). Paragraph (g) of this section provides transition rules addressing the amendments made by Public Law 115–97, including the rules for contracts that are grandfathered. Paragraph (h) of this section sets forth the effective date provisions. For rules concerning the deductibility of compensation for services that are not covered by section 162(m)(1) and this section, see section 162(a)(1) and § 1.162–7. This section is not determinative as to whether compensation meets the requirements of section 162(a)(1). For rules concerning

the deduction limitation under section 162(m)(6) applicable to certain health insurance providers, see § 1.162–31. For purposes of this section, references to an amount being paid to an employee refer to the event that otherwise would result in the availability of a deduction to the employer with respect to such amount, whether that results from an actual payment in cash, transfer of property, or other event.

(b) *Limitation on deduction.* Section 162(m)(1) precludes a deduction under chapter 1 of the Internal Revenue Code by any publicly held corporation for compensation paid to any covered employee to the extent that the compensation for the taxable year exceeds $1,000,000.

(c) *Definitions*—(1) *Publicly held corporation*—(i) *General rule.* A publicly held corporation means any corporation that issues securities required to be registered under section 12 of the Exchange Act or that is required to file reports under section 15(d) of the Exchange Act. In addition, a publicly held corporation means any S corporation (as defined in section 1361(a)(1)) that issues securities that are required to be registered under section 12(b) of the Exchange Act, or that is required to file reports under section 15(d) of the Exchange Act. For purposes of this section, whether a corporation is publicly held is determined based solely on whether, as of the last day of its taxable year, the securities issued by the corporation are required to be registered under section 12 of the Exchange Act or the corporation is required to file reports under section 15(d) of the Exchange Act. Whether registration under the Exchange Act is required by rules other than those of the Exchange Act is irrelevant to this determination. A publicly traded partnership that is treated as a corporation under section 7704 (or otherwise) is a publicly held corporation if, as of the last day of its taxable year, its securities are required to be registered under section 12 of the Exchange Act or it is required to file reports under section 15(d) of the Exchange Act.

(ii) *Affiliated groups*—(A) *In general.* A publicly held corporation includes an affiliated group of corporations (affiliated group), as defined in section 1504 (determined without regard to section 1504(b)), that includes one or more publicly held corporations (as defined in paragraph (c)(1)(i) of this section). In the case of an affiliated group that includes two or more publicly held corporations as defined in paragraph (c)(1)(i) of this section, each member of the affiliated group that is a publicly held corporation as defined in paragraph (c)(1)(i) of this section is separately subject to this section, and, due to having at least one member that is a publicly held corporation, the affiliated group as a whole is subject to this section. Thus, for example, assume that a publicly held corporation (as defined in paragraph (c)(1)(i) of this section) is a wholly-owned subsidiary of another publicly held corporation (as defined in paragraph (c)(1)(i) of this section), which is a wholly-owned subsidiary of a privately held corporation. In this case, the two subsidiaries are separately subject to this section, and all three corporations are members of an affiliated group that is subject to this section. If an individual is a covered employee of both subsidiaries, each subsidiary has its own $1 million deduction limitation with respect to that covered employee. Furthermore, each subsidiary has its own set of covered employees as defined in paragraphs (c)(2)(i) through (iv) of this section (although the same individual may be a covered employee of both subsidiaries).

(B) *Proration of amount disallowed as a deduction.* If, in a taxable year, a covered employee (as defined in paragraphs (c)(2)(i) through (v) of this section) of one member of an affiliated group is paid compensation by more than one member of the affiliated group, compensation paid by each member of the affiliated group is aggregated with compensation paid to the covered employee by all other members of the affiliated group (excluding compensation paid by any other publicly held corporation in the affiliated group, as defined in paragraph (c)(1)(i) of this section, of which the individual is also a covered employee as defined in paragraphs (c)(2)(i) through (v) of this section). In the event that, in a taxable year, a covered employee (as defined in paragraphs (c)(2)(i) through (v) of this section) is paid compensation by more than one publicly held corporation in an affiliated group and is also a covered employee of more than one publicly held payor corporation (as defined in paragraph (c)(1)(i) of this section) in the affiliated group, the amount disallowed as a deduction is determined separately with respect to each publicly held corporation of which the individual is a covered employee. Any amount disallowed as a deduction by this section must be prorated among the payor corporations (excluding any other publicly held payor corporation of which the individual is also a covered employee) in proportion to the amount of compensation paid to the covered employee (as defined in paragraphs (c)(2)(i) through (v) of this section) by each such corporation in the taxable year. For purposes of this paragraph (c)(1)(ii)(B), the amount of compensation treated as paid by a payor corporation that is not a publicly held corporation (as defined in paragraph (c)(1)(i) of this section) is determined by prorating the amount actually paid by that payor corporation in proportion to the total amount paid by all of the publicly held corporations of which the individual is a covered employee (as defined in paragraph (c)(2)(i) through (v) of this section). This process is repeated for each publicly held payor corporation of which the individual is a covered employee.

(iii) *Disregarded entities.* For purposes of paragraph (c)(1) of this section, a publicly held corporation includes a corporation that owns an entity that is disregarded as an entity separate from its owner within the meaning of § 301.7701–2(c)(2)(i) of this chapter if the disregarded entity issues securities required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act.

(iv) *Qualified subchapter S subsidiaries.* For purposes of paragraph (c)(1) of this section, a publicly held corporation includes an S corporation that owns a qualified subchapter S subsidiary as defined in section 1361(b)(3)(B) (QSub) if the QSub issues securities required to be registered under section 12(b) of the Exchange Act, or is required to file reports under section 15(d) of the Exchange Act.

(v) *Qualified real estate investment trust subsidiaries.* For purposes of paragraph (c)(1) of this section, a publicly held corporation includes a real estate investment trust as defined in section 856(a) that owns a qualified real estate investment trust subsidiary as defined in section 856(i)(2) (QRS), if the QRS issues securities required to be registered under section 12(b) of the Exchange Act or is required to file reports under section 15(d) of the Exchange Act.

(vi) *Examples.* The following examples illustrate the provisions of this paragraph (c)(1). For each example, assume that no corporation is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii) of this section. Furthermore, for each example, unless provided otherwise, a reference to a publicly held corporation means a publicly held corporation as defined in paragraph (c)(1)(i) of this section. Additionally, for each example, assume that the corporation is a calendar-year taxpayer and has a fiscal year ending

December 31 for reporting purposes under the Exchange Act. The examples in this paragraph (c)(1)(vi) are not intended to provide guidance on the legal requirements of the Securities Act and Exchange Act and the rules thereunder (17 CFR part 240).

(A) *Example 1 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* Corporation Z plans to issue debt securities in a public offering registered under the Securities Act. Corporation Z is not required to file reports under section 15(d) of the Exchange Act for any other class of securities and does not have another class of securities required to be registered under section 12 of the Exchange Act. On April 1, 2021, the SEC declares effective the Securities Act registration statement for Corporation Z's debt securities. As a result, Corporation Z is required to file reports under section 15(d) of the Exchange Act, and this requirement continues to apply as of December 31, 2021.

(*2*) *Conclusion.* Corporation Z is a publicly held corporation for its 2021 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(B) *Example 2 (Corporation not required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(A) of this section (*Example 1*), except that, on January 1, 2022, pursuant to section 15(d) of the Exchange Act, Corporation Z's obligation to file reports under section 15(d) is automatically suspended for the fiscal year ending December 31, 2022, because Corporation Z meets the statutory requirements for an automatic suspension. As of December 31, 2022, Corporation Z is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation Z is not a publicly held corporation for its 2022 taxable year because it is not required to file reports under section 15(d) of the Exchange Act as of as of the last day of its taxable year.

(C) *Example 3 (Corporation not required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(B) of this section (*Example 2*), except that, on January 1, 2022, pursuant to section 15(d) of the Exchange Act, Corporation Z's obligation to file reports under section 15(d) is not automatically suspended for the fiscal year ending December 31, 2022. Instead, on May 2, 2022, Corporation Z is eligible to suspend its section 15(d) reporting obligation under 17 CFR 240.12h–3 (Rule 12h–3 under the Exchange Act) and files Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934, (or its successor) to suspend its section 15(d) reporting obligation for its fiscal year ending December 31, 2022. As of December 31, 2022, Corporation Z is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation Z is not a publicly held corporation for its 2022 taxable year because it is not required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year. If Corporation Z had not utilized Rule 12h–3 to suspend its section 15(d) reporting obligation, Corporation Z would be a publicly held corporation for its 2022 taxable year because it would have been required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(D) *Example 4 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* Corporation Y is a wholly-owned subsidiary of Corporation X, which is required to file reports under the Exchange Act. Corporation Y issued a class of debt securities in a public offering registered under the Securities Act, and therefore is required to file reports under section 15(d) of the Exchange Act for its fiscal year ending December 31, 2020. Corporation Y has no other class of securities registered under the Exchange Act. In its Form 10–K, Annual Report Pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, (or its successor) for the 2020 fiscal year, Corporation Y may omit Item 11, Executive Compensation (required by Part III of Form 10–K), which requires disclosure of compensation of certain executive officers, because it is wholly-owned by Corporation X and the other conditions of General Instruction I to Form 10–K are satisfied.

(*2*) *Conclusion.* Corporation Y is a publicly held corporation for its 2020 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(E) *Example 5 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* Corporation A has a class of securities registered under section 12(g) of the Exchange Act. For its 2020 taxable year, Corporation A is a publicly held corporation. On September 30, 2021, Corporation A is eligible to terminate the registration of its securities under section 12(g) of the Exchange Act pursuant to 17 CFR 240.12g–4(a)(2) (Rule 12g–4(a)(2) under the Exchange Act), but does not terminate the registration of its securities prior to December 31, 2021. Because Corporation A did not issue securities in a public offering registered under the Securities Act, Corporation A is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation A is not a publicly held corporation for its 2021 taxable year because, as of the last day of its taxable year, the securities issued by Corporation A are not required to be registered under section 12 of the Exchange Act and Corporation A is not required to file reports under section 15(d) of the Exchange Act.

(F) *Example 6 (Corporation required to file reports under section 15(d) of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(E) of this section (*Example 5*), except that Corporation A previously issued a class of securities in a public offering registered under the Securities Act. Furthermore, on October 1, 2021, Corporation A terminates the registration of its securities under section 12(g) of the Exchange Act. Because Corporation A issued a class of securities in a public offering registered under the Securities Act and is not eligible to suspend its reporting obligation under section 15(d) of the Exchange Act, as of December 31, 2021, Corporation A is required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation A is a publicly held corporation for its 2021 taxable year because it is required to file reports under section 15(d) of the Exchange Act as of the last day of its taxable year.

(G) *Example 7 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* On November 1, 2021, Corporation B is an issuer with only one class of equity securities. On November 5, 2021, Corporation B files a registration statement for its equity securities under section 12(g) of the Exchange Act. Corporation B's filing of its registration statement is voluntary because the Exchange Act does not require Corporation B to register its class of securities under section 12(g) of the Exchange Act based on the number and composition of its record holders. On December 1, 2021, the SEC declares effective the Exchange Act registration statement for Corporation B's securities. As of December 31, 2021, Corporation B continues to have its class of equity securities registered voluntarily under section 12 of the Exchange Act. Corporation B is not required to file reports under section 15(d) of the Exchange Act because it did not register any class of securities in a public offering under the Securities Act.

(*2*) *Conclusion.* Corporation B is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities issued by Corporation B are not required to be registered under section 12 of the Exchange Act and Corporation B is not required to file reports under section 15(d) of the Exchange Act.

(H) *Example 8 (Corporation not required to file reports under section 15(d) of the Exchange Act and not required to register securities under section 12 of the Exchange Act)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(G) of this section (*Example 7*), except that, on December 31, 2022, because of a change in circumstances, Corporation B must register its class of equity securities under section 12(g) of the Exchange Act within 120 days of December 31, 2022. On February 1, 2023, the SEC declares effective the Exchange Act registration statement for Corporation B's securities.

(*2*) *Conclusion.* Corporation B is not a publicly held corporation for its 2022 taxable year because, as of the last day of that taxable year, Corporation B is not required to file reports under section 15(d) of the Exchange Act and the class of equity securities issued by Corporation B is not yet required to be registered under section 12 of the Exchange Act.

(I) *Example 9 (Securities of foreign private issuer in the form of ADRs traded in the over-the-counter market)*—(*1*) *Facts.* For its fiscal

and taxable years ending December 31, 2021, Corporation W is a foreign private issuer. Because Corporation W has not registered an offer or sale of securities under the Securities Act, it is not required to file reports under section 15(d) of the Exchange Act. Corporation W qualifies for an exemption from registration of its securities under section 12(g) of the Exchange Act pursuant to 17 CFR 240.12g3–2(b) (Rule 12g3–2(b) under the Exchange Act). Corporation W wishes to have its securities traded in the U.S. in the over-the-counter market in the form of ADRs. Because Corporation W qualifies for an exemption pursuant to Rule 12g3–2(b), Corporation W is not required to register its securities underlying the ADRs under section 12 of the Exchange Act; however, the depositary bank is required to register the ADRs under the Securities Act. Even though the depositary bank is required to register the ADRs under the Securities Act, the registration of the ADRs does not result in either the depositary bank or Corporation W being required to file reports under section 15(d) of the Exchange Act. On February 3, 2021, the SEC declares effective the Securities Act registration statement for the ADRs. On February 4, 2021, Corporation W's ADRs begin trading in the over-the-counter market. On December 31, 2021, the securities of Corporation W are not required to be registered under section 12 of the Exchange Act because Corporation W qualifies for an exemption pursuant to Rule 240.12g3–2(b). Furthermore, on December 31, 2021, Corporation W is not required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporation W is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities underlying the ADRs are not required to be registered under section 12 of the Exchange Act and Corporation W is not required to file reports under section 15(d) of the Exchange Act. The result would be the same if Corporation W had its securities traded in the over-the-counter market other than in the form of ADRs.

(J) *Example 10 (Securities of foreign private issuer in the form of ADRs quoted on Over the Counter Bulletin Board)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(I) of this section (*Example 9*), except that Corporation W has its securities quoted on the Over the Counter Bulletin Board (OTCBB) in the form of ADRs. Because Corporation W qualifies for an exemption pursuant to 17 CFR 240.12g3–2(b) (Rule 12g3–2(b) under the Exchange Act), Corporation W is not required to register its securities underlying the ADRs under section 12 of the Exchange Act. However, the depositary bank is required to register the ADRs under the Securities Act. In addition, section 6530(b)(1) of the OTCBB Rules requires that a foreign equity security may be quoted on the OTCBB only if the security is registered with the SEC pursuant to section 12 of the Exchange Act and the issuer of the security is current in its reporting obligations. To comply with the OTCBB Rules, on February 5, 2021, Corporation W files a registration statement for its class of securities underlying the ADRs under section 12(g) of the Exchange Act. On February 26, 2021, the SEC declares effective the Exchange Act registration statement for Corporation W's securities. As of December 31, 2021, Corporation W is subject to the reporting obligations under section 12 of the Exchange Act as a result of the section 12 registration.

(*2*) *Conclusion.* Corporation W is not a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, its ADRs and the securities underlying the ADRs are not required by the Exchange Act to be registered under section 12 and Corporation W is not required to file reports under section 15(d) of the Exchange Act. The Securities Act requirement applicable to the bank pursuant to the OTCBB rules is irrelevant. The result would be the same if Corporation W had its securities traded on the OTCBB other than in the form of ADRs.

(K) *Example 11 (Securities of foreign private issuer in the form of ADRs listed on a national securities exchange without a capital raising transaction)*—(*1*) *Facts.* For its fiscal and taxable years ending December 31, 2021, Corporation V is a foreign private issuer. Corporation V wishes to list its securities on the New York Stock Exchange (NYSE) in the form of ADRs without a capital raising transaction. Under the Exchange Act, Corporation V is required to register its securities underlying the ADRs under section 12(b) of the Exchange Act. Because the ADRs and the deposited securities are separate securities, the depositary bank is required to register the ADRs under the Securities Act. On February 2, 2021, the SEC declares effective Corporation V's registration statement under section 12(b) of the Exchange Act in connection with the underlying securities, and the depositary bank's registration statement under the Securities Act in connection with the ADRs. On March 1, 2021, Corporation V's securities begin trading on the NYSE in the form of ADRs. As of December 31, 2021, Corporation V is not required to file reports under section 15(d) of the Exchange Act; however, the securities underlying the ADRs are required to be registered under section 12(b) of the Exchange Act.

(*2*) *Conclusion.* Corporation V is a publicly held corporation for its 2021 taxable year because, as of the last day of that taxable year, the securities underlying the ADRs are required to be registered under section 12 of the Exchange Act. The result would be the same if Corporation V had its securities listed on the NYSE other than in the form of ADRs. The result also would be the same if Corporation V had wished to raised capital during its 2021 taxable year and been required to register the offer of securities underlying the ADRs under the Securities Act and to register the class of those securities under section 12(b) of the Exchange Act, and the depositary bank was required to register the ADRs under the Securities Act.

(L) *Example 12 (Foreign private issuer incorporates subsidiary in the United States to issue debt securities and subsequently issues a guarantee)*—(*1*) *Facts.* For its fiscal and taxable years ending December 31, 2021, Corporation T is a foreign private issuer. Corporation T wishes to access the U.S. capital markets. Corporation T incorporates Corporation U, a wholly-owned subsidiary, in the U.S. to issue debt securities. On January 15, 2021, the SEC declares effective Corporation U's Securities Act registration statement. To enhance Corporation U's credit and the marketability of Corporation U's debt securities, Corporation T issues a guarantee of Corporation U's securities and, as required, registers the guarantee under the Securities Act on Corporation U's registration statement. On December 31, 2021, Corporations T and U are required to file reports under section 15(d) of the Exchange Act.

(*2*) *Conclusion.* Corporations T and U are publicly held corporations for their 2021 taxable years because they are required to file reports under section 15(d) of the Exchange Act as of the last day of their taxable years.

(M) *Example 13 (Affiliated group comprised of two corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* Employee D, a covered employee of Corporation N, receives compensation from, Corporations N and O, members of an affiliated group. Corporation N, the parent corporation, is a publicly held corporation. Corporation O is a direct subsidiary of Corporation N and is a privately held corporation. The total compensation paid to Employee D from the affiliated group members is $3,000,000 for the taxable year, of which Corporation N pays $2,100,000 and Corporation O pays $900,000.

(*2*) *Conclusion.* Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m)(1), $2,000,000 of the aggregate compensation paid is nondeductible. Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation. Thus, two thirds of each corporation's payment will be nondeductible. Corporation N has a nondeductible compensation expense of $1,400,000 ($2,100,000 × $2,000,000/$3,000,000). Corporation O has a nondeductible compensation expense of $600,000 ($900,000 × $2,000,000/$3,000,000).

(N) *Example 14 (Affiliated group comprised of two corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(M) of this section (*Example 13*), except that Corporation O is a publicly held corporation, Corporation N is a privately held corporation, and Employee D is a covered employee of Corporation O (instead of Corporation N).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(M) of this section (*Example 13*). Even though subsidiary Corporation O is the publicly held corporation, Corporations N and O still comprise an affiliated group. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible, and Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation.

(O) *Example 15 (Affiliated group comprised of two publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(M) of this section (*Example 13*), except that Corporation O is a publicly held corporation. As in paragraph (c)(1)(vi)(M) of this section

(*Example 13*), Employee D is not a covered employee of Corporation O.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(M) of this section (*Example 13*). Even though Corporations N and O each are publicly held corporations, Corporations N and O comprise an affiliated group for purposes of prorating the amount disallowed as a deduction. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible, and Corporations N and O each are treated as paying a ratable portion of the nondeductible compensation.

(P) *Example 16 (Affiliated group comprised of two publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(O) of this section (*Example 15*), except that Employee D also is a covered employee of Corporation O.

(*2*) *Conclusion.* Corporations N and O each are publicly held corporations and separately subject to this section, but also comprise an affiliated group. Because Employee D is a covered employee of both Corporations N and O, each of which is a separate publicly held corporation, the determination of the amount disallowed as a deduction is made separately for each publicly held corporation. Corporation N has a nondeductible compensation expense of $1,100,000 (the excess of $2,100,000 over $1,000,000), and Corporation O has no nondeductible compensation expense because the amount it paid to Employee D did not exceed $1,000,000.

(Q) *Example 17 (Affiliated group comprised of three corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* Employee C, a covered employee of publicly held parent Corporation P, receives compensation from Corporations P, Q, and R, members of an affiliated group. Corporation Q is a direct subsidiary of Corporation P, and Corporation R is a direct subsidiary of Corporation Q. Corporations Q and R both are privately held. The total compensation paid to Employee C from the affiliated group members is $3,000,000 for the taxable year, of which Corporation P pays $1,500,000, Corporation Q pays $900,000, and Corporation R pays $600,000.

(*2*) *Conclusion.* Because the compensation paid by affiliated group members is aggregated for purposes of section 162(m)(1), $2,000,000 of the aggregate compensation paid is nondeductible. Corporations P, Q, and R each are treated as paying a ratable portion of the nondeductible compensation. Thus, two thirds of each corporation's payment will be nondeductible. The nondeductible compensation expense for Corporation P is $1,000,000 ($1,500,000 × $2,000,000/$3,000,000); for Corporation Q is $600,000 ($900,000 × $2,000,000/$3,000,000); and for Corporation R is $400,000 ($600,000 × $2,000,000/$3,000,000).

(R) *Example 18 (Affiliated group comprised of three corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(Q) of this section (*Example 17*), except that Corporation Q is a publicly held corporation and Corporation P is a privately held corporation, and Employee C is a covered employee of Corporation Q (instead of Corporation P).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(Q) of this section (*Example 17*). Even though Corporation Q, the subsidiary, is the publicly held corporation, Corporations P, Q, and R comprise an affiliated group. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible, and Corporations P, Q, and R each are treated as paying a ratable portion of the nondeductible compensation.

(S) *Example 19 (Affiliated group comprised of three corporations, two of which are publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(R) of this section (*Example 18*), except that Corporation R also is a publicly held corporation. As in paragraph (c)(1)(vi)(R) of this section (*Example 18*), Corporation Q is a publicly held corporation, Corporation P is a privately held corporation, and Employee C is a covered employee of Corporation Q but not a covered employee of Corporation R.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(R) of this section (*Example 18*). Even though Corporation R also is a publicly held corporation, Corporations P, Q, and R comprise an affiliated group. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible, and Corporations P, Q, and R each are treated as paying a ratable portion of the nondeductible compensation.

(T) *Example 20 (Affiliated group comprised of three publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(Q) of this section (*Example 17*), except that Corporations Q and R also are publicly held corporations, and Employee C is a covered employee of both Corporations P and Q but is not a covered employee of Corporation R.

(*2*) *Conclusion.* Even though Corporations P, Q, and R each are publicly held corporations, they comprise an affiliated group. Because Employee C is a covered employee of both Corporations P and Q, the determination of the amount disallowed as a deduction is separately prorated among Corporations P and R and among Corporations Q and R. For each separate calculation of the total amount of the disallowed deduction and the proration of the disallowed deduction, the amount paid by Corporation R is taken into account in proportion to the total compensation paid by Corporations P and Q. With respect to Corporations P and R, $875,000 of the aggregate compensation is nondeductible (the excess of $1,875,000 (the sum of the compensation paid by Corporation P ($1,500,000) and the portion of compensation paid by Corporation R that is treated as allocable to Employee C being a covered employee of Corporation P ($600,000 × $1,500,000/($1,500,000 + $900,000) = $375,000) over the $1,000,000 deduction limitation). Corporations P and R each are treated as paying a ratable portion of the nondeductible compensation. Corporation P has a nondeductible compensation expense of $700,000 ($1,500,000 × $875,000/$1,875,000), and Corporation R has a nondeductible compensation expense of $175,000 ($375,000 × $875,000/$1,875,000). For Corporations Q and R, $125,000 of the aggregate compensation is nondeductible (the excess of $1,125,000 (the sum of the compensation paid by Corporation Q ($900,000) and the portion of compensation paid by Corporation R that is treated as allocable to Employee C being a covered employee of Corporation Q ($600,000 × $900,000/($1,500,000 + $900,000) = $225,000) over the $1,000,000 deduction limitation). Corporation Q has a nondeductible compensation expense of $100,000 ($900,000 × $125,000/$1,125,000), and Corporation R has a nondeductible compensation expense of $25,000 ($225,000 × $125,000/$1,125,000). The total nondeductible compensation expense for Corporation R is $200,000.

(U) *Example 21 (Affiliated group comprised of three publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(T) of this section (*Example 20*), except that Employee C does not receive any compensation from Corporation R.

(*2*) *Conclusion.* Even though Corporations P, Q, and R each are publicly held corporations and separately subject to this section, they comprise an affiliated group. Because Employee C is a covered employee of, and receives compensation from, both Corporations P and Q, each of which is a separate publicly held corporation, the determination of the amount disallowed as a deduction is made separately for Corporations P and Q. Corporation P has a nondeductible compensation expense of $500,000 (the excess of $1,500,000 over $1,000,000), and Corporation Q has no nondeductible compensation expense because the amount it paid to Employee C was below $1,000,000.

(V) *Example 22 (Affiliated group comprised of three corporations, one of which is a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(Q) of this section (*Example 17*), except that Corporation R is a direct subsidiary of Corporation P (and not a direct subsidiary of Corporation Q).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(Q) of this section (*Example 17*). Corporations P, Q, and R comprise an affiliated group. Accordingly, $2,000,000 of the aggregate compensation paid is nondeductible, and Corporations P, Q, and R each are treated as paying a ratable portion of the nondeductible compensation.

(W) *Example 23 (Affiliated group comprised of three publicly held corporations)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(1)(vi)(V) of this section (*Example 22*), except that Corporations Q and R also are publicly held corporations, and Employee C is a covered employee of both Corporations P and Q but not of Corporation R.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(1)(vi)(V) of this section (*Example 22*). Even though Corporations P, Q, and R each are publicly held corporations, they comprise an affiliated group. Because Employee C is a covered employee of both Corporations P and Q, the amount disallowed as a deduction is prorated separately among Corporations P and R and among Corporations Q and R.

(X) *Example 24 (Disregarded entity)*—(*1*) *Facts.* Corporation G is privately held for its

2020 taxable year. Entity H, a limited liability company, is wholly-owned by Corporation G and is disregarded as an entity separate from its owner under § 301.7701–2(c)(2)(i) of this chapter. As of December 31, 2020, Entity H is required to file reports under section 15(d) of the Exchange Act.

(2) *Conclusion.* Because Entity H is required to file reports under section 15(d) of the Exchange Act and is disregarded as an entity separate from its owner, Corporation G is a publicly held corporation for its 2020 taxable year. The result would be the same if Corporation G was a REIT under section 856(a) and Entity H was a QRS under section 856(i)(2).

(2) *Covered employee*—(i) *General rule.* Except as provided in paragraph (c)(2)(vi) of this section, with respect to a publicly held corporation as defined in paragraph (c)(1) of this section (without regard to paragraph (c)(1)(ii) of this section), for the publicly held corporation's taxable year, a covered employee means any of the following—

(A) The principal executive officer (PEO) or principal financial officer (PFO) of the publicly held corporation serving at any time during the taxable year, including individuals acting in either such capacity.

(B) The three highest compensated executive officers of the publicly held corporation for the taxable year (other than the principal executive officer or principal financial officer, or an individual acting in such capacity), regardless of whether the executive officer is serving at the end of the publicly held corporation's taxable year, and regardless of whether the executive officer's compensation is subject to disclosure for the last completed fiscal year under the executive compensation disclosure rules under the Exchange Act. For purposes of this paragraph (c)(2)(i)(B), the term ''executive officer'' means an executive officer as defined in 17 CFR 240.3b–7. The amount of compensation used to identify the three most highly compensated executive officers for the taxable year is determined pursuant to the executive compensation disclosure rules under the Exchange Act (using the taxable year as the fiscal year for purposes of making the determination), regardless of whether the corporation's fiscal year and taxable year end on the same date.

(C) Any individual who was a covered employee of the publicly held corporation (or any predecessor of a publicly held corporation, within the meaning of paragraph (c)(2)(ii) of this section) for any preceding taxable year beginning after December 31, 2016. For taxable years beginning prior to January 1, 2018, covered employees are identified in accordance with the rules in § 1.162–27(c)(2).

(ii) *Predecessor of a publicly held corporation*—(A) *Publicly held corporations that become privately held.* For purposes of this paragraph (c)(2)(ii), a predecessor of a publicly held corporation includes a publicly held corporation that, after becoming a privately held corporation, again becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the corporation's U.S. Federal income tax return (disregarding any extensions) for the last taxable year for which the corporation was previously publicly held.

(B) *Corporate reorganizations.* A predecessor of a publicly held corporation includes a publicly held corporation the stock or assets of which are acquired in a corporate reorganization (as defined in section 368(a)(1)).

(C) *Corporate divisions.* A predecessor of a publicly held corporation includes a publicly held corporation that is a distributing corporation (within the meaning of section 355(a)(1)(A)) that distributes the stock of a controlled corporation (within the meaning of section 355(a)(1)(A)) to its shareholders in a distribution or exchange qualifying under section 355(a)(1) (corporate division). The rule of this paragraph (c)(2)(ii)(C) applies only with respect to covered employees of the distributing corporation who begin performing services for the controlled corporation (or for a corporation affiliated with the controlled corporation that receives stock of the controlled corporation in the corporate division) within the period beginning 12 months before and ending 12 months after the distribution.

(D) *Affiliated groups.* A predecessor of a publicly held corporation includes any other publicly held corporation that becomes a member of its affiliated group (as defined in paragraph (c)(1)(ii) of this section).

(E) *Asset acquisitions.* If a publicly held corporation, including one or more members of an affiliated group as defined in paragraph (c)(1)(ii) of this section (acquiror), acquires at least 80% of the gross operating assets (determined by fair market value on the date of acquisition) of another publicly held corporation (target), then the target is a predecessor of the acquiror. For an acquisition of assets that occurs over time, only assets acquired within a 12-month period are taken into account to determine whether at least 80% of the target's gross operating assets were acquired. However, this 12-month period is extended to include any continuous period that ends on, or begins on, any day during which the acquiror has an arrangement to purchase, directly or indirectly, assets of the target. A shareholder's additions to the assets of target made as part of a plan or arrangement to avoid the application of this subsection to acquiror's purchase of target's assets are disregarded in applying this paragraph (c)(2)(ii)(E). This paragraph (c)(2)(ii)(E) applies only with respect to the target's covered employees who begin performing services for the acquiror (or a corporation affiliated with the acquiror) within the period beginning 12 months before and ending 12 months after the date of the transaction as defined in paragraph (c)(2)(ii)(I) of this section (incorporating any extensions to the 12-month period made pursuant to this paragraph).

(F) *Predecessor of a predecessor.* For purposes of this paragraph (c)(2)(ii), a predecessor of a corporation includes each predecessor of the corporation and the predecessor or predecessors of any prior predecessor or predecessors.

(G) *Corporations that are not publicly held at the time of the transaction and sequential transactions*—(*1*) *Predecessor corporation is not publicly held at the time of the transaction.* This paragraph (c)(2)(ii)(G)(*1*) applies if a corporation that was previously publicly held (the first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that the first corporation is not a publicly held corporation at the time of the relevant transaction (or transactions). If this paragraph (c)(2)(ii)(G)(*1*) applies, the first corporation is a predecessor of a publicly held corporation if the second corporation is a publicly held corporation at the time of the relevant transaction (or transactions) and the relevant transaction (or transactions) take place during a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the first corporation was previously publicly held.

(*2*) *Second corporation is not publicly held at the time of the transaction.* This paragraph (c)(2)(ii)(G)(*2*) applies if a corporation that is publicly held (the first corporation) at the time of the relevant transaction (or transactions) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that the second corporation is not a publicly held corporation at the time of the relevant transaction (or transactions). If this paragraph (c)(2)(ii)(G)(*2*) applies, the

first corporation is a predecessor of a publicly held corporation if the second corporation becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the first corporation's last taxable year in which the transaction is taken into account.

(*3*) *Neither corporation is publicly held at the time of the transaction.* This paragraph (c)(2)(ii)(G)(*3*) applies if a corporation that was previously publicly held (the first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that neither the first corporation nor the second corporation is a publicly held corporation at the time of the relevant transaction (or transactions). If this paragraph (c)(2)(ii)(G)(*3*) applies, the first corporation is a predecessor of a publicly held corporation if the second corporation becomes a publicly held corporation for a taxable year ending before the 36-month anniversary of the due date for the first corporation's U.S. Federal income tax return (excluding any extensions) for the last taxable year for which the first corporation was previously publicly held.

(*4*) *Sequential transactions.* If a corporation that was previously publicly held (the first corporation) would be a predecessor to another corporation (the second corporation) under the rules of this paragraph (c)(2)(ii) but for the fact that the first corporation is (or its assets are) transferred to one or more intervening corporations prior to being transferred to the second corporation, and if each intervening corporation would be a predecessor of a publicly held corporation with respect to the second corporation if the intervening corporation or corporations were publicly held corporations, then paragraphs (c)(2)(ii)(G)(*1*) through (*3*) of this section also apply without regard to the intervening corporations.

(H) *Elections under sections 336(e) and 338.* For purposes of this paragraph (c)(2), if a corporation makes an election to treat as an asset purchase either the sale, exchange, or distribution of stock pursuant to regulations under section 336(e) (§§ 1.336–1 through 1.336–5) or the purchase of stock pursuant to regulations under section 338 (§§ 1.338–1 through 1.338–11, 1.338(h)(10)–1, and 1.338(i)–1), the corporation that issued the stock is treated as the same corporation both before and after such transaction.

(I) *Date of transaction.* For purposes of this paragraph (c)(2)(ii), the date that a transaction is treated as having occurred is the date on which all events necessary for the transaction to be described in the relevant provision in this paragraph (c)(2)(ii) have occurred.

(J) *Publicly traded partnership.* For purposes of applying this paragraph (c)(2)(ii), a publicly traded partnership is a predecessor of a publicly held corporation if under the same facts and circumstances a corporation substituted for the publicly traded partnership would be a predecessor of the publicly held corporation, and at the time of the transaction the publicly traded partnership is treated as a publicly held corporation as defined in paragraph (c)(1)(i) of this section. In making this determination, the rules in paragraphs (c)(2)(ii)(A) through (I) of this section apply by analogy to publicly traded partnerships.

(iii) *Disregarded entities.* If a publicly held corporation under paragraph (c)(1) of this section owns an entity that is disregarded as an entity separate from its owner under § 301.7701–2(c)(2)(i) of this chapter, then the covered employees of the publicly held corporation are determined pursuant to paragraphs (c)(2)(i) and (ii) of this section. The executive officers of the entity that is disregarded as an entity separate from its corporate owner under § 301.7701–2(c)(2)(i) of this chapter are neither covered employees of the entity nor of the publicly held corporation unless they meet the definition of covered employee in paragraphs (c)(2)(i) and (ii) of this section with respect to the publicly held corporation, in which case they are covered employees for its taxable year.

(iv) *Qualified subchapter S subsidiaries.* If a publicly held corporation under paragraph (c)(1) of this section owns an entity that is a QSub under section 1361(b)(3)(B), then the covered employees of the publicly held corporation are determined pursuant to paragraphs (c)(2)(i) and (ii) of this section. The executive officers of the QSub are neither covered employees of the QSub nor of the publicly held corporation unless they meet the definition of covered employee in paragraphs (c)(2)(i) and (ii) of this section with respect to the publicly held corporation, in which case they are covered employees for the taxable year of the publicly held corporation.

(v) *Qualified real estate investment trust subsidiaries.* If a publicly held corporation under paragraph (c)(1) of this section owns an entity that is a QRS under section 856(i)(2), then the covered employees of the publicly held corporation are determined pursuant to paragraphs (c)(2)(i) and (ii) of this section. The executive officers of the QRS are neither covered employees of the QRS nor of the publicly held corporation unless they meet the definition of covered employee in paragraphs (c)(2)(i) and (ii) of this section with respect to the publicly held corporation, in which case they are covered employees for the taxable year of the publicly held corporation.

(vi) *Covered employee of an affiliated group.* A person who is identified as a covered employee in paragraphs (c)(2)(i) through (v) of this section for a publicly held corporation's taxable year is also a covered employee for the taxable year of an affiliated group treated as a publicly held corporation pursuant to paragraph (c)(1)(ii) of this section (treatment of an affiliated group).

(vii) *Examples.* The following examples illustrate the provisions of this paragraph (c)(2). For each example, assume that the corporation has a taxable year that is a calendar year and has a fiscal year ending December 31 for reporting purposes under the Exchange Act. Also, for each example, unless provided otherwise, assume that none of the employees were covered employees for any taxable year preceding the first taxable year set forth in that example (since being a covered employee for a preceding taxable year would provide a separate, independent basis for classifying that employee as a covered employee for a subsequent taxable year).

(A) *Example 1 (Covered employees of members of an affiliated group)—(1) Facts.* Corporations A, B, and C are direct wholly-owned subsidiaries of Corporation D. Corporations D and A are each publicly held corporations as of December 31, 2020. Corporations B and C are not publicly held corporations for their 2020 taxable years. Employee E served as the PEO of Corporation D from January 1, 2020, to March 31, 2020. Employee F served as the PEO of Corporation D from April 1, 2020, to December 31, 2020. Employee G served as the PEO of Corporation A for its entire 2020 taxable year. Employee H served as the PEO of Corporation B for its entire 2020 taxable year. Employee I served as the PEO of Corporation C for its entire 2020 taxable year. From April 1, 2020, through September 30, 2020, Employee E served as an advisor (not as a PEO) to Employee I and received compensation from Corporation C for these services. In 2020, all four corporations paid compensation to their respective PEOs.

(*2*) *Conclusion (Employees E and F).* Because both Employees E and F served as the PEO of Corporation D during its 2020 taxable year, both Employees E and F are covered employees of Corporation D for its 2020 and subsequent taxable years.

(*3*) *Conclusion (Employee G).* Because Employee G served as the PEO of Corporation

A, Employee G is a covered employee of Corporation A for its 2020 and subsequent taxable years.

(*4*) *Conclusion (Employee H).* Even though Employee H served as the PEO of Corporation B, Employee H is not a covered employee of Corporation B for its 2020 taxable year, because Corporation B is considered a publicly held corporation solely by reason of being a member of an affiliated group as defined in paragraph (c)(1)(ii) of this section.

(*5*) *Conclusion (Employee I).* Even though Employee I served as the PEO of Corporation C, Employee I is not a covered employee of Corporation C for its 2020 taxable year, because Corporation C is considered a publicly held corporation solely by reason of being a member of an affiliated group as defined in paragraph (c)(1)(ii) of this section.

(B) *Example 2 (Covered employees of a publicly held corporation)*—(*1*) *Facts.* Corporation J is a publicly held corporation. Corporation J is not a smaller reporting company or emerging growth company for purposes of reporting under the Exchange Act. For 2020, Employee K served as the sole PEO of Corporation J and Employees L and M both served as the PFO of Corporation J at separate times during the year. Employees N, O, and P were, respectively, the first, second, and third highest compensated executive officers of Corporation J for 2020 other than the PEO and PFO, and all three retired before December 31, 2020. Employees Q, R, and S were, respectively, Corporation J's fourth, fifth, and sixth highest compensated executive officers other than the PEO and PFO for 2020, and all three were serving as of December 31, 2020. On March 1, 2021, Corporation J filed its Form 10–K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 with the SEC. With respect to Item 11, Executive Compensation (as required by Part III of Form 10–K, or its successor), Corporation J disclosed the compensation of Employee K for serving as the PEO, Employees L and M for serving as the PFO, and Employees Q, R, and S pursuant to 17 CFR 229.402(a)(3)(iii) (Item 402 of Regulation S–K). Corporation J also disclosed the compensation of Employees N and O pursuant to 17 CFR 229.402(a)(3)(iv) (Item 402 of Regulation S–K).

(*2*) *Conclusion (Employee K).* Because Employee K served as the PEO during 2020, Employee K is a covered employee for Corporation J's 2020 taxable year.

(*3*) *Conclusion (Employees L and M).* Because Employees L and M served as the PFO during 2020, Employees L and M are covered employees for Corporation J's 2020 taxable year.

(*4*) *Conclusion (Employees N, O, P, Q, R, and S).* Even though the executive compensation disclosure rules under the Exchange Act require Corporation J to disclose the compensation of Employees N, O, Q, R, and S for 2020, Corporation J's three highest compensated executive officers who are covered employees for its 2020 taxable year are Employees N, O, and P, because these are the three highest compensated executive officers other than the PEO and PFO for 2020.

(C) *Example 3 (Covered employees of a smaller reporting company)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(B) of this section (*Example 2*), except that Corporation J is a smaller reporting company or emerging growth company for purposes of reporting under the Exchange Act. With respect to Item 11, Executive Compensation, Corporation J disclosed the compensation of Employee K for serving as the PEO, Employees Q and R pursuant to 17 CFR 229.402(m)(2)(ii) (Item 402(m) of Regulation S–K), and Employees N and O pursuant to 17 CFR 229.402(m)(2)(iii) (Item 402(m) of Regulation S–K).

(*2*) *Conclusion.* The result is the same as in paragraph (c)(2)(vii)(L) of this section (*Example 2*). For purposes of identifying a corporation's covered employees, it is irrelevant whether the reporting obligation under the Exchange Act for smaller reporting companies and emerging growth companies apply to the corporation, and it is irrelevant whether the specific executive officers' compensation must be disclosed pursuant to the disclosure rules under the Exchange Act applicable to the corporation.

(D) *Example 4 (Covered employees of a publicly held corporation that is not required to file a Form 10–K)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(B) of this section (*Example 2*), except that on February 4, 2021, Corporation J files Form 15, Certification and Notice of Termination of Registration under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports under Sections 13 and 15(d) of the Securities Exchange Act of 1934, (or its successor) to terminate the registration of its securities. Corporation J's duty to file reports under Section 13(a) of the Exchange Act is suspended upon the filing of the Form 15 and, as a result, Corporation J is not required to file a Form 10–K and disclose the compensation of its executive officers for 2020.

(*2*) *Conclusion.* The result is the same as in paragraph (c)(2)(vii)(B) of this section (*Example 2*). Covered employees include executive officers of a publicly held corporation even if the corporation is not required to disclose the compensation of its executive officers under the Exchange Act. Therefore, Employees K, L, M, N, O, and P are covered employees for 2020. The result would be different if Corporation J filed Form 15 to terminate the registration of its securities prior to December 31, 2020. In that case, Corporation J would not be a publicly held corporation for its 2020 taxable year, and, therefore, Employees K, L, M, N, O, and P would not be covered employees for Corporation J's 2020 taxable year.

(E) *Example 5 (Covered employees of two publicly held corporations after a corporate transaction)*—(*1*) *Facts.* Corporation T is a publicly held corporation for its 2019 taxable year. Corporation U is a privately held corporation for its 2019 and 2020 taxable years. On July 31, 2020, Corporation U acquires for cash 80% of the only class of outstanding stock of Corporation T. The affiliated group (comprised of Corporations U and T) elects to file a consolidated Federal income tax return. As a result of this election, Corporation T has a short taxable year ending on July 31, 2020. Corporation T does not change its fiscal year for reporting purposes under the Exchange Act to correspond to the short taxable year. Corporation T remains a publicly held corporation for its short taxable year ending on July 31, 2020, and its subsequent taxable year ending on December 31, 2020, for which it files a consolidated Federal income tax return with Corporation U. For Corporation T's taxable year ending July 31, 2020, Employee V serves as the only PEO, and Employee W serves as the only PFO. Employees X, Y, and Z are the three most highly compensated executive officers of Corporation T for the taxable year ending July 31, 2020, other than the PEO and PFO. As a result of the acquisition, effective July 31, 2020, Employee V ceases to serve as the PEO of Corporation T. Instead, Employee AA starts serving as the PEO of Corporation T on August 1, 2020. Employee V continues to provide services for Corporation T but never serves as PEO again (or as an individual acting in such capacity). For Corporation T's taxable year ending December 31, 2020, Employee AA serves as the only PEO, and Employee W serves as the only PFO. Employees X, Y, and Z continue to serve as executive officers of Corporation T during the taxable year ending December 31, 2020. Employees BB, CC, and DD are the three most highly compensated executive officers of Corporation T, other than the PEO and PFO, for the taxable year ending December 31, 2020.

(*2*) *Conclusion (Employee V).* Because Employee V served as the PEO during Corporation T's short taxable year ending July 31, 2020, Employee V is a covered employee for Corporation T's short taxable year ending July 31, 2020, even though Employee V's compensation is required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act only for the fiscal year ending December 31, 2020. Because Employee V was a covered employee for Corporation T's short taxable year ending July 31, 2020, Employee V is also a covered employee for Corporation T's short taxable year ending December 31, 2020.

(*3*) *Conclusion (Employee W).* Because Employee W served as the PFO during Corporation T's short taxable years ending July 31, 2020, and December 31, 2020, Employee W is a covered employee for both taxable years, even though Employee W's compensation is required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act only for the fiscal year ending December 31, 2020. Because Employee W was a covered employee for Corporation T's short taxable year ending July 31, 2020, Employee W would be a covered employee for Corporation T's short taxable year ending December 31, 2020, even if Employee W did not serve as the PFO during this taxable year.

(*4*) *Conclusion (Employee AA).* Because Employee AA served as the PEO during Corporation T's short taxable year ending December 31, 2020, Employee AA is a covered employee for that short taxable year.

(*5*) *Conclusion (Employees X, Y, and Z).* Employees X, Y, and Z are covered

employees for Corporation T's short taxable years ending July 31, 2020, and December 31, 2020. Employees X, Y, and Z are covered employees for Corporation T's short taxable year ending July 31, 2020, because those employees are the three highest compensated executive officers for that short taxable year. Because they were covered employees for Corporation T's short taxable year ending July 31, 2020, Employees X, Y, and Z are covered employees for Corporation T's short taxable year ending December 31, 2020 and would be covered employees for that later short taxable year even if their compensation would not be required to be disclosed pursuant to the executive compensation disclosure rules under the Exchange Act.

(*6*) *Conclusion (Employees BB, CC, and DD).* Employees BB, CC, and DD are covered employees for Corporation T's short taxable year ending December 31, 2020, because those employees are the three highest compensated executive officers for that short taxable year.

(F) *Example 6 (Predecessor of a publicly held corporation)*—(*1*) *Facts.* Corporation EE is a publicly held corporation for its 2021 taxable year. Corporation EE is a privately held corporation for its 2022 and 2023 taxable years. For its 2024 taxable year, Corporation EE is a publicly held corporation.

(*2*) *Conclusion.* For its 2024 taxable year, Corporation EE is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(A) of this section because, after ceasing to be a publicly held corporation, it again became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, for Corporation EE's 2024 taxable year, the covered employees of Corporation EE include the covered employees of Corporation EE for its 2021 taxable year and any additional covered employees determined pursuant to this paragraph (c)(2).

(G) *Example 7 (Predecessor of a publicly held corporation)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(F) of this section (*Example 6*), except that Corporation EE remains a privately held corporation until it becomes a publicly held corporation for its 2027 taxable year.

(*2*) *Conclusion.* Corporation EE is not a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(A) of this section because it became a publicly held corporation for a taxable year ending after April 15, 2025. Therefore, any covered employee of Corporation EE for its 2021 taxable year is not a covered employee of Corporation EE for its 2027 taxable year due to that individual's status as a covered employee of Corporation EE for a preceding taxable year (beginning after December 31, 2016) but may be a covered employee due to that individual's status during the 2027 taxable year.

(H) *Example 8 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* On June 30, 2021, Corporation FF (a publicly held corporation) merged into Corporation GG (a publicly held corporation) in a transaction that qualifies as a reorganization under section 368(a)(1)(A), with Corporation GG as the surviving corporation. As a result of the merger, Corporation FF has a short taxable year ending June 30, 2021. Corporation FF is a publicly held corporation for this short taxable year. Corporation GG does not have a short taxable year and is a publicly held corporation for its 2021 taxable year.

(*2*) *Conclusion.* Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(B) of this section. Therefore, any covered employee of Corporation FF for its short taxable year ending June 30, 2021, is a covered employee of Corporation GG for its 2021 taxable year. For Corporation GG's 2021 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(I) *Example 9 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(H) of this section (*Example 8*), except that, after the merger, Corporation GG is a privately held corporation for its 2021 taxable year.

(*2*) *Conclusion.* Because Corporation GG is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(J) *Example 10 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(I) of this section (*Example 9*), except that Corporation GG, becomes a publicly held corporation (as defined in paragraph (c)(1)(i) of this section) on June 30, 2023, and is a publicly held corporation for its 2023 taxable year.

(*2*) *Conclusion.* Because Corporation GG became a publicly held corporation for a taxable year ending prior to April 15, 2025, Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. For Corporation GG's 2023 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(K) *Example 11 (Predecessor of a publicly held corporation that is party to a merger)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(J) of this section (*Example 10*), except that Corporation FF is a privately held corporation for its taxable year ending June 30, 2021, but was a publicly held corporation for its 2020 taxable year.

(*2*) *Conclusion.* Even though Corporation FF was a privately held corporation when it merged with Corporation GG on June 30, 2021, Corporation FF will be a predecessor corporation if Corporation GG becomes a publicly held corporation within a taxable year ending prior to April 15, 2024. Because Corporation GG became a publicly held corporation for its taxable year ending December 31, 2023, Corporation FF is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. For Corporation GG's 2023 and subsequent taxable years, the covered employees of Corporation GG include the covered employees of Corporation FF (for a preceding taxable year beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(L) *Example 12 (Predecessor of a publicly held corporation that is party to a merger and subsequently becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(J) of this section (*Example 10*), except that, on June 30, 2022, Corporation GG becomes a publicly held corporation by becoming a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section). Corporation II is the parent corporation of the group and is a publicly held corporation. Employee HH was a covered employee of Corporation FF for its taxable year ending June 30, 2021. On July 1, 2022, Employee HH becomes an employee of Corporation II.

(*2*) *Conclusion.* By becoming a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section) on June 30, 2022, Corporation GG became a publicly held corporation for a taxable year ending prior to April 15, 2025. Therefore, Corporation FF is a predecessor of a publicly held corporation (Corporation GG) within the meaning of paragraph (c)(2)(ii)(G) of this section. Furthermore, Corporation FF is also a predecessor of Corporation II, a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. For Corporation II's 2022 and subsequent taxable years, Employee HH is a covered employee of the affiliated group that includes Corporation II because Employee HH was a covered employee of Corporation FF for its taxable year ending June 30, 2021.

(M) *Example 13 (Predecessor of a publicly held corporation that is party to a merger and subsequently becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(L) of this section (*Example 12*), except that Corporation FF was a privately held corporation for its taxable year ending June 30, 2021, and Employee HH was a covered employee of Corporation FF for its taxable year ending December 31, 2020.

(*2*) *Conclusion.* Even though Corporation FF was a privately held corporation when it merged with Corporation GG on June 30, 2021, Corporation FF will be a predecessor corporation if Corporation GG becomes a publicly held corporation for a taxable year ending prior to April 15, 2024. Because Corporation GG became a publicly held corporation for its 2022 taxable year by becoming a member of an affiliated group (as defined in paragraph (c)(1)(ii) of this section), Corporation FF is a predecessor of a publicly held corporation (Corporation GG) within the meaning of paragraph (c)(2)(ii)(G) of this section. Furthermore, Corporation FF is also a predecessor of Corporation II, a publicly held corporation within the meaning of paragraph (c)(2)(ii)(G) of this section. Therefore, any covered employee of Corporation FF for its 2020 taxable year is a covered employee of the affiliated group that includes Corporation II for its 2022 and subsequent taxable years. For Corporation II's

2022 taxable year, Employee HH is a covered employee of the affiliated group that includes Corporation II because Employee HH was a covered employee of Corporation FF for its 2020 taxable year.

(N) *Example 14 (Predecessor of a publicly held corporation that is a party to a merger)*—(*1*) *Facts.* Corporation JJ is a publicly held corporation for its 2019 taxable year and is incorporated in State KK. On June 1, 2019, Corporation JJ formed a wholly-owned subsidiary, Corporation LL. Corporation LL is a publicly held corporation incorporated in State MM. On June 30, 2021, Corporation JJ merged into Corporation LL under State MM law in a transaction that qualifies as a reorganization under section 368(a)(1)(A), with Corporation LL as the surviving corporation. As a result of the merger, Corporation JJ has a short taxable year ending June 30, 2021. Corporation JJ is a publicly held corporation for this short taxable year.

(*2*) *Conclusion.* Corporation JJ is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(B) of this section. For Corporation LL's taxable years ending after June 30, 2021, the covered employees of Corporation LL include the covered employees of Corporation JJ for its short taxable year ending June 30, 2021 (as well as preceding taxable years beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(O) *Example 15 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* On June 30, 2021, Corporation OO acquires for cash 100% of the only class of outstanding stock of Corporation NN. The affiliated group (comprised of Corporations NN and OO) elects to file a consolidated Federal income tax return. As a result of this election, Corporation NN has a short taxable year ending on June 30, 2021. Corporation NN is a publicly held corporation for its taxable year ending June 30, 2021, and a privately held corporation for subsequent taxable years. On June 30, 2022, Corporation OO completely liquidates Corporation NN. Corporation OO is a publicly held corporation for its 2021 and 2022 taxable years.

(*2*) *Conclusion.* After Corporation OO acquired Corporation NN, Corporations NN and OO comprise an affiliated group as defined in paragraph (c)(1)(ii) of this section. Thus, Corporation NN is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(D) of this section. For Corporation OO's taxable years ending after June 30, 2021, the covered employees of Corporation OO include the covered employees of Corporation NN for its short taxable year ending June 30, 2021 (as well as preceding taxable years beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(P) *Example 16 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(O) of this section (*Example 15*), except that Corporation OO is a privately held corporation on June 30, 2021, and for its 2021 and 2022 taxable years.

(*2*) *Conclusion.* Because Corporation OO is a privately held corporation for its 2021 and 2022 taxable years, it is not subject to section 162(m)(1) for these taxable years.

(Q) *Example 17 (Predecessor of a publicly held corporation becomes member of an affiliated group)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(P) of this section (*Example 16*), except that, on October 1, 2022, the SEC declares effective Corporation OO's Securities Act registration statement in connection with its initial public offering, and Corporation OO is a publicly held corporation for its 2022 taxable year.

(*2*) *Conclusion (Taxable Year Ending December 31, 2021).* Because Corporation OO is a privately held corporation for its 2021 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(*3*) *Conclusion (Taxable Year Ending December 31, 2022).* For the 2022 taxable year, Corporations NN and OO comprise an affiliated group as defined in paragraph (c)(1)(ii) of this section. Corporation NN is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(D) and (G) of this section because Corporation OO became a publicly held corporation for a taxable year ending prior to April 15, 2025. For Corporation OO's 2022 and subsequent taxable years, the covered employees of Corporation OO include the covered employees of Corporation NN for its short taxable year ending June 30, 2021 (as well as preceding taxable years beginning after December 31, 2016) and any additional covered employees determined pursuant to this paragraph (c)(2).

(R) *Example 18 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* Corporations VV, WW, and XX are publicly held corporations for their 2020 and 2021 taxable years. Corporations VV and WW are members of an affiliated group. Corporation WW is a direct subsidiary of Corporation VV. On June 30, 2021, Corporation VV acquires for cash 40% of the gross operating assets (determined by fair market value as of January 31, 2022) of Corporation XX. On January 31, 2022, Corporation WW acquires an additional 40% of the gross operating assets (determined by fair market value as of January 31, 2022) of Corporation XX. Employees EB, EC, and EA are covered employees for Corporation XX's 2020 taxable year. Employees ED and EF are also covered employees for Corporation XX's 2021 taxable year. On January 15, 2021, Employee EA started performing services as an employee of Corporation WW. On July 1, 2021, Employee EB started performing services as an employee of Corporation WW. On February 1, 2022, Employees EC and ED started performing services as employees of Corporation WW. On June 30, 2023, Employee EF started performing services as an employee of Corporation WW.

(*2*) *Conclusion.* Because an affiliated group, comprised of Corporations VV and WW, acquired 80% of Corporation XX's gross operating assets (determined by fair market value) within a twelve-month period, Corporation XX is a predecessor of a publicly held corporation within the meaning of paragraph (c)(2)(ii)(E) of this section. Therefore, any covered employee of Corporation XX for its 2020 and 2021 taxable years (who started performing services as an employee of Corporation WW within the period beginning 12 months before and ending 12 months after the date of the January 31, 2022, acquisition (determined under paragraph (c)(2)(ii)(I) of this section) is a covered employee of Corporation WW for its 2021, 2022, and subsequent taxable years. For Corporation WW's 2021 and subsequent taxable years, the covered employees of Corporation WW include Employee EB and any additional covered employees determined pursuant to paragraph (c)(2)(i) of this section. For Corporation WW's 2022 and subsequent taxable years, the covered employees of Corporation WW include Employees EB, EC, and ED, and any additional covered employees determined pursuant to this paragraph (c)(2). Because Employee EA started performing services as an employee of Corporation WW before January 31, 2021, Employee EA is not a covered employee of Corporation WW for its 2021 taxable year and subsequent taxable years by reason of paragraph (c)(2)(ii)(E) of this section, but may be a covered employee of Corporation WW by application of other rules in this paragraph (c)(2). Because Employee EF started performing services as an employee of Corporation WW after January 31, 2023, Employee EF is not a covered employee of Corporation WW for its 2023 taxable year by reason of paragraph (c)(2)(ii)(E) of this section, but may be a covered employee of Corporation WW by application of other rules in this paragraph (c)(2).

(S) *Example 19 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(R) of this section (*Example 18*), except that Corporations VV and WW are not publicly held corporations on June 30, 2021, or for their 2021 taxable years.

(*2*) *Conclusion.* Because Corporations VV and WW are not publicly held corporations for their 2021 taxable years, they are not subject to section 162(m)(1) for their 2021 taxable years.

(T) *Example 20 (Predecessor of a publicly held corporation and asset acquisition)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(R) of this section (*Example 18*), except that, on October 1, 2022, the SEC declares effective Corporation VV's Securities Act registration statement in connection with its initial public offering, and Corporation VV is a publicly held corporation for its 2022 taxable year.

(*2*) *Conclusion (2021 taxable year).* Because Corporations VV and WW are not publicly held corporations for their 2021 taxable years, they are not subject to section 162(m)(1) for their 2021 taxable years.

(*3*) *Conclusion (2022 taxable year).* Corporation XX is a predecessor of a publicly held corporation within the meaning of paragraphs (c)(2)(ii)(E) and (G) of this section because a member of the affiliated group comprised of Corporations VV and WW acquired 80% of Corporation XX's gross operating assets (determined by fair market

value) within a twelve-month period ending on January 31, 2022, and the parent of the affiliated group, Corporation VV, subsequently became a publicly held corporation for a taxable year ending prior to April 15, 2024. Therefore, any covered employee of Corporation XX for its 2020 and 2021 taxable years (who started performing services as an employee of Corporation WW within the period beginning 12 months before and ending 12 months after the acquisition) is a covered employee of the affiliated group comprised of Corporations VV and WW for its 2022 and subsequent taxable years. For Corporation WW's 2022 and subsequent taxable years, the covered employees of Corporation WW include Employees EB, EC, and ED, and any additional covered employees determined pursuant to this paragraph (c)(2).

(U) *Example 21 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* Corporation CA is a publicly held corporation for its 2021 and 2022 taxable years. On March 2, 2021, Corporation DDD forms a wholly-owned subsidiary, Corporation CB, and transfers assets to it. On April 1, 2022, Corporation CA distributes all shares of Corporation CB to its shareholders in a transaction described in section 355(a)(1). On April 1, 2022, the SEC declares effective Corporation CB's Securities Act registration statement in connection with its initial public offering. Corporation CB is a publicly held corporation for its 2022 taxable year. Employee EG serves as the PFO of Corporation CA from January 1, 2022, to March 31, 2022. On April 2, 2022, Employee EG starts performing services as an employee of Corporation CB advising the PFO of Corporation CB. After March 31, 2022, Employee EG ceases to provide services for Corporation CA.

(*2*) *Conclusion.* Because the distribution of the stock of Corporation CB is a transaction described under section 355(a)(1), Corporation CA is a predecessor of Corporation CB within the meaning of paragraph (c)(2)(ii)(C) of this section. Because Employee EG was a covered employee of Corporation CA for its 2022 taxable year, Employee ED is a covered employee of Corporation CB for its 2022 taxable year. The result is the same whether Employee EG performs services as an advisor for Corporation CB as an employee or an independent contractor.

(V) *Example 22 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(U) of this section (*Example 21*), except that Corporation CA distributes 100% of the shares of Corporation CB to Corporation CD in exchange for all of Corporation CD's stock in Corporation CA in a transaction described in section 355(a)(1) and Corporation CB does not register any class of securities with the SEC. Also, Employee EG performs services as an employee of Corporation CD instead of as an employee of Corporation CB. Corporation CD is a privately held corporation for its 2022 taxable year. On October 1, 2023, the SEC declares effective Corporation CD's Securities Act registration statement in connection with its initial public offering. Corporation CD is a publicly held corporation for its 2023 taxable year. On January 1, 2028, Employee EG starts performing services as an employee of Corporation CA. Corporation CA is a publicly held corporation for its 2028 taxable year.

(*2*) *Conclusion (2022 taxable year).* Because Corporation CD is a privately held corporation for its 2022 taxable year, it is not subject to section 162(m)(1) for this taxable year.

(*3*) *Conclusion (2023 taxable year).* Because the exchange of the stock of Corporation CB for the stock of Corporation CA is a transaction described in section 355(a)(1), Corporations CB and CD are an affiliated group, and Corporation CD became a publicly held corporation for a taxable year ending prior to April 15, 2026, Corporation CA is a predecessor of Corporation CD within the meaning of paragraphs (c)(2)(ii)(D) and (G) of this section. Employee EG was a covered employee of Corporation CA for its 2022 taxable year, and started performing services as an employee of Corporation CD following April 1, 2021, and before April 1, 2023. Therefore, Employee ED is a covered employee of Corporation CD for its 2023 taxable year.

(*4*) *Conclusion (2028 taxable year).* Because Employee EG served as the PFO of Corporation CA from January 1, 2022, to March 31, 2022, Employee EG was a covered employee of Corporation CA for its 2022 taxable year. Because an individual who is a covered employee for a taxable year remains a covered employee for all subsequent taxable years (even after the individual has separated from service), Employee EG is a covered employee of Corporation CA for its 2028 taxable year.

(W) *Example 23 (Predecessor of a publicly held corporation and a division)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(V) of this section (*Example 22*), except that Employee EG starts performing services as an employee of Corporation CD on June 30, 2023, instead of on April 2, 2022, and never performs services for Corporation CA after June 30, 2023. Furthermore, on June 30, 2023, Employee EH, a covered employee of Corporation CB for all of its taxable years, starts performing services for Corporation EF as an independent contractor advising its PEO but not serving as a PEO.

(*2*) *Conclusion (2023 taxable year).* Because the exchange of the stock of Corporation CB for the stock of Corporation CA is a transaction described in section 355(a)(1) and Corporation CD became a publicly held corporation for a taxable year ending before April 15, 2026, Corporation CA is a predecessor of Corporation CD within the meaning of paragraphs (c)(2)(ii)(D) and (G) of this section. Even though Employee EG was a covered employee of Corporation CA for its 2022 taxable year, because Employee EG started performing services as an employee of Corporation CD after April 1, 2023, Employee EG is not a covered employee of Corporation CD for its 2023 taxable year under paragraph (c)(2)(ii)(C) of this section. However, Employee EG may be a covered employee of Corporation CD by application of other rules in this paragraph (c)(2). Because Employee EH was a covered employee of Corporation CB for its 2022 taxable year, Employee EH is a covered employee of Corporation CD for its 2023 taxable year.

(X) *Example 24 (Predecessor of a publicly held corporation and election under section 338(h)(10))*—(*1*) *Facts.* Corporation CE is the common parent of a group of corporations filing consolidated returns that includes Corporation CF as a member. Corporation CE wholly-owns Corporation CF, a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section. On June 30, 2021, Corporation CG purchases Corporation CF from Corporation CE. Corporation CE and Corporation CG make a timely election under section 338(h)(10) with respect to the purchase of Corporation CF stock. For its taxable year ending December 31, 2021, Corporation CF continues to be a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section.

(*2*) *Conclusion.* As provided in paragraph (c)(2)(ii)(H) of this section, Corporation CF is treated as the same corporation after the section 338(h)(10) transaction as before the transaction for purposes for purposes of this paragraph (c)(2). Any covered employee of Corporation CF for its short taxable year ending June 30, 2021, is a covered employee of Corporation CF for its short taxable year ending on December 31, 2021, and subsequent taxable years.

(Y) *Example 25 (Disregarded entity)*—(*1*) *Facts.* Corporation CH is a privately held corporation for its 2020 taxable year. Entity CI is a wholly-owned limited liability company and is disregarded as an entity separate from its owner, Corporation CH, under § 301.7701–2(c)(2)(i) of this chapter. As of December 31, 2020, Entity CI is required to file reports under section 15(d) of the Exchange Act. For the 2020 taxable year, Employee EI is the PEO and Employee EJ is the PFO of Corporation CH. Employees EK, EL, and EM, are the three most highly compensated executive officers of Corporation CH (other than Employees EI and EJ). Employee EN is the PFO of Entity CI and does not perform any policy making functions for Corporation CH. Entity CI has no other executive officers.

(*2*) *Conclusion.* Because Entity CI is disregarded as an entity separate from its owner, Corporation CH, and is required to file reports under section 15(d) of the Exchange Act, Corporation CH is a publicly held corporation under paragraph (c)(1)(iii) of this section for its 2020 taxable year. Even though Employee EN is a PFO of Entity CI, Employee EN is not considered a PFO of Corporation CH under paragraph (c)(2)(iii) of this section. As PEO and PFO, Employees EI and EJ are covered employees of Corporation CH under paragraph (c)(2)(i) of this section. Additionally, as the three most highly compensated executive officers of Corporation CH (other than Employees EI and EJ), Employees EK, EL, and EM also are covered employees of Corporation CH under paragraph (c)(2)(i) of this section for Corporation CH's 2020 taxable year. The result would be the same if Entity CI was not required to file reports under section 15(d) of the Exchange Act and Corporation CH was a publicly held corporation pursuant to paragraph (c)(1)(i) instead of paragraph (c)(1)(iii) of this section.

(Z) *Example 26 (Disregarded entity)*—(*1*) *Facts.* The facts are the same as in paragraph (c)(2)(vii)(Y) of this section (*Example 25*), except that Employee EN performs a policy making function for Corporation CH. If Corporation CH were subject to the SEC executive compensation disclosure rules, then Employee EN would be treated as an executive officer of Corporation CH pursuant to 17 CFR 240.3b–7 for purposes of determining the three highest compensated executive officers for Corporation CH's 2020 taxable year. Employee EN is compensated more than Employee EK, but less than Employees EL and EM.

(*2*) *Conclusion.* Because Entity CI is disregarded as an entity separate from its owner, Corporation CH, and is required to file reports under section 15(d) of the Exchange Act, Corporation CH is a publicly held corporation under paragraph (c)(1)(iii) of this section for its 2020 taxable year. As PEO and PFO, Employees EI and EJ are covered employees of Corporation CH under paragraph (c)(2)(i) of this section. Employee EN is one of the three highest compensated executive officers for Corporation CH's taxable year. Because Employees EN, EL, and EM are the three most highly compensated executive officers of Corporation CH (other than Employees EI and EJ), they are covered employees of Corporation CH under paragraph (c)(2)(i) of this section for Corporation CH's 2020 taxable year. The result would be the same if Entity CI was not required to file reports under section 15(d) of the Exchange Act and Corporation CH was a publicly held corporation pursuant to paragraph (c)(1)(i) instead of paragraph (c)(1)(iii) of this section.

(AA) *Example 27 (Individual as covered employee of a publicly held corporation that includes the affiliated group)*—(*1*) *Facts.* Corporations CJ and CK are publicly held corporations for their 2020, 2021, and 2022 taxable years. Corporation CK is a direct subsidiary of Corporation CJ. Employee EO is an employee, but not a covered employee (as defined in paragraph (c)(2)(i) of this section), of Corporation CJ for its 2020, 2021, and 2022 taxable years. From April 1, 2020, to September 30, 2020, Employee EO serves as the PFO of Corporation CK. Employee EO does not perform any services for Corporation CK for its 2021 and 2022 taxable years, however, employee EO is a covered employee (as defined in paragraph (c)(2)(i) of this section) of Corporation CK for its 2020, 2021, and 2022 taxable years. For the 2020 taxable year, Employee EO receives compensation of $1,500,000 for services provided to Corporations CJ and CK. Employee EO receives $2,000,000 from Corporation CJ for performing services for Corporation CJ during each of its 2021 and 2022 taxable years. On June 30, 2022, Corporation CK pays $500,000 to Employee EO from a nonqualified deferred compensation plan that complies with section 409A.

(*2*) *Conclusion (2020 taxable year).* Because Employee EO is a covered employee of Corporation CK and because the affiliated group (comprised of Corporations CJ and CK) is a publicly held corporation, Employee EO is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(vi) of this section. Compensation paid by Corporations CJ and CK is aggregated for purposes of section 162(m)(1) and, as a result, $500,000 of the aggregate compensation paid is nondeductible. The result would be the same if Corporation CJ was a privately held corporation for its 2020 taxable year.

(*3*) *Conclusion (2021 taxable year).* Because Employee EO is a covered employee of Corporation CK pursuant to paragraph (c)(2)(i)(C) of this section and because the affiliated group (comprised of Corporations CJ and CK) is a publicly held corporation, Employee EO is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(vi) of this section. Compensation paid by Corporations CJ and CK is aggregated for purposes of section 162(m)(1) and, as a result, $1,000,000 of the aggregate compensation paid is nondeductible. The result would be the same if Corporation CJ was a privately held corporation for its 2021 taxable year.

(*4*) *Conclusion (2022 taxable year).* Because Employee EO is a covered employee of Corporation CK pursuant to paragraph (c)(2)(i)(C) of this section and because the affiliated group (comprised of Corporations CJ and CK) is a publicly held corporation, Employee EO is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(vi) of this section. Compensation paid by Corporations CJ and CK is aggregated for purposes of section 162(m)(1) and, as a result, $1,500,000 of the aggregate compensation paid is nondeductible. The result would be the same if Corporation CJ was a privately held corporation for its 2022 taxable year.

(BB) *Example 28 (Individual as covered employee of a publicly held corporation that includes the affiliated group)*—(*1*) *Facts.* Corporation CL is a publicly held corporation for its 2020 through 2023 taxable years. Corporations CM and CN are direct subsidiaries of Corporation CL and are privately held corporations for their 2020 through 2022 taxable years. Employee EP serves as the PFO of Corporation CL from January 1, 2020 to December 31, 2020, when Employee EP terminates employment from Corporation CL. On January 1, 2021, Employee EP starts performing services as an employee of Corporation CM. In 2021, Employee EP receives compensation from Corporation CM in excess of $1,000,000. On April 1, 2022, Employee EP starts performing services as an employee of Corporation CN. On September 30, 2022, Employee EP terminates employment from Corporations CM and CN. In 2022, Employee EP receives compensation from Corporations CM and CN in excess of $1,000,000. For the 2021 and 2022 taxable years, Employee EP does not serve as either the PEO or PFO of Corporations CM and CN, and is not one of the three highest compensated executive officers (other than the PEO or PFO) of Corporations CM and CN. On April 1, 2023, Corporation CL distributes all the shares of Corporation CM to its shareholders in a transaction described in section 355(a)(1). On April 1, 2023, the SEC declares effective Corporation CM's Securities Act registration statement in connection with its initial public offering. Corporation CM is a publicly held corporation for its 2023 taxable year. On April 2, 2023, Employee EP starts performing services as an employee of Corporation CM but is not an executive officer of Corporation CM.

(*2*) *Conclusion (2021 taxable year).* Employee EP is a covered employee of Corporation CL for the 2020 and subsequent taxable years. Because Employee EP is a covered employee of Corporation CL and because the affiliated group (comprised of Corporations CL, CM, and CN) is a publicly held corporation, Employee EP is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(vi) of this section for the 2020 and subsequent taxable years. Therefore, Corporation CM's deduction for compensation paid to Employee EP for the 2021 taxable year is subject to section 162(m)(1). The result would be the same if Corporation CM was a publicly held corporation as defined in paragraph (c)(1)(i) of this section.

(*3*) *Conclusion (2022 taxable year).* Because Employee EP is a covered employee of Corporation CL and because the affiliated group (comprised of Corporations CL, CM, and CN) is a publicly held corporation, Employee EP is a covered employee of the publicly held corporation that is the affiliated group pursuant to paragraph (c)(2)(vi) of this section. Therefore, Corporation CM's and CN's deduction for compensation paid to Employee EP for the 2022 taxable year is subject to section 162(m)(1). Because the compensation paid by all affiliated group members is aggregated for purposes of section 162(m)(1), $1,000,000 of the aggregate compensation paid is nondeductible. Corporations CM and CN are each treated as paying a ratable portion of the nondeductible compensation. The result would be the same if either Corporation CM or CN (or both) was a publicly held corporation as defined in paragraph (c)(1)(i) of this section.

(*4*) *Conclusion (2023 taxable year).* Because the distribution of the stock of Corporation CM is a transaction described in section 355(a)(1), Corporation CL is a predecessor of Corporation CM within the meaning of paragraph (c)(2)(ii)(C) of this section. However, because Employee EP started performing services as an employee of Corporation CM on January 1, 2021, and the distribution of stock of Corporation CM did not occur until April 1, 2023, Employee EP is not a covered employee of Corporation CM for its 2023 taxable year.

(3) *Compensation*—(i) *In general.* For purposes of the deduction limitation described in paragraph (b) of this section, compensation means the aggregate amount allowable as a deduction to the publicly held corporation under chapter 1 of the Internal Revenue Code for the taxable year (determined without regard to section 162(m)(1)) for remuneration for services performed by a covered employee in any capacity, whether or not the services were performed during

the taxable year. Compensation includes an amount that is includible in the income of, or paid to, a person other than the covered employee (including a beneficiary after the death of the covered employee) for services performed by the covered employee.

(ii) *Compensation paid by a partnership.* For purposes of paragraph (c)(3)(i) of this section, compensation includes an amount equal to a publicly held corporation's distributive share of a partnership's deduction for compensation expense attributable to the remuneration paid by the partnership to a covered employee of the publicly held corporation for services performed by the covered employee, including a payment for services under section 707(a) or under section 707(c).

(iii) *Exceptions.* Compensation does not include—

(A) Remuneration covered in section 3121(a)(5)(A) through (D) (concerning remuneration that is not treated as wages for purposes of the Federal Insurance Contributions Act);

(B) Remuneration consisting of any benefit provided to or on behalf of an employee if, at the time the benefit is provided, it is reasonable to believe that the employee will be able to exclude it from gross income; or

(C) Salary reduction contributions described in section 3121(v)(1).

(iv) *Examples.* The following examples illustrate the provisions of this paragraph (c)(3). For each example, assume that the corporation is a calendar year taxpayer.

(A) *Example 1*—(*1*) *Facts.* Corporation Z is a publicly held corporation for its 2020 taxable year, during which Employee A serves as the PEO of Corporation Z and also serves on the board of directors of Corporation Z. In 2020, Corporation Z paid $1,200,000 to Employee A plus a $50,000 fee for serving as a director of Corporation Z. These amounts are otherwise deductible for Corporation Z's 2020 taxable year.

(*2*) *Conclusion.* The $1,200,000 paid to Employee A in 2020 plus the $50,000 director's fee paid to Employee A in 2020 are compensation within the meaning of this paragraph (c)(3). Therefore, Corporation Z's $1,250,000 deduction for the 2020 taxable year is subject to the section 162(m)(1) limit.

(B) *Example 2*—(*1*) *Facts.* Corporation X is a publicly held corporation for its 2020 and all subsequent taxable years. Employee B serves as the PEO of Corporation X for its 2020 taxable year and is a participant in the Corporation X nonqualified retirement plan that meets the requirements of section 409A. The plan provides for the distribution of benefits over a three-year period beginning after a participant separates from service. Employee B terminates employment in 2021. In 2022, Employee B receives a $75,000 fee for services as a director and $1,500,000 as the first payment under the retirement plan. Employee B continues to serve on the board of directors until 2023 when Employee B dies before receiving the retirement benefit for 2023 and before becoming entitled to any director's fees for 2023. In 2023 and 2024, Corporation X pays the $1,500,000 annual retirement benefits to Person C, a beneficiary of Employee B.

(*2*) *Conclusion (2022 Taxable Year).* In 2022, Corporation X paid Employee B $1,575,000, including $1,500,000 under the retirement plan and $75,000 in director's fees. The retirement benefit and the director's fees are compensation within the meaning of this paragraph (c)(3). Therefore, Corporation X's $1,575,000 deduction for the 2022 taxable year is subject to the section 162(m)(1) limit.

(*3*) *Conclusion (2023 and 2024 Taxable Years).* In 2023 and 2024, Corporation X made payments to Person C of $1,500,000 under the retirement plan. The retirement benefits are compensation within the meaning of this paragraph (c)(3). Therefore, Corporation X's deduction for each annual payment of $1,500,000 for the 2023 and 2024 taxable years is subject to the section 162(m)(1) limit.

(C) *Example 3*—(*1*) *Facts.* Corporation T is a publicly held corporation for its 2021 taxable year. Corporation S is a privately held corporation for its 2021 taxable year. On January 2, 2021, Corporations S and T form a general partnership. Under the partnership agreement, Corporations S and T each have a 50% distributive share of the partnership's income, gain, loss, and deductions. For the taxable year ending December 31, 2021, Employee D, a covered employee of Corporation T, performs services for the partnership, and the partnership pays $800,000 to Employee D for these services, the deduction of $400,000 of which is allocated to Corporation T. Corporation T's $400,000 distributive share of the partnership's deduction is reported separately to Corporation T pursuant to § 1.702–1(a)(8)(iii).

(*2*) *Conclusion.* Because Corporation T's $400,000 distributive share of the partnership's deduction is attributable to the compensation paid by the partnership for services performed by Employee D, a covered employee of Corporation T, the $400,000 is compensation within the meaning of this paragraph (c)(3) and Corporation T's deduction for this expense for its 2021 taxable year is subject to the section 162(m)(1) limit. Corporation T's $400,000 allocation of the partnership's deduction is aggregated with Corporation T's deduction for compensation paid to Employee D, if any, in determining the amount allowable as a deduction to Corporation T for compensation paid to Employee D for Corporation T's 2021 taxable year. The result is the same whether Employee D performs services for the partnership as a common law employee, an independent contractor, or a partner, and whether the payment to Employee D is a payment under section 707(a) or section 707(c).

(4) *Securities Act.* The Securities Act means the Securities Act of 1933.

(5) *Exchange Act.* The Exchange Act means the Securities Exchange Act of 1934.

(6) *SEC.* The SEC means the United States Securities and Exchange Commission.

(7) *Foreign Private Issuer.* A foreign private issuer means an issuer as defined in 17 CFR 240.3b–4(c).

(8) *American Depositary Receipt (ADR).* An American Depositary Receipt or ADR means a negotiable certificate that evidences ownership of a specified number (or fraction) of a foreign private issuer's securities held by a depositary (typically, a U.S. bank).

(9) *Privately held corporation.* A privately held corporation is a corporation that is not a publicly held corporation as defined in paragraph (c)(1) of this section (without regard to paragraph (c)(1)(ii) of this section).

(d) *Corporations that become publicly held*—(1) *In general.* In the case of a corporation that was a privately held corporation and then becomes a publicly held corporation, the deduction limitation of paragraph (b) of this section applies to any compensation that is otherwise deductible for the taxable year ending on or after the date that the corporation becomes a publicly held corporation. A corporation is considered to become publicly held on the date that its registration statement becomes effective either under the Securities Act or the Exchange Act. The rules in this section apply to a partnership that becomes a publicly traded partnership that is a publicly held corporation within the meaning of paragraph (c)(1)(i) of this section.

(2) *Example.* The following example illustrates the provision of this paragraph (d).

(i) *Facts.* In 2021, Corporation E plans to issue debt securities in a public offering registered under the Securities Act. Corporation E is not required to file reports under section 15(d) of the Exchange Act with respect to any other class of securities and does not have another class of securities required to be registered under section 12 of the Exchange Act. On December 18, 2021, the SEC declares effective the Securities Act registration statement for Corporation E's debt securities.

(ii) *Conclusion.* Corporation E becomes a publicly held corporation on December 18, 2021 because it is then required to file reports under section 15(d) of the Exchange Act. The deduction limitation of paragraph (b) of this section applies to any compensation that is otherwise deductible for Corporation E's taxable year ending on or after December 18, 2021.

(e) *Coordination with disallowed excess parachute payments under section 280G.* The $1,000,000 limitation

in paragraph (b) of this section is reduced (but not below zero) by the amount (if any) that would have been included in the compensation of the covered employee for the taxable year but for being disallowed by reason of section 280G. For example, assume that during a taxable year a corporation pays $1,500,000 to a covered employee, of which $600,000 is an excess parachute payment, as defined in section 280G(b)(1), and a deduction for that excess parachute payment is disallowed by reason of section 280G(a). Because the $1,000,000 limitation in paragraph (b) of this section is reduced by the amount of the excess parachute payment, the corporation may deduct $400,000 ($1,000,000 − $600,000), and $500,000 of the otherwise deductible amount is nondeductible by reason of section 162(m)(1). Thus $1,100,000 (of the total $1,500,000 payment) is non-deductible, reflecting the disallowance related to the excess parachute payment under section 280G and the application of section 162(m)(1).

(f) *Coordination with excise tax on specified stock compensation.* The $1,000,000 limitation in paragraph (b) of this section is reduced (but not below zero) by the amount (if any) of any payment (with respect to such employee) of the tax imposed by section 4985 directly or indirectly by the expatriated corporation (as defined in section 4985(e)(2)) or by any member of the expanded affiliated group (as defined in section 4985(e)(4)) that includes such corporation.

(g) *Transition rules*—(1) *Amount of compensation payable under a written binding contract that was in effect on November 2, 2017*—(i) *General rule.* This section does not apply to the deduction for compensation payable under a written binding contract that was in effect on November 2, 2017, and that is not modified in any material respect on or after that date (a grandfathered amount). Instead, section 162(m), as in effect prior to its amendment by Public Law 115–97, applies to limit the deduction for that compensation. Because § 1.162–27 implemented section 162(m) as in effect prior to its amendment by Public Law 115–97, the rules of § 1.162–27 determine the applicability of the deduction limitation under section 162(m) with respect to the payment of a grandfathered amount (including the potential application of the separate grandfathering rules contained in § 1.162–27(h)). Compensation is a grandfathered amount only to the extent that as of November 2, 2017, the corporation was and remains obligated under applicable law (for example, state contract law) to pay the compensation under the contract if the employee performs services or satisfies the applicable vesting conditions. This section applies to the deduction for any amount of compensation that exceeds the grandfathered amount. If a grandfathered amount and non-grandfathered amount are otherwise deductible for the same taxable year and, under the rules of § 1.162–27, the deduction of some or all of the grandfathered amount may be limited (for example, the grandfathered amount does not satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation), then the grandfathered amount is aggregated with the non-grandfathered amount to determine the deduction disallowance for the taxable year under section 162(m)(1) (so that the deduction limit applies to the excess of the aggregated amount over $1 million).

(ii) *Contracts that are terminable or cancelable.* If a written binding contract is renewed after November 2, 2017, this section (and not § 1.162–27) applies to any payments made after the renewal. A written binding contract that is terminable or cancelable by the corporation without the employee's consent after November 2, 2017, is treated as renewed as of the earliest date that any such termination or cancellation, if made, would be effective. Thus, for example, if the terms of a contract provide that it will be automatically renewed or extended as of a certain date unless either the corporation or the employee provides notice of termination of the contract at least 30 days before that date, the contract is treated as renewed as of the date that termination would be effective if that notice were given. Similarly, for example, if the terms of a contract provide that the contract will be terminated or canceled as of a certain date unless either the corporation or the employee elects to renew within 30 days of that date, the contract is treated as renewed by the corporation as of that date (unless the contract is renewed before that date, in which case, it is treated as renewed on the earlier date). Alternatively, if the corporation will remain legally obligated by the terms of a contract beyond a certain date at the sole discretion of the employee, the contract will not be treated as renewed as of that date if the employee exercises the discretion to keep the corporation bound to the contract. A contract is not treated as terminable or cancelable if it can be terminated or canceled only by terminating the employment relationship of the employee. A contract is not treated as renewed if upon termination or cancellation of the contract the employment relationship continues but would no longer be covered by the contract. However, if the employment continues after the termination or cancellation, payments with respect to the post-termination or post-cancellation employment are not made pursuant to the contract (and, therefore, are not grandfathered amounts).

(iii) *Compensation payable under a plan or arrangement.* If a compensation plan or arrangement is a written binding contract in effect on November 2, 2017, the deduction for the amount that the corporation is obligated to pay to an employee pursuant to the plan or arrangement is not subject to this section solely because the employee was not eligible to participate in the plan or arrangement as of November 2, 2017, provided the employee was employed on November 2, 2017, by the corporation that maintained the plan or arrangement, or the employee had the right to participate in the plan or arrangement under a written binding contract as of that date.

(iv) *Compensation subject to recovery by corporation.* If the corporation is obligated or has discretion to recover compensation paid in a taxable year only upon the future occurrence of a condition that is objectively outside of the corporation's control, then the corporation's right to recovery is disregarded for purposes of determining the grandfathered amount for the taxable year. Whether or not the corporation exercises its discretion to recover any compensation does not affect the amount of compensation that the corporation remains obligated to pay under applicable law.

(v) *Compensation payable from an account balance plan*—(A) *In general.* Except as otherwise provided in this paragraph (g), the grandfathered amount of payments from an account balance plan (as defined in § 1.409A–1(c)(2)(i)(A)) that is a written binding contract in effect as of November 2, 2017, is the amount that the corporation is obligated to pay pursuant to the terms of the account balance plan in effect as of that date, as determined under applicable law. If under the terms of the plan, the corporation is obligated to pay the employee the account balance that is credited with earnings and losses and has no right to terminate or materially amend the plan, then the grandfathered amount would be the account balance as of November 2, 2017, plus any additional contributions and earnings and losses that the corporation is obligated to credit to the account

balance in accordance with the terms of the plan as of November 2, 2017, through the date of payment.

(B) *Account balance plan providing right to terminate.* If under the terms of the account balance plan in effect as of November 2, 2017, the corporation may terminate the contract and distribute the account balance to the employee, then the grandfathered amount would be the account balance determined as if the corporation had terminated the plan on November 2, 2017 or, if later, the earliest possible date the plan could be terminated in accordance with the terms of the plan (termination date). Whether additional contributions and earnings and losses credited to the account balance after the termination date, through the earliest possible date the account balance could have been distributed to the employee in accordance with the terms of the plan, are grandfathered depends on whether the terms of the plan require the corporation to make those contributions or credit those earnings and losses through that distribution date. Notwithstanding the foregoing, the corporation may treat the account balance as of the termination date as the grandfathered amount regardless of when the amount is paid and regardless of whether it has been credited with additional contributions or earnings or losses prior to payment.

(C) *Account balance plan providing right to discontinue future contributions.* If under the terms of the account balance plan in effect as of November 2, 2017, the corporation has no right to terminate the plan, but may discontinue future contributions and distribute the account balance in accordance with the terms of the plan, then the grandfathered amount would be the account balance determined as if the corporation had exercised the right to discontinue contributions on November 2, 2017, or, if later, the earliest permissible date the corporation could exercise that right in accordance with the terms of the plan (the freeze date). If, after the freeze date, the plan requires the crediting of earnings and losses on the account balance through the payment date, then the earnings and losses credited to the grandfathered account balance would also be grandfathered. Notwithstanding the foregoing, the corporation may treat the account balance as of the freeze date as the grandfathered amount regardless of when the amount is paid and regardless of whether it has been credited with earnings or losses prior to payment.

(vi) *Compensation payable from a nonaccount balance plan*—(A) *In general.* Except as otherwise provided in this paragraph (g), the grandfathered amount of payments from a nonaccount balance plan (as defined in § 1.409A–1(c)(2)(i)(C)) that is a written binding contract in effect as of November 2, 2017, is the amount that the corporation is obligated to pay pursuant to the terms of the nonaccount balance plan in effect as of that date, as determined under applicable law. If under the terms of the plan, the corporation is obligated to pay the employee the benefit under the plan and has no right to terminate or materially amend the plan, then the grandfathered amount would be the benefit under the plan as of November 2, 2017, plus any additional accrued benefits that the corporation is obligated to pay in accordance with the terms of the plan as of November 2, 2017, through the date of payment.

(B) *Nonaccount balance plan providing right to terminate.* If under the terms of the nonaccount balance plan in effect as of November 2, 2017, the corporation may terminate the plan and distribute the total benefit to the employee, then the grandfathered amount would be the present value of the total benefit (lump sum value) determined as if the corporation had terminated the plan on November 2, 2017 or, if later, the earliest possible date the plan could be terminated in accordance with the terms of the plan (termination date). Whether an increase or decrease in the lump sum value after the termination date, through the earliest possible date the lump sum value could have been distributed to the employee, is grandfathered depends on whether the terms of the plan require the corporation to increase or decrease the lump sum value through the distribution date. For example, if the plan did not require the corporation to make further service or compensation credits, then any increase in the lump sum value for these credits after the termination date is not grandfathered. Notwithstanding the foregoing, the corporation may treat the lump sum value as of the termination date as the grandfathered amount regardless of when the amount is paid and regardless of whether it has increased or decreased prior to payment. For purposes of this paragraph (g)(1)(vi)(B), the lump sum value is determined based on the actuarial methods and assumptions provided in the plan in effect on November 2, 2017, if the assumptions are reasonable, or any reasonable actuarial assumptions if the plan does not provide for applicable actuarial methods and assumptions or the terms of the plan were not reasonable. The determination of the lump sum value may not take into account the likelihood that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk that the employer, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments, the possibility of a future change in the law, or similar risks or contingencies. If the benefit provided under the plan in effect on November 2, 2017, is paid as a life annuity or other form of benefit that is not a single lump sum payment, the application of the grandfathered amount to the payments of the benefit is determined in accordance with the ordering rule of paragraph (g)(1)(viii) of this section.

(C) *Nonaccount balance plan providing right to discontinue future accrual of benefits.* If under the terms of the nonaccount balance plan in effect as of November 2, 2017, the corporation has no right to terminate the plan, but may discontinue future accruals of benefits and distribute the benefit in accordance with the terms of the plan, then the grandfathered amount would be the lump sum value of the total benefit (lump sum value) determined as if the corporation had exercised the right to discontinue the future accrual of benefits on November 2, 2017, or, if later, the earliest permissible date the corporation could exercise such right in accordance with the terms of the plan (the freeze date). If, after the freeze date, the plan required the corporation to increase or decrease the lump sum value through the payment date, then any increase to the grandfathered lump sum would also be grandfathered. Notwithstanding the foregoing, the corporation may treat the lump sum value determined as of the freeze date as the grandfathered amount regardless of when the amount is paid and regardless of whether it has been increased or decreased prior to payment. For purposes of this paragraph (g)(1)(vi)(C), the lump sum value is determined based on the actuarial methods and assumptions provided in the plan in effect on November 2, 2017, if the assumptions are reasonable, or any reasonable actuarial assumptions if the plan does not provide for applicable actuarial methods and assumptions or the terms of the plan were not reasonable. The determination of the lump sum value may not take into account the likelihood that payments will not be made (or will be reduced) because of the unfunded status of the plan, the risk that the employer, the trustee, or another party will be unwilling or unable to pay, the possibility of future plan amendments,

the possibility of a future change in the law, or similar risks or contingencies. If the benefit paid under the plan in effect on November 2, 2017, is paid as a life annuity or other form of benefit that is not a single lump sum payment, the application of the grandfathered amount to the payments of the benefit is determined in accordance with the ordering rule of paragraph (g)(1)(viii) of this section.

(vii) *Grandfathered amount limited to a particular plan or arrangement.* The grandfathered amount under a plan or arrangement applies solely to the amounts paid under that plan or arrangement, so that regardless of whether all of the grandfathered amount is paid to the participant (for example, regardless of whether some or all of the grandfathered amount under the plan is forfeited under the terms of the plan), no portion of that grandfathered amount may be treated as a grandfathered amount under any other separate plan or arrangement in which the employee is a participant.

(viii) *Ordering rule.* If a portion of the amount payable under a plan or arrangement is a grandfathered amount and a portion is subject to this section, and payment under the plan or arrangement is made in a series of payments (including payments as a life annuity), the grandfathered amount is allocated to the first payment of an amount under the plan or arrangement that is otherwise deductible. If the grandfathered amount exceeds the initial payment, the excess is allocated to the next payment of an amount under the plan or arrangement that is otherwise deductible, and this process is repeated until the entire grandfathered amount has been paid. Notwithstanding the foregoing, for amounts otherwise deductible for taxable years ending before December 20, 2019, the grandfathered amount may be allocated to each payment on a pro rata basis or to the last otherwise deductible payment. If one of these two methods was used for taxable years ending before December 20, 2019, then, for taxable years ending on or after December 20, 2019, the method must be changed to allocate any remaining grandfathered amount to the first payment for the remaining payments (treating as the first payment the first otherwise deductible amount for taxable years ending on or after December 20, 2019).

(2) *Material modifications.* (i) If a written binding contract is modified on or after November 2, 2017, this section (and not § 1.162–27) applies to any payments made after the modification. A material modification occurs when the contract is amended to increase the amount of compensation payable to the employee. If a written binding contract is materially modified, it is treated as a new contract entered into as of the date of the material modification. Thus, amounts received by an employee under the contract before a material modification are not affected, but amounts received subsequent to the material modification are treated as paid pursuant to a new contract, rather than as paid pursuant to a written binding contract in effect on November 2, 2017.

(ii) A modification of the contract that accelerates the payment of compensation is a material modification unless the amount of compensation paid is discounted to reasonably reflect the time value of money. If the contract is modified to defer the payment of compensation, any compensation paid or to be paid that is in excess of the amount that was originally payable to the employee under the contract will not be treated as resulting in a material modification if the additional amount is based on applying to the amount originally payable either a reasonable rate of interest or the rate of return on a predetermined actual investment as defined in § 31.3121(v)(2)–1(d)(2)(i)(B) of this chapter (whether or not assets associated with the amount originally owed are actually invested therein) such that the amount payable by the employer at the later date will be based on the reasonable rate of interest or the actual rate of return on the predetermined actual investment (including any decrease, as well as any increase, in the value of the investment). For an arrangement under which the grandfathered amounts are subject to increase or decrease based on the performance of a predetermined actual investment, the addition or substitution of a predetermined actual investment or reasonable interest rate as an investment alternative for amounts deferred is not treated as a material modification. However, a modification of a contract to defer payment of a grandfathered amount that results in payment of additional amounts (such as additional earnings) does not necessarily mean that the additional amounts are grandfathered amounts; for rules concerning the determination of grandfathered amounts see paragraph (g) of this section. Notwithstanding the foregoing, if compensation attributable to an option to purchase stock (other than an incentive stock option described in section 422 or a stock option granted under an employee stock purchase plan described in section 423) or a stock appreciation right is grandfathered, an extension of the exercise period that is extended in compliance with § 1.409A–1(b)(5)(v)(C)(*1*) will not be treated as a material modification and the amount of compensation paid upon the exercise of the stock option or stock appreciation right will be grandfathered.

(iii) The adoption of a supplemental contract or agreement that provides for increased compensation, or the payment of additional compensation, is a material modification of a written binding contract if the facts and circumstances demonstrate that the additional compensation to be paid is based on substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract. However, a material modification of a written binding contract does not include a supplemental payment that is equal to or less than a reasonable cost-of-living increase over the payment made in the preceding year under that written binding contract. In addition, the failure, in whole or in part, to exercise negative discretion under a contract does not result in the material modification of that contract (although the existence of the negative discretion under the contract may impact the initial determination of whether amounts under the contract are grandfathered amounts).

(iv) If a grandfathered amount is subject to a substantial risk of forfeiture (as defined in § 1.409A–1(d)), then a modification of the contract that results in a lapse of the substantial risk of forfeiture is not considered a material modification. Furthermore, for compensation received pursuant to the substantial vesting of restricted property, or the exercise of a stock option or stock appreciation right that does not provide for a deferral of compensation (as defined in § 1.409A–1(b)(5)(i) and (ii)), a modification of a written binding contract in effect on November 2, 2017, that results in a lapse of the substantial risk of forfeiture (as defined § 1.83–3(c)) is not considered a material modification.

(3) *Examples.* The following examples illustrate the provisions of this paragraph (g). For each example, assume for all relevant years that the corporation is a publicly held corporation within the meaning of paragraph (c)(1) of this section and is a calendar year taxpayer, and is not a ''smaller reporting company'' or ''emerging growth company'' for purposes of reporting under the Exchange Act. Furthermore, assume that, for each example, if any arrangement is subject to section 409A,

then the arrangement complies with section 409A, and that no arrangement is subject to section 457A.

(i) *Example 1 (Multi-year agreement for annual salary)*—(A) *Facts.* On October 2, 2017, Corporation X executed a three-year employment agreement with Employee A for an annual salary of $2,000,000 beginning on January 1, 2018. Employee A serves as the PFO of Corporation X for the 2017 through 2020 taxable years. The agreement provides for automatic extensions after the three-year term for additional one-year periods, unless the corporation exercises its option to terminate the agreement within 30 days before the end of the three-year term or, thereafter, within 30 days before each anniversary date. Termination of the employment agreement does not require the termination of Employee A's employment with Corporation X. Under applicable law, the agreement for annual salary constitutes a written binding contract in effect on November 2, 2017, to pay $2,000,000 of annual salary to Employee A for three years through December 31, 2020.

(B) *Conclusion.* If this section applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, employment agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's annual salary. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2018 through 2020 taxable years. The deduction for Employee A's annual salary for the 2018 through 2020 taxable years is not subject to section 162(m)(1). However, the employment agreement is treated as renewed on January 1, 2021, unless it is previously terminated, and the deduction limit of this § 1.162–33 (and not § 1.162–27) will apply to the deduction for any payments made under the employment agreement on or after that date.

(ii) *Example 2 (Agreement for severance based on annual salary and discretionary bonus)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(i) of this section (*Example 1*), except that the employment agreement also requires Corporation X to pay Employee A severance if Corporation X terminates the employment relationship without cause during the term of the agreement. The amount of severance is equal to the sum of two times Employee A's annual salary plus two times Employee A's discretionary bonus (if any) paid within 24 months preceding termination. Under applicable law, the agreement for severance constitutes a written binding contract in effect on November 2, 2017, to pay $4,000,000 (two times Employee A's $2,000,000 annual salary) if Corporation X terminates Employee A's employment without cause during the term of the agreement.

(B) *Conclusion.* If this section applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, employment agreement is a written binding contract to pay Employee A $4,000,000 if Employee A is terminated without cause prior to December 31, 2020, this section does not apply (and § 1.162–27 does apply) to the deduction for $4,000,000 of Employee A's severance. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2018 through 2020 taxable years. The deduction for $4,000,000 of Employee A's severance is not subject to section 162(m)(1). However, the employment agreement is treated as renewed on January 1, 2021, unless it is previously terminated, and this § 1.162–33 (and not § 1.162–27) will apply to the deduction for any payments made under the employment agreement, including for severance, on or after that date.

(iii) *Example 3 (Effect of discretionary bonus payment on agreement for severance based on annual salary and discretionary bonus)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(ii) of this section (*Example 2*), except that, on October 31, 2017, Corporation X paid Employee A a discretionary bonus of $100,000, on May 14, 2018, Corporation X paid Employee A a discretionary bonus of $600,000, and on April 30, 2019, terminated Employee A's employment without cause. Pursuant to the terms of the employment agreement for severance, on May 1, 2019, Corporation X paid to Employee A a $5,400,000 severance payment (the sum of two times the $2,000,000 annual salary, two times the $100,000 discretionary bonus, and two times the $600,000 discretionary bonus).

(B) *Conclusion.* If this section applies, Employee A is a covered employee for Corporation X's 2019 taxable year. Because the October 2, 2017, agreement is a written binding contract to pay Employee A $4,000,000 if Employee A is terminated without cause prior to December 31, 2020, and $200,000 if Corporation X terminates Employee A's employment without cause prior to October 31, 2019, this section does not apply (and § 1.162–27 does apply) to the deduction for $4,200,000 of Employee A's severance payment. The deduction for $4,200,000 of Employee A's severance payment is not subject to section 162(m)(1). Because the October 2, 2017, agreement is not a written binding contract to pay Employee A's $600,000 discretionary bonus (since, as of November 2, 2017, Corporation X was not obligated under applicable law to make the bonus payment), the deduction for $1,200,000 of the $5,400,000 payment is subject to this section (and not § 1.162–27).

(iv) *Example 4 (Effect of adjustment to annual salary on severance)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(ii) of this section (*Example 2*), except that the employment agreement provides for discretionary increases in salary and, on January 1, 2019, Corporation X increased Employee A's annual salary from $2,000,000 to $2,050,000, an increase that was less than a reasonable, cost-of-living adjustment.

(B) *Conclusion (Annual salary).* If this section applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's annual salary unless the change in the salary is a material modification. Even though the $50,000 increase is paid on the basis of substantially the same elements or conditions as the salary that is otherwise paid under the contract, the $50,000 increase does not constitute a material modification because it is less than or equal to a reasonable cost-of-living increase to the $2,000,000 annual salary Corporation X is required to pay under applicable law as of November 2, 2017. However, the deduction for the $50,000 increase is subject to this section (and not § 1.162–27).

(C) *Conclusion (Severance payment).* Because the October 2, 2017, agreement is a written binding contract to pay Employee A severance of $4,000,000, this section would not apply (and § 1.162–27 would apply) to the deduction for this amount of severance unless the change in the employment agreement is a material modification. Even though the $100,000 increase in severance (two times the $50,000 increase in salary) would be paid on the basis of substantially the same elements or conditions as the severance that would otherwise be paid pursuant to the written binding contract, the $50,000 increase in salary on which it is based does not constitute a material modification of the written binding contract since it is less than or equal to a reasonable cost-of-living increase. However, the deduction for the $100,000 increase in severance is subject to this section (and not § 1.162–27).

(v) *Example 5 (Effect of adjustment to annual salary on severance)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(iv) of this section (*Example 4*), except that, on January 1, 2019, Corporation X increased Employee A's annual salary from $2,000,000 to $3,000,000, an increase that exceeds a reasonable, cost-of-living adjustment.

(B) *Conclusion (Annual salary).* If this section applies, Employee A is a covered employee for Corporation X's 2018 through 2020 taxable years. Because the October 2, 2017, agreement is a written binding contract to pay Employee A an annual salary of $2,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee A's annual salary unless the change in the employment agreement is a material modification. The $1,000,000 increase is a material modification of the written binding contract because the additional compensation is paid on the basis of substantially the same elements or conditions as the compensation that is otherwise paid pursuant to the written binding contract, and it exceeds a reasonable, annual cost-of-living increase from the $2,000,000 annual salary for 2018 that Corporation X is required to pay under applicable law as of November 2, 2017. Because the written binding contract is materially modified as of January 1, 2019, the deduction for all annual salary paid to Employee A in 2019 and thereafter is subject to this section (and not § 1.162–27).

(C) *Conclusion (Severance payment).* Because the October 2, 2017, agreement is a written binding contract to pay Employee A severance of $4,000,000, this section would not apply (and § 1.162–27 would apply) to

the deduction for this amount of severance unless the change in the employment agreement is a material modification. The additional $2,000,000 severance payment (two times the $1,000,000 increase in annual salary) constitutes a material modification of the written binding contract because the $1,000,000 increase in salary on which it is based constitutes a material modification of the written binding contract since it exceeds a reasonable cost-of-living increase from the $2,000,000 annual salary for 2018 that Corporation X is required to pay under applicable law as of November 2, 2017. Because the agreement is materially modified as of January 1, 2019, the deduction for any amount of severance paid to Employee A under the agreement is subject to this section (and not § 1.162–27).

(vi) *Example 6 (Elective deferral of an amount that corporation was obligated to pay under applicable law)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(i) of this section (*Example 1*), except that, on December 15, 2018, Employee A makes a deferral election under a nonqualified deferred compensation (NQDC) plan to defer $200,000 of annual salary earned and payable in 2019. Pursuant to the NQDC plan, the $200,000, including earnings, is to be paid in a lump sum on the date six months following Employee A's separation from service. The earnings are based on the Standard & Poor's 500 Index. Under applicable law, pursuant to the written binding contract in effect on November 2, 2017, (and absent the deferral agreement) Corporation X would have been obligated to pay $200,000 to Employee A in 2019, but is not obligated to pay any earnings on the $200,000 deferred pursuant to the deferral election Employee A makes on December 15, 2018. Employee A separates from service on December 15, 2020. On June 15, 2021, Corporation X pays $250,000 (the deferred $200,000 of salary plus $50,000 in earnings).

(B) *Conclusion.* If this section applies, Employee A is a covered employee for Corporation X's 2021 taxable year. Employee A's NQDC plan is not a material modification of the written binding contract in effect on November 2, 2017, because the earnings to be paid under the NQDC plan are based on a predetermined actual investment (as defined in § 31.3121(v)(2)–1(d)(2)(i)(B) of this chapter). The deduction for the $50,000 of earnings to be paid that exceed the amount originally payable to Employee A under the written binding contract ($200,000 of salary) are subject to this section (and not § 1.162–27). This section does not apply (and § 1.162–27 does apply) to the deduction for the $200,000 portion of the $250,000 payment that Corporation X was obligated under applicable law to pay as of November 2, 2017. Pursuant to § 1.162–27(c)(2), Employee A is not a covered employee for Corporation X's 2021 taxable year; thus, the deduction for the $200,000 payment is not subject to section 162(m)(1).

(vii) *Example 7 (Compensation subject to discretionary recovery by corporation)*—(A) *Facts.* Employee B serves as the PFO of Corporation Z for its 2017 through 2019 taxable years. On October 2, 2017, Corporation Z executed a bonus agreement with Employee B that requires Corporation Z to pay Employee B a performance bonus of $3,000,000 on May 1, 2019, if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC. The agreement does not permit Corporation Z to reduce the amount of the bonus payment for any reason if the Corporation Z attains the net earnings performance target. However, the agreement provides that, if the bonus is paid and subsequently the financial statements are restated to show that the net earnings did not increase by at least 10%, then Corporation Z may, in its discretion, recover the $3,000,000 from Employee B within six months of the restatement. Under applicable law, the agreement for the performance bonus constitutes a written binding contract in effect on November 2, 2017, to pay $3,000,000 to Employee B if Corporation Z's net earnings increase by at least 10% for its 2018 taxable year based on the financial statements filed with the SEC. On May 1, 2019, Corporation Z pays $3,000,000 to Employee B because its net earnings increased by at least 10% of its 2018 taxable year.

(B) *Conclusion.* If this section applies, Employee B is a covered employee for Corporation Z's 2019 taxable year. Because the October 2, 2017, agreement is a written binding contract to pay Employee B $3,000,000 if the applicable conditions are met, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000 regardless of whether Corporation Z's financial statements are restated to show that its net earnings did not increase by at least 10%, and regardless of whether Corporation Z exercises its discretion to recover the bonus if Corporation Z's financial statements are restated to show that its net earnings did not increase by at least 10%.

(viii) *Example 8 (Performance bonus plan with negative discretion)*—(A) *Facts.* Employee E serves as the PEO of Corporation V for the 2017 and 2018 taxable years. On February 1, 2017, Corporation V establishes a bonus plan, under which Employee E will receive a cash bonus of $1,500,000 if a specified performance goal is satisfied. The compensation committee retains the right, if the performance goal is met, to reduce the bonus payment to no less than $400,000 if, in its judgment, other subjective factors warrant a reduction. On November 2, 2017, under applicable law, which takes into account the employer's ability to exercise negative discretion, the bonus plan established on February 1, 2017, constitutes a written binding contract to pay $400,000. On March 1, 2018, the compensation committee certifies that the performance goal was satisfied, but exercises its discretion to reduce the award to $500,000. On April 1, 2018, Corporation V pays $500,000 to Employee E. The payment satisfies the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(B) *Conclusion.* If this section applies, Employee E is a covered employee for Corporation V's 2018 taxable year. Because the February 1, 2017, plan is a written binding contract to pay Employee E $400,000 if the performance goal is satisfied, this section does not apply (and § 1.162–27 does apply) to the deduction for the $400,000 portion of the $500,000 payment. Furthermore, pursuant to paragraph (g)(2)(iii) of this section, the failure of the compensation committee to exercise its discretion to reduce the award further to $400,000, instead of $500,000, does not result in a material modification of the contract. Pursuant to § 1.162–27(e)(1), the deduction for the $400,000 payment is not subject to section 162(m)(1) because the payment satisfies the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation. The deduction for the remaining $100,000 of the $500,000 payment is subject to this section (and not § 1.162–27) and therefore the status as qualified performance-based compensation is irrelevant to the application of section 162(m)(1) to this remaining amount.

(ix) *Example 9 (Equity-based compensation with underlying grants made prior to November 2, 2017)*—(A) *Facts.* On January 2, 2017, Corporation T executed a 4-year employment agreement with Employee G to serve as its PEO, and Employee G serves as the PEO for the four-year term. Pursuant to the employment agreement, on January 2, 2017, Corporation T executed a grant agreement and granted to Employee G nonqualified stock options to purchase 1,000 shares of Corporation T stock, stock appreciation rights (SARs) on 1,000 shares, and 1,000 shares of Corporation T restricted stock. On the date of grant, the stock options had no readily ascertainable fair market value as defined in § 1.83–7(b), and neither the stock options nor the SARs provided for a deferral of compensation under § 1.409A–1(b)(5)(i)(A) and (B). The stock options, SARs, and shares of restricted stock are subject to a substantial risk of forfeiture and all substantially vest on January 2, 2020. Employee G may exercise the stock options and the SARs at any time from January 2, 2020, through January 2, 2027. On January 2, 2020, Employee G exercises the stock options and the SARs, and the 1,000 shares of restricted stock become substantially vested (as defined in § 1.83–3(b)). The grant agreement pursuant to which grants of the stock options, SARs, and shares of restricted stock are made constitutes a written binding contract under applicable law. The compensation attributable to the stock options and the SARs satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(B) *Conclusion.* If this section applies, Employee G is a covered employee for Corporation T's 2020 taxable year. Because the January 2, 2017, grant agreement constitutes a written binding contract, this section does not apply (and § 1.162–27 does apply) to the deduction for compensation received pursuant to the exercise of the stock options and the SARs, or the restricted stock becoming substantially vested (as defined in § 1.83–3(b)). Pursuant to § 1.162–27(e)(1), the deduction attributable to the stock options and the SARs is not subject to section 162(m)(1) because the compensation satisfies the requirements of § 1.162–27(e)(2) through

(5) as qualified performance-based compensation. However, the deduction attributable to the restricted stock is subject to section 162(m)(1) because the compensation does not satisfy the requirements of § 1.162–27(e)(2) through (5) as qualified performance-based compensation.

(x) *Example 10 (Plan in which an employee is not a participant on November 2, 2017)*—(A) *Facts.* On October 2, 2017, Employee H executes an employment agreement with Corporation Y to serve as its PFO, and begins employment with Corporation Y. The employment agreement, which is a written binding contract under applicable law, provides that if Employee H continues in his position through April 1, 2018, Employee H will become a participant in the NQDC plan of Corporation Y and that Employee H's benefit accumulated on that date will be $3,000,000. On April 1, 2021, Employee H receives a payment of $4,500,000 (the increase from $3,000,000 to $4,500,000 is not a result of a material modification as defined in paragraph (g)(2) of this section), which is the entire benefit accumulated under the plan through the date of payment.

(B) *Conclusion.* If this section applies, Employee H is a covered employee for Corporation Y's 2021 taxable year. Even though Employee H was not eligible to participate in the NQDC plan on November 2, 2017, Employee H had the right to participate in the plan under a written binding contract as of that date. Because the amount required to be paid pursuant to the written binding contract is $3,000,000, this section does not apply (and § 1.162–27 does apply) to the deduction for the $3,000,000 portion of the $4,500,000. Pursuant to § 1.162–27(c)(2), Employee H is not a covered employee of Corporation Y for the 2021 taxable year. The deduction for the $3,000,000 portion of the $4,500,000 is not subject to section 162(m)(1). The deduction for the remaining $1,500,000 portion of the payment is subject to this section (and not § 1.162–27).

(xi) *Example 11 (Material modification of annual salary)*—(A) *Facts.* On January 2, 2017, Corporation R executed a 5-year employment agreement with Employee I to serve as Corporation R's PFO, providing for an annual salary of $1,800,000. The agreement constitutes a written binding contract under applicable law. In 2017 and 2018, Employee I receives the salary of $1,800,000 per year. In 2019, Corporation R increases Employee I's salary by $40,000, which is less than a reasonable cost-of-living increase from $1,800,000. On January 1, 2020, Corporation R increases Employee I's salary to $2,400,000. The $560,000 increase exceeds a reasonable, annual cost-of-living increase from $1,840,000.

(B) *Conclusion ($1,840,000 Payment in 2019).* If this section applies, Employee I is a covered employee for Corporation R's 2018 through 2020 taxable years. Because the January 1, 2017, agreement is a written binding contract to pay Employee I an annual salary of $1,800,000, this section does not apply (and § 1.162–27 does apply) to the deduction for Employee I's annual salary unless the change in the employment agreement is a material modification. Pursuant to § 1.162–27(c)(2), Employee I is not a covered employee of Corporation R for the 2019 taxable year, so the deduction for the $1,800,000 salary is not subject to section 162(m)(1). Even though the $40,000 increase is made on the basis of substantially the same elements or conditions as the salary, the $40,000 increase does not constitute a material modification of the written binding contract because the $40,000 is less than or equal to a reasonable cost-of-living increase. However, the deduction for the $40,000 increase is subject to this section (and not § 1.162–27).

(C) *Conclusion (Salary increase to $2,400,000 in 2020).* The $560,000 increase in salary in 2020 is a material modification of the written binding contract because the additional compensation is paid on the basis of substantially the same elements or conditions as the salary, and it exceeds a reasonable, annual cost-of-living increase from $1,840,000. Because the written binding contract is materially modified as of January 1, 2020, the deduction for all salary paid to Employee I on and after January 1, 2020, is subject is subject to this section (and not § 1.162–27).

(xii) *Example 12 (Additional payment not considered a material modification)*—(A) *Facts.* The facts are the same as in paragraph (g)(3)(xi) of this section (*Example 11*), except that instead of an increase in salary, in 2020 Employee I receives a restricted stock grant subject to Employee I's continued employment for the balance of the contract.

(B) *Conclusion.* The restricted stock grant is not a material modification of the written binding contract because any additional compensation paid to Employee I under the grant is not paid on the basis of substantially the same elements and conditions as Employee I's salary. However, the deduction attributable to the restricted stock grant is subject to this section (and not § 1.162–27).

(h) *Effective/Applicability dates*—(1) *Effective date.* This section is effective on December 30, 2020.

(2) *Applicability dates*—(i) *General applicability date.* Except as otherwise provided in paragraph (h)(2)(ii) of this section, this section applies to taxable years beginning on or after December 30, 2020. Taxpayers may choose to apply this section for taxable years beginning after December 31, 2017, and before December 30, 2020 provided the taxpayer applies this section in its entirety and in a consistent manner.

(ii) *Special applicability dates*—(A) *Definition of covered employee.* The definition of covered employee in paragraph (c)(2)(i) of this section applies to taxable years ending on or after September 10, 2018. However, for a corporation whose fiscal year and taxable year do not end on the same date, the rule in paragraph (c)(2)(i)(B) of this section requiring the determination of the three most highly compensated executive officers to be made pursuant to the rules under the Exchange Act applies to taxable years ending on or after December 20, 2019.

(B) *Definition of predecessor of a publicly held corporation*—(*1*) *Publicly held corporations that become privately held.* The definition of predecessor of a publicly held corporation in paragraph (c)(2)(ii)(A) of this section applies to any publicly held corporation that becomes a privately held corporation for a taxable year beginning after December 31, 2017, and, subsequently, again becomes a publicly held corporation on or after December 30, 2020. The definition of predecessor of a publicly held corporation in paragraph (c)(2)(ii)(A) of this section does not apply to any publicly held corporation that became a privately held corporation for a taxable year beginning before January 1, 2018, with respect to the earlier period as a publicly held corporation; or a publicly held corporation that becomes a privately held corporation for a taxable year beginning after December 31, 2017, and, subsequently, again becomes a publicly held corporation before December 30, 2020.

(*2*) *Corporate transactions.* The definition of predecessor of a publicly held corporation in paragraphs (c)(2)(ii)(B) through (H) of this section applies to corporate transactions that occur (as provided in the transaction timing rule of paragraph (c)(2)(ii)(I) of this section) on or after December 30, 2020. With respect to any of the following corporate transactions occurring after December 20, 2019, and before December 30, 2020, excluding target corporations from the definition of the term ''predecessor'' is not a reasonable good faith interpretation of the statute:

(*i*) A publicly held target corporation the stock or assets of which are acquired by another publicly held corporation in a transaction to which section 381(a) applies.

(*ii*) A publicly held target corporation, at least 80% of the total voting power of the stock of which, and at least 80% of the total value of the stock of which, are acquired by a publicly held acquiring corporation (including an affiliated group).

(C) *Definition of compensation.* The definition of compensation provided in paragraph (c)(3)(ii) of this section (relating to distributive share of partnership deductions for compensation paid) applies to any deduction for compensation that is paid after December 18, 2020. The definition of compensation in paragraph (c)(3)(ii) does not apply to compensation paid pursuant to a written binding contract that is in effect on December 20, 2019,

and that is not materially modified after that date. For purposes of this paragraph (h)(3), written binding contract and material modification have the same meanings as provided in paragraphs (g)(1) and (2) of this section.

(D) *Corporations that become publicly held.* The rule in paragraph (d) of this section (providing that the deduction limitation of paragraph (b) of this section applies to a deduction for any compensation that is otherwise deductible for the taxable year ending on or after the date that a privately held corporation becomes a publicly held corporation) applies to corporations that become publicly held after December 20, 2019. A privately held corporation that becomes a publicly held corporation on or before December 20, 2019, may rely on the transition rules provided in § 1.162–27(f)(1) until the earliest of the events provided in § 1.162–27(f)(2). A subsidiary that is a member of an affiliated group (as defined in § 1.162–27(c)(1)(ii)) may rely on transition relief provided in § 1.162–27(f)(4) if it becomes a separate publicly held corporation (whether in a spin-off transaction or otherwise) on or before December 20, 2019.

(E) *Transition rules.* Except for the transition rules in paragraphs (g)(1)(v) through (vii) of this section, the transition rules in paragraphs (g)(1) and (2) of this section (providing that this section does not apply to compensation payable under a written binding contract which was in effect on November 2, 2017, and which is not modified in any material respect on or after such date) apply to taxable years ending on or after September 10, 2018.

■ **Par. 4.** Section 1.338–1 is amended by revising paragraph (b)(2)(i) to read as follows:

§ 1.338–1 General principles; status of old target and new target.

* * * * *

(b) * * *

(2) * * *

(i) The rules applicable to employee benefit plans (including those plans described in sections 79, 104, 105, 106, 125, 127, 129, 132, 137, and 220), qualified pension, profit-sharing, stock bonus and annuity plans (sections 401(a) and 403(a)), simplified employee pensions (section 408(k)), tax qualified stock option plans (sections 422 and 423), welfare benefit funds (sections 419, 419A, 512(a)(3), and 4976), voluntary employee benefit associations (section 501(c)(9) and the regulations thereunder (§§ 1.501(c)(9)–1 through 1.501(c)(9)–8)) and certain excessive employee remuneration (section 162(m) and the regulations thereunder (§§ 1.162–27, 1.162–31, and 1.162–33));

* * * * *

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: December 11, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–28484 Filed 12–28–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF TREASURY

31 CFR Part 1

RIN 1505–AC66

Privacy Act of 1974; Exemption

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the Department of the Treasury, Departmental Offices (DO) gives notice of a final rule exemption for a new system of records entitled ''Department of the Treasury, Departmental Offices .227—Committee on Foreign Investment in the United States (CFIUS) Case Management System,'' maintained by the Committee on Foreign Investment in the United States from certain provisions of the Privacy Act. The exemption is intended to comply with the legal prohibitions against the disclosure of certain kinds of information and to protect certain information maintained in this system of records.

DATES: Effective December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Ryan Law, Deputy Assistant Secretary for Management, Office of Privacy, Transparency, and Records, 1750 Pennsylvania Avenue NW, 8th Floor, Washington, DC 20220. Mr. Law may be reached via telephone at (202) 622- 5710 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The Department of the Treasury (Treasury) published a notice of proposed rulemaking in the **Federal Register**, 85 FR 58308, September 18, 2020, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act. As background, in 2018, the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Subtitle A of Title XVII of Public Law 115–232, 132 Stat. 2173, was enacted. FIRRMA amends section 721 of the Defense Production Act of 1950, as amended (Section 721), which delineates the authorities and jurisdiction of the Committee on Foreign Investment in the United States (CFIUS). FIRRMA maintains CFIUS's jurisdiction over any transaction that could result in foreign control of any U.S. business, and broadens the authorities of the President and CFIUS under Section 721 to review and take action to address any national security concerns arising from certain non-controlling investments and certain real estate transactions involving foreign persons.

Executive Order 13456, 73 FR 4677 (January 23, 2008), directs the Secretary of the Treasury to issue regulations implementing Section 721. On January 17, 2020, Treasury published two rules broadly implementing FIRRMA, and those rules took effect on February 13, 2020. 85 FR 3112 and 85 FR 3158. Subsequent amendments were made to the regulations in 2020. 85 FR 8747, 85 FR 45311, and 85 FR 57124.

In addition to the exemptions below, pursuant to section 721(c) of the Defense Production Act of 1950, as amended, 50 U.S.C. 4565(c) and subject to certain exceptions provided therein, any information or documentary material filed with the President or CFIUS under Section 721 is exempt from disclosure under the Freedom of Information Act, as amended (FOIA), 5 U.S.C. 552, and no such information or documentary material may be made public.

Treasury published separately the notice of the new system of records maintained by CFIUS. 85 FR 55534, as amended.

Under 5 U.S.C. 552a(k)(1), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records is subject to the exemption contained in section 552(b)(1) of title 5. (FOIA exemption (b)(1) protects from disclosure information that is ''specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy'' and is ''in fact properly classified pursuant to such Executive order.'')

Under 5 U.S.C. 552a(k)(2), the head of a Federal agency may promulgate rules to exempt a system of records from certain provisions of 5 U.S.C. 552a if the system of records contains investigatory materials compiled for law enforcement purposes that are not within the scope of subsection (j)(2) of the Privacy Act (which applies to agencies and

components thereof that perform as their principal function any activity pertaining to the enforcement of criminal laws).

To the extent that this system of records contains classified information protected by 5 U.S.C.552a(k)(1) or investigatory materials compiled for law enforcement purposes protected by 5 U.S.C. 552a(k)(2), Treasury exempts the following system of records from various provisions of the Privacy Act: DO .227 CFIUS Case Management System.

Under 5 U.S.C. 552a(k)(1) and (k)(2), Treasury exempts certain records in the above-referenced system of records from 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4), (e)(1), (e)(4)(G), (H), and (I), and (f) of the Privacy Act. See 31 CFR 1.36.

The following are the reasons why the classified records and investigatory materials contained in the above-referenced systems of records maintained by CFIUS may be exempted from various provisions of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

(1) From 5 U.S.C. 552a(c)(3) (Accounting for Disclosures) because release of the accounting of disclosures of the records in this system could alert individuals that they have been identified as a national security threat or the subject of an analysis related to the national security interests of the United States, to the existence of the analysis, and reveal the interest on the part of Treasury or CFIUS as well as the recipient agency. Disclosure of the accounting would present a serious impediment to efforts to protect national security interests by giving individuals an opportunity to learn whether they have been identified as subjects of a national security-related analysis. As further described in the following paragraph, access to such knowledge would impair Treasury's ability to carry out its mission, since individuals could:

(i) Take steps to avoid analysis;

(ii) inform associates that a national security analysis is in progress;

(iii) learn the nature of the national security analysis;

(iv) learn the scope of the national security analysis;

(v) begin, continue, or resume conduct that may pose a threat to national security upon inferring they may not be part of a national security analysis because their records were not disclosed; or

(vi) destroy information relevant to the national security analysis.

(2) From subsection *5 U.S.C. 552*a(d)(1), (d)(2), (d)(3), and (d)(4) (Access to Records), because access to a portion of the records contained in this system of records could inform individuals whether they have been identified as a national security threat or the subject of an analysis related to the national security interests of the United States, to the existence of the analysis and reveal the interest on the part of Treasury, CFIUS or another agency. Access to the records would present a serious impediment to efforts to protect national security interests by permitting the individual who is the subject of a record to learn whether they have been identified as subjects of a national security-related analysis. Access to such knowledge would impair Treasury's ability to carry out its mission, since individuals could take steps to impede the analysis and avoid detection, including the steps described in paragraph (1)(i)–(vi) of this section. Amendment of the records would interfere with ongoing analysis and impose an impossible administrative burden given CFIUS's statutory deadlines. The information contained in the system may also include classified information, the release of which would pose a threat to the national security of the United States. In addition, permitting access and amendment to such information could disclose sensitive security information that could be detrimental to Treasury.

(3) From subsection *5 U.S.C. 552*a(e)(1) (Relevance and Necessity of Information), because in the course of its operations, CFIUS must be able to review information from a variety of sources. What information is relevant and necessary may not always be apparent until after the evaluation is completed. In the interests of national security, it is appropriate to include a broad range of information that may aid in identifying and assessing the nature and scope of foreign threats to the United States. Additionally, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific analysis. In the interests of national security, it is appropriate to retain all information that may aid in establishing patterns of suspicious foreign investment activity.

(4) From subsection 5 U.S.C. 552a(e)(4)(G), (H), and (I) (Agency Requirements), and 5 U.S.C. 552a(f), because portions of this system are exempt from the access and amendment provisions of subsection (d). The reason for invoking the exemption is to protect material authorized to be kept secret in the interest of national security pursuant to Executive Orders 12968, 13526, successor or prior Executive Orders, and other legal authorities relevant to the intelligence responsibilities of Treasury.

Any information from a system of records for which an exemption is claimed under 5 U.S.C. 552a(k)(1) or 5 U.S.C. 552a(k)(2) which is also included in another system of records retains the same exempt status such information has in the system of records for which such exemption is claimed.

This final rule is not a ''significant regulatory action''' under Executive Order 12866.

Pursuant to the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, it is hereby certified that this rule will not have significant economic impact on a substantial number of small entities. The term ''small entity'' is defined to have the same meaning as the terms ''small business,'' ''small organization'' and ''small governmental jurisdiction'' as defined in the RFA.

The regulation, issued under sections (k)(1) and (k)(2) of the Privacy Act, exempts certain information maintained by Treasury in the above-referenced systems of records from certain Privacy Act rights of individuals who are United States citizens or aliens lawfully admitted for permanent residence. In as much as the Privacy Act rights are personal and apply only to U.S. citizens or an alien lawfully admitted for permanent residence, small entities, as defined in the RFA, are not provided rights under the Privacy Act and are outside the scope of this regulation.

Public Comments

Treasury received one comment on the notice of proposed rulemaking, but it was outside the scope of the rulemaking. No comments were received on the system of records notice. Treasury will implement the rulemaking as proposed.

List of Subjects in 31 CFR Part 1

Courts, Freedom of information, Government employees, Privacy.

For the reasons stated in the preamble, part 1 of Title 31 of the Code of Federal Regulations is amended as follows:

PART 1—[AMENDED]

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

Authority: 5 U.S.C. 301 and 31 U.S.C. 321. Subpart A also issued under 5 U.S.C. 552, as amended. Subpart C also issued under 5 U.S.C. 552a, as amended.

■ 2. In § 1.36, amend the tables in paragraphs (c)(1)(ii) and (g)(1)(ii) by adding in alphanumeric order an entry

for ''DO .227 CFIUS Case Management System'' to read as follows:

§ 1.36 Systems exempt in whole or in part from provisions of 5 U.S.C. 552a and this part.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

No.	System name
* * * * *	
DO .227	CFIUS Case Management System.
* * * * *	

* * * * *

(g) * * *

(1) * * *

(ii) * * *

No.	System name
* * * * *	
DO .227	CFIUS Case Management System.
* * * * *	

* * * * *

Ryan Law,

Deputy Assistant Secretary Privacy, Transparency, and Records, U.S. Department of the Treasury.

[FR Doc. 2020–26612 Filed 12–29–20; 8:45 am]

BILLING CODE P

Proposed Rules

Federal Register
Vol. 85, No. 250
Wednesday, December 30, 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.

ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER

1 CFR Part 12

Official Subscriptions to the Print Edition of the Federal Register

AGENCY: Administrative Committee of the Federal Register.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Administrative Committee of the Federal Register proposes to update its regulations for official requests for specific issues or subscriptions to the print edition of the **Federal Register** as required by the Federal Register Printing Savings Act of 2017.

DATES: Comments are due January 29, 2021.

ADDRESSES: Docket materials are available for review at the Office of the Federal Register, 7 G Street NW, Suite A–734, Washington, DC 20401, 202–741–6030. Please contact the persons listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection of docket materials. The Office of the Federal Register's official hours of business are Monday through Friday, 8:45 a.m. to 5:15 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Katerina Horska, Director of Legal Affairs and Policy, or Miriam Vincent, Staff Attorney, Office of the Federal Register, at *Fedreg.legal@nara.gov,* or 202–741–6030.

SUPPLEMENTARY INFORMATION:

Background and Purpose

Under the Federal Register Act (44 U.S.C. Chapter 15), the Administrative Committee of the Federal Register (Administrative Committee, Committee, ACFR, or we) is responsible for issuing regulations governing **Federal Register** publications. This includes establishing the number of official print copies of the **Federal Register** that can be distributed to Members of Congress, officers and employees of the United States, or Federal agencies (44 U.S.C. 1506). The ACFR sets out the number of official copies that Members of Congress and any other office of the United States are entitled to receive without charge in 1 CFR 12.1. This section also establishes how Federal offices of the United States request subscriptions to print copies of the **Federal Register**.

In January of 2018, the Federal Register Printing Savings Act of 2017 (Pub. L. 115–120) (the Act) updated 44 U.S.C. 1506 by changing subscription terms to yearly and placing other requirements on requests for official print copies of the **Federal Register**. Specifically, the Act prohibits the Government Publishing Office (GPO) from distributing the **Federal Register** without charge to Members of Congress or any other office of the United States unless they request a specific issue of the **Federal Register** or a subscription to the print edition of the **Federal Register** for that year. The Act also limits subscriptions to single-year terms. In addition, the Act requires the ACFR to issue regulations that notify Members of Congress and any other office of the United States of these restrictions and provide information on requesting official copies or subscriptions. We are proposing to revise 1 CFR 12.1 to meet the requirements of the Act by setting out how Members of Congress and any other office of the United States may request an official copy or a subscription to the print edition of the **Federal Register**.

Other Actions Taken To Implement the Act

Since the effective date of the Act, GPO has issued two Circular Letters related to its implementation. The first, GPO Circular Letter 1001, announced to official subscribers that GPO was creating a database to help implement the requirements of the Act (Gov't Publ'g Office, Circular Letter No. 1001 (2018), *https://www.gpo.gov/how-to-work-with-us/agency/circular-letters/federal-register-printing-savings-act-of-2017*). The second, GPO Circular Letter 1021, announced GPO's new online subscription portal for official distribution of the print edition of the **Federal Register** located at *https://www.gpo.gov/frsubs* (Gov't Publ'g Office, Circular Letter No. 1021 (2018), *https://www.gpo.gov/how-to-work-with-us/agency/circular-letters/federal-register-printing-savings-act-of-2017-2*). On the portal's form, an office of the United States may sign up for a yearly subscription to the print edition of the **Federal Register**, with an option for the delivery of multiple copies to the office. The subscription will be valid for one calendar year. GPO will send subscribers a reminder that they will need to sign up for the next calendar year if they wish to continue to receive print copies of the daily **Federal Register**. If official subscribers do not use the portal to sign up, they will not receive print copies of the **Federal Register** at the start of the new calendar year. Currently, the portal also provides Members of Congress and other offices of the United States an email address (*FRsubs@gpo.gov*) for requesting specific issues of the daily **Federal Register**. However, future versions of the portal's form will allow Members of Congress and other offices of the United States to request specific issues of the daily **Federal Register**, in addition to subscriptions, directly through the portal.

To highlight these developments, GPO placed a direct link to the subscription portal on its homepage menu (Who We Are>Our Agency>Official Federal Register Subscription Form). We will also provide updates on any changes to the official distribution of print copies of the **Federal Register** on *www.federalregister.gov* and in the front matter of **Federal Register** issues.

We are not proposing any changes to the process for requesting quantity overruns or extra copies. The paragraphs of § 12.1 governing those processes will be re-designated as paragraphs (d) through (f) instead of paragraphs (b) through (d), but the processes themselves will remain the same. We are also not proposing to change the paid subscription process in part 11. The Act did not affect the process for paid subscriptions, so this rule applies only to requests for distribution of the **Federal Register** without charge.

Regulatory Analysis

The Administrative Committee developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below is a summary of the Committee's determinations after analysis of these

statutes and Executive orders with respect to this rulemaking.

Executive Orders 12866, 13563, and 13771

This proposed rule has been drafted in accordance with Executive Order 12866, section 1(b), ''The Principles of Regulation,'' and Executive Order 13563, ''Improving Regulation and Regulatory Review.'' The Administrative Committee has determined that this proposed rule is not a significant regulatory action as defined under section 3(f) of Executive Order 12866. Thus, this proposed rule has not been reviewed by the Office of Management and Budget (OMB), and it is exempt under OMB guidance from the requirements of Executive Order 13771 (see Office of Mgmt. & Budget, Guidance Implementing Executive Order 13771, Titled ''Reducing Regulation and Controlling Regulatory Costs'' (2017)).

Regulatory Flexibility Act

This proposed rule will not have a significant impact on small entities because it imposes no requirements on the public. Members of the public can access **Federal Register** publications for free through GPO's website, *https://www.govinfo.gov/.*

Federalism

This proposed rule has no federalism implications under Executive Order 13132. It does not impose compliance costs on state or local governments or preempt state law.

List of Subjects in 1 CFR Part 12

Code of Federal Regulations, Compilation of Presidential Documents, **Federal Register**, Government publications, Public papers of Presidents of U.S., U.S. Government Manual.

For the reasons discussed in the preamble, under the authority at 44 U.S.C. 1506, the Administrative Committee of the Federal Register proposes to amend 1 CFR part 12 as follows:

PART 12—OFFICIAL DISTRIBUTION WITHIN FEDERAL GOVERNMENT

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

Authority: 44 U.S.C. 1506; sec. 6, E.O. 10530, 19 FR 2709; 3 CFR, 1954–1958 Comp., p. 189.

■ 2. Amend § 12.1 by:
■ a. Revising paragraph (a),
■ b. Redesignating paragraphs (b) through (e) as (d) through (g), and
■ c. Adding new paragraphs (b) and (c).

The revision and additions read as follows:

§ 12.1 Federal Register.

(a) The **Federal Register**, issued under the authority of the Administrative Committee, is officially maintained online and is available on at least one Government Publishing Office website.

(b) Requests for subscriptions to the **Federal Register** may be made as follows:

(1) Requests from a Member of Congress or any other office of the United States for a specific issue or a subscription may be submitted via a Government Publishing Office website or by email to an email address provided on that website.

(2) Official subscription requests:

(i) May be made in the current year for that year or for the upcoming year,

(ii) Will expire at the end of each calendar year, and

(iii) Will not automatically continue into a new calendar year.

(c) Notifications regarding procedures for requesting official copies of specific issues or print subscriptions are available:

(1) On a Government Publishing Office website dedicated to official subscriptions,

(2) On *www.federalregister.gov,* and

(3) In the front matter of the **Federal Register**, which is the text that precedes the main text of the daily issue of the **Federal Register**.

* * * * *

Oliver A. Potts,

Secretary, Administrative Committee of the Federal Register.

[FR Doc. 2020–28663 Filed 12–29–20; 8:45 am]

BILLING CODE 1301–00–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1022; Project Identifier AD–2020–01101–T]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company 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 The Boeing Company Model 757–200, –200CB, and –300 series airplanes. This proposed AD was prompted by a report indicating the passenger service units (PSUs) and life vest panels became separated from their attachments during several survivable accident sequences. This proposed AD would require installing lanyard assemblies on the PSUs, and, for certain airplanes, on the life vest panels and video panels as applicable. 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 12, 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 Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminster Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; phone: 562–797–1717; internet: *https://www.myboeingfleet.com.* You may view this referenced 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–2020–1022.

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–2020–1022; 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: Scott Craig, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200

South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3566; email: *michael.s.craig@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to participate in this rulemaking by submitting written comments, data, or views about this proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one copy of the comments. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2020–1022; Project Identifier AD–2020–01101–T'' at the beginning of your comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments received by the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this NPRM because of those comments.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this 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 the person identified in the **FOR FURTHER INFORMATION CONTACT** section. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Discussion

The FAA has received a report indicating the PSUs and life vest panels became separated from their attachments during several survivable accident sequences. In addition, there is no secondary means of retention (lanyards) for the PSU to the airplane structure. The FAA has determined that video panels may also become separated from their attachments during survivable accident sequences. This condition, if not addressed, could result in the PSUs, life vest panels, and video panels becoming detached and falling into the cabin, which could lead to passenger injuries and impede egress during an evacuation.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020. The service information describes procedures for installing lanyard assemblies on the PSUs, life vest panels, and video panels as applicable. 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

The FAA is proposing this AD because the agency 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 accomplishment of the actions identified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, described previously, except as discussed under ''Differences Between this Proposed AD and the Service Information,'' and except for any differences identified as exceptions in the regulatory text of this proposed AD.

For information on the procedures and compliance times, see this service information at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–1022.

Explanation of Requirements Bulletin

The FAA worked in conjunction with industry, under the Airworthiness Directive Implementation Aviation Rulemaking Committee (AD ARC), to enhance the AD system. One enhancement is a process for annotating which steps in the service information are ''required for compliance'' (RC) with an AD. Boeing has implemented this RC concept into Boeing service bulletins.

In an effort to further improve the quality of ADs and AD-related Boeing service information, a joint process improvement initiative was worked between the FAA and Boeing. The initiative resulted in the development of a new process in which the service information more clearly identifies the actions needed to address the unsafe condition in the ''Accomplishment Instructions.'' The new process results in a Boeing Requirements Bulletin, which contains only the actions needed to address the unsafe condition (*i.e.,* only the RC actions).

Differences Between This Proposed AD and the Service Information

Since Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, was issued, the FAA has determined that airplane having variable number NB451 is also affected by the unsafe condition. Therefore, we have included variable number NB451 in this AD. This difference has been coordinated with Boeing.

Costs of Compliance

The FAA estimates that this proposed AD affects 363 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Install Lanyard Assemblies	Up to 75 work-hours × $85 per hour = Up to $6,375	Up to $45,750	Up to $52,125	Up to $18,921,375.

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 (AD):

The Boeing Company: Docket No. FAA–2020–1022; Project Identifier AD–2020–01101–T.

(a) Comments Due Date

The FAA must receive comments by February 12, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 757–200, –200CB, and –300 series airplanes, certificated in any category, as identified in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, and airplane having variable number NB451.

(d) Subject

Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by a report indicating the passenger service units (PSUs) and life vest panels became separated from their attachments during several survivable accident sequences. The FAA is issuing this AD to address the PSUs, life vest panels, and video panels becoming detached and falling into the cabin, which could lead to passenger injuries and impede egress during an evacuation.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the ''Compliance'' paragraph of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Special Attention Service Bulletin 757–25–0315, Revision 1, dated May 20, 2020, which is referred to in Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020.

(h) Exceptions to Service Information Specifications

(1) Where Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020, uses the phrase ''the Revision 1 date of Requirements Bulletin 757–25–0315 RB,'' this AD requires using ''the effective date of this AD.''

(2) For airplane variable number NB451, do the applicable actions for Group 4 identified in, and in accordance with, the Accomplishment Instructions of Boeing Special Attention Requirements Bulletin 757–25–0315 RB, Revision 1, dated May 20, 2020.

(i) Parts Installation Limitation

As of the applicable time specified in paragraph (i)(1) or (2) of this AD, no person may install on any airplane any PSU, life vest panel, or video panel without an updated lanyard assembly installed.

(1) For airplanes that have PSUs, life vest panels, or video panels without the updated lanyard assemblies installed as of the effective date of this AD: After modification of the airplane as required by paragraph (g) of this AD.

(2) For airplanes that do not have PSUs, life vest panels, or video panels without the updated lanyard assemblies installed as of the effective date of this AD: As of the effective date of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Seattle 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)(1) of this AD. Information may be emailed to: *9-ANM-Seattle-ACO-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, Seattle 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.

(k) Related Information

(1) For more information about this AD, contact Scott Craig, Aerospace Engineer, Cabin Safety and Environmental Systems Section, FAA, Seattle ACO Branch, 2200 South 216th St., Des Moines, WA 98198; phone and fax: 206–231–3566; email: *michael.s.craig@faa.gov.*

(2) 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; phone: 562–797–1717; internet: *https://www.myboeingfleet.com.* You may view this referenced 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 November 6, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–28823 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2020–0015]

RIN 0651–AD46

Disclaimer Practice in Patents and Patent Applications

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (USPTO) proposes to amend the rules of practice to expand when certain types of patent applicants and patentees may, subject to other conditions, obtain or enforce a second patent for an invention that is similar (*i.e.,* patentably indistinct) to a first patent. Ordinarily, in examination before the USPTO, any application for a second patent covering such similar invention would be rejected. The proposed rule change is limited to the situation where owners of the first and second patents or patent applications are different but have an agreement to conduct research together (*i.e.,* a joint research agreement). For this limited situation, the proposed rule change would increase the ability to file a document, called a terminal disclaimer, that ties the rights of a second patent to the first patent. Specifically, a terminal disclaimer causes the second patent to limit its enforceable patent term to end no later than the first patent's term and limits when the second patent can be enforced. The proposed rule change would expand when a terminal disclaimer is permitted to be filed in the joint research agreement situation by eliminating the requirement that the second patent or patent application be filed later than the first patent or patent application. The USPTO also proposes to amend its rules of practice to explicitly state existing practices in the rules regarding when certain affidavits and declarations, as well as terminal disclaimers, may be filed.

DATES: Comments must be received by March 22, 2021 to ensure consideration.

ADDRESSES: For reasons of government efficiency, comments must be submitted through the Federal eRulemaking Portal at *https://www.regulations.gov.* To submit comments via the portal, one should enter docket number PTO–P–2020–0015 on the homepage and click ''search.'' The site will provide search results listing all documents associated with this docket. Commenters can find a reference to this notice and click on the ''Comment Now!'' icon, complete the required fields, and enter or attach their 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 in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Susy Tsang-Foster, Senior Legal Advisor, Office of Patent Legal Administration, Office of the Deputy Commissioner for Patent Examination Policy, by email at *Susy.Tsang-Foster@uspto.gov;* or Robert Clarke, Editor, Manual of Patent Examining Procedure, Office of the Deputy Commissioner for Patent Examination Policy, by email at *Robert.Clarke@uspto.gov.*

SUPPLEMENTARY INFORMATION: Patent applications and patents are subject to the doctrine of nonstatutory double patenting to prevent both the unjust timewise extension of the right to exclude and multiple infringement suits by different parties. These situations may arise from the granting of multiple patents with patentably indistinct claims where the patents have a common owner, applicant, or inventor or where the patents are not commonly owned but are subject to a joint research agreement. Double patenting analysis is not limited to situations in which the reference patents or applications, whose claims form the basis for the nonstatutory double patenting rejection, are prior art as defined in 35 U.S.C. 102. The reference may have an effectively filed date that is before, the same as, or after the effective filing date of a claimed invention in an application under examination or patent under reexamination (*i.e.,* the subject patent application or patent). Thus, the reference need not be ''prior art'' to the claimed invention in the subject application or patent for its claims to be relied upon in a nonstatutory double patenting rejection. For more information on the nonstatutory double patenting doctrine, see section 804 of the Manual of Patent Examining Procedure (Ninth Edition, Revision 10.2019, June 2020).

I. Background: A. Joint Research Agreements: The Cooperative Research and Technology Enhancement Act of 2004 (CREATE Act), Public Law 108–453, 118 Stat. 3596, was passed to promote cooperative research between universities, the public sector, and private enterprises. The CREATE Act amended 35 U.S.C. 103(c), effective on December 10, 2004, to provide that subject matter developed by another person and a claimed invention shall be treated as owned by the same person or subject to an obligation of assignment to the same person for purposes of excluding prior art usable in obviousness rejections if three conditions are met: (1) The claimed invention was made by or on behalf of parties to a joint research agreement that was in effect on or before the date the claimed invention was made; (2) the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and (3) the application for patent for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement.

The legislative history recognized that the CREATE Act would result in two or more patents being issued to patentably indistinct inventions, and called upon the nonstatutory double patenting doctrine to protect the public from multiple enforcement actions based on patents issued due to the passage of the CREATE Act. *See* H.R. Rep. No. 108–425, at 6 (2003) (stating that a terminal disclaimer is required ''when double patenting is determined to exist for two or more claimed inventions'' for any application for which the applicant takes advantage of the ''safe harbor'' provision in [pre-AIA] 35 U.S.C. 103(c) as amended by the CREATE Act). Consistent with the legislative history, the nonstatutory double patenting doctrine was expanded to include rejections based on patents or patent applications that were disqualified as prior art under pre-AIA 35 U.S.C. 103(c).

A prior art exception, similar to the prior art exclusion in the CREATE Act, was enacted in 35 U.S.C. 102(b)(2)(C) and 102(c) by the Leahy-Smith America Invents Act, Public Law 112–29, 125 Stat. 284 (2011). Consistent with this prior art exception, the nonstatutory double patenting doctrine was further

revised to include rejections based on patents or patent applications that were excepted as prior art under 35 U.S.C. 102(b)(2)(C) and 102(c).

B. Current Practice: A nonstatutory double patenting rejection may be obviated, in most circumstances, by filing a terminal disclaimer. Under current USPTO regulations, two types of terminal disclaimers may be used to obviate nonstatutory double patenting rejections. The first type is filed pursuant to 37 CFR 1.321(c) and must include a provision that the subject patent or any patent issuing from the subject patent application shall be enforceable only for and during the time period that the subject patent or any patent issuing from the subject patent application is commonly owned with the reference that is the basis of the nonstatutory double patenting rejection. The second type is filed pursuant to 37 CFR 1.321(d) and must include a provision that the subject patent or any patent issuing from the subject patent application shall be enforceable only for and during such period that the subject patent or any patent issuing from the subject patent application and the reference are not separately enforced. The second type obviates nonstatutory double patenting based on a non-commonly owned reference that is disqualified or excepted as prior art as a result of activities undertaken within the scope of a joint research agreement.

Currently, 37 CFR 1.321(d) limits the ability of parties to a joint research agreement to file a terminal disclaimer to overcome a nonstatutory double patenting rejection to instances where the reference application or patent had previously been applied as prior art or was available as prior art against the subject application or patent and the reference application publication or patent had been excepted or disqualified respectively as prior art under 37 CFR 1.104(c)(4)(ii) or (c)(5)(ii). *See Changes To Implement the Cooperative Research and Technology Enhancement Act of 2004,* 70 FR 54259, 54262 (Sept. 14, 2005). 37 CFR 1.321(d) does not provide for the filing of such a terminal disclaimer where the reference is not prior art under 35 U.S.C. 102(a)(2) or pre-AIA 35 U.S.C. 102(e) and therefore cannot be excepted or disqualified as prior art as set forth in 37 CFR 1.104(c)(4)(ii) or (c)(5)(ii). For example, a reference is not prior art where the effective filing date of the claimed invention in the subject application or patent is the same as or before the effectively filed date of the reference. Because of this limitation, the USPTO has granted a number of petitions requesting a waiver of the prior art requirement in 37 CFR 1.321(d). Another example where the reference is not prior art under 35 U.S.C. 102(a)(2) or pre-AIA 35 U.S.C. 102(e) is where the inventive entities are the same for the reference and the subject application or patent.

C. *Recent Judicial Change:* In 2014, the U.S. Court of Appeals for the Federal Circuit clarified for patents subject to the 20-year patent term that a first patent that expires before a second patent to a common owner or inventor may be used as a reference in a nonstatutory double patenting rejection, regardless of whether the first patent is prior art to the second patent. See *Gilead Sciences, Inc.* v. *Natco Pharma Ltd.,* 753 F.3d 1208 (Fed. Cir. 2014). Following *Gilead,* applicants that received a nonstatutory double patenting rejection based on an application or a patent under a joint research agreement that was not earlier filed than the application under examination have filed petitions under 37 CFR 1.183 seeking waiver of the requirement in current 37 CFR 1.321(d) that the reference in a terminal disclaimer be prior art in order to file a terminal disclaimer under 37 CFR 1.321(d). In the last two years, the USPTO has received petitions under 37 CFR 1.183 to waive such requirement of 37 CFR 1.321(d) in 26 applications. In 22 of the 26 applications the petitions have been granted. In four of the 26 applications, the petitions were dismissed either because the terminal disclaimer or the petition failed to comply with the requirements of 37 CFR 1.321(d) or 37 CFR 1.183. Each of these dismissals and the impact of the proposed rule is discussed in more detail below. The proposed rule would not have the same impact on these four applications because the facts for each application are different. On the whole, in view of the routine granting of petitions to waive the prior art requirement in the current regulations over the last two years, the Office has determined that this proposed rule would be beneficial to avoid the unnecessary costs and delays incurred by users with the current petition process.

In two applications the petitions were dismissed because the offered terminal disclaimers failed to comply with all of the other requirements of 37 CFR 1.321(d). If these had been filed under the proposed rule, there would be no change as to the initial disapproval of these terminal disclaimers as the other requirements of 37 CFR 1.321(d) still must be met. The only change in this scenario under the proposed rules would be that a petition would not have been required—a proper terminal disclaimer will be accepted without the need for a petition. Moving forward in these applications, a *proper* terminal disclaimer would be accepted in any renewed petition (or depending on the timing, without a renewed petition if it occurs under the proposed rules). In one of the applications, for example, a renewed petition has been filed and if the revised terminal disclaimer is determined to be proper, the renewed petition will be granted. No action has been taken in the other application to rectify the errors in the terminal disclaimer.

In the other two applications where petitions were dismissed, the dismissals were the result of petitioners' failure to set forth an extraordinary situation within the meaning of 37 CFR 1.183 that would warrant waiver of the prior art requirement in 37 CFR 1.321(d). In both applications, the petitions failed to state the existence of any extraordinary situation as required by the language of 37 CFR 1.183. Under the proposed rule, should another applicant in a similar situation file a terminal disclaimer that complies with all of the requirements of proposed 37 CFR 1.321(d), the disclaimer would be accepted without the need for a grantable petition under 37 CFR 1.183. Moving forward in these applications, if a renewed petition provides the proper showing, the request to waive the prior art requirement in the rule will be granted and concurrently filed terminal disclaimers that comply with all of the other requirements in 37 CFR 1.321(d) will be accepted. In one of the applications, a renewed petition has been filed.

II. Proposed Changes: A. Changes to Current Practice: The USPTO proposes to revise 37 CFR 1.321(d) to permit a terminal disclaimer filed by a party to a joint research agreement to obviate nonstatutory double patenting even where the patent application or patent referenced in the terminal disclaimer is not prior art under 35 U.S.C. 102 with respect to the subject application or patent in which the disclaimer is filed. This change would accommodate the two non-prior art circumstances discussed above in which a reference would not qualify as prior art under 35 U.S.C. 102(a)(2) or pre-AIA 35 U.S.C. 102(e). This change, permitting a party to a joint research agreement to file a terminal disclaimer even where the reference is not prior art, is consistent with the purpose of the CREATE Act as stated in its legislative history. Note that this change does not obviate the requirement in pre-AIA 35 U.S.C. 103(c) or in 35 U.S.C. 102(c) that the claimed

invention of the application or patent in which the terminal disclaimer is filed was made as a result of activities undertaken within the scope of the joint research agreement.

The USPTO is further proposing to revise 37 CFR 1.321 such that it will no longer be applicable to an owner of a sectional interest in a patent. A sectional interest allows for the exercise of the exclusive patent rights in a specified part or portion of the United States. *See Potter* v. *Holland,* 4 Blatchf. 206, 19 F. Cas.1154, 1159 (1858) (discussing disclaimers by an owner of a sectional interest in a patent). While 35 U.S.C. 253 permits a disclaimer by an owner of a sectional interest, the assignment of a sectional interest is exceedingly rare; thus, to simplify the rule, the USPTO is proposing that a disclaimer by an owner of a sectional interest not be encompassed by 37 CFR 1.321. The USPTO proposes to address disclaimers by owners of a sectional interest via a petition under 37 CFR 1.182. The petition must clearly explain the extent of the disclaimant's interest in the patent and identify the complete claim(s) or term of a patent being disclaimed. This change will assist in preventing avoidable costs and delays to users due to the improper filing of terminal disclaimers by a partial owner of an application or patent as an alleged sectional interest owner.

B. Changes Consistent with Current Practice: (1) When a Disclaimer May Be Filed: The USPTO proposes to revise 37 CFR 1.321 to explicitly provide that a terminal disclaimer may be filed to obviate a potential nonstatutory double patenting rejection or concern. Such disclaimer may be filed during the pendency of the application or after patent grant. The current practice of the USPTO is to accept terminal disclaimers that would overcome a potential nonstatutory double patenting rejection. Such preemptive terminal disclaimers avoid delays in examination resulting from the imposition of nonstatutory double patenting rejections. By revising the rule to be consistent with the current practice of accepting terminal disclaimers even when a nonstatutory double patenting rejection has not been made, the proposed change makes clear that patent applicants may file such disclaimers to avoid delays in examination.

A motion authorizing filing of a disclaimer must be granted before a disclaimer may be filed in an application or a patent involved in an interference under part 41 or administrative proceeding under part 42 before the Patent Trial and Appeal Board (Board). Also, where a terminal disclaimer is filed to overcome a nonstatutory double patenting issue in a reexamination proceeding, it should be filed in the reexamination proceeding and not in the patent file.

(2) Who May File a Disclaimer: Under proposed 37 CFR 1.321, a disclaimer in a patent may only be filed by the owner or owner(s) of the whole interest in the patent. Where more than one owner exists, the disclaimer may be filed as either a single document by all the owners of the whole interest in the patent or as several documents considered together, wherein each document sets forth the extent of disclaimant's ownership interest in the patent and the total ownership interest accounts for 100% of the ownership interest. Similarly, where more than one applicant exists, a disclaimer may be filed as either a single document by all the applicants or as several documents considered together, wherein each document sets forth the extent of the disclaimant's ownership interest in the application and the total ownership interest accounts for 100% of the ownership interest. An assignee of record of an application filed before September 16, 2012, may execute a terminal disclaimer. In applications filed on or after September 16, 2012, an assignee of record of an application that is also the applicant of that application may execute a terminal disclaimer. For all applications and patents, regardless of the filing date, a patent practitioner of record may execute a terminal disclaimer.

Consistent with 35 U.S.C. 253, the USPTO proposes to refer to the party making the disclaimer in 37 CFR 1.321 as the ''disclaimant'' rather than the grantee, patentee, applicant, or assignee, as currently prescribed. The use of the common term to refer to the party making the disclaimer avoids confusion as to the proper party to file the paper regardless of when the terminal disclaimer was filed.

Consistent with the proposed change to explicitly permit the preemptive filing of a terminal disclaimer before a nonstatutory double patenting rejection is made, the USPTO is also proposing to revise 37 CFR 1.130 in an analogous manner. Specifically, in addition to the current practice in which an affidavit or declaration of attribution or prior public disclosure under the AIA is not filed until after rejection, the proposed change will explicitly permit an applicant or patent owner to file this type of affidavit or declaration to overcome a potential rejection of a claim over the reference, as is the current practice. If adopted, this proposed change to 37 CFR 1.130 would aid in the compact prosecution of applications and reexamination proceedings by encouraging applicants and patent owners to preemptively file such an affidavit or declaration as they may already do under current practice.

III. Discussion of Specific Rules: The following is a discussion of proposed amendments to title 37 of the Code of Federal Regulations, part 1:

The USPTO proposes to amend § 1.130 by deleting ''When any claim of an application or a patent under reexamination is rejected'' in paragraphs (a) and (b). Paragraph (c) is proposed to be revised to change the two instances of ''the rejection is based upon'' to ''the disclosure sought to be disqualified.''

The USPTO proposes to amend § 1.321 and to revise its title to limit its applicability to disclaimers in a patent or application by the owner of the whole interest.

The USPTO proposes to amend § 1.321(a) by adding the heading ''Disclaimer of Any Complete Claim or Claims in a Patent'' and moving the provisions concerning the filing of a terminal disclaimer in a patent to § 1.321(b)(1). Paragraph (a)(1) is proposed to be revised to replace ''an attorney or agent of record'' with ''a patent practitioner of record.'' The requirement that the disclaimer include a provision that the disclaimer is binding upon the disclaimant and its successors and assigns has been moved from § 1.321(a) to new proposed § 1.321(a)(5). The reference to a patentee owning a sectional interest is also proposed to be removed from paragraph (a). Paragraph (a)(2), which currently applies to both a disclaimer of a complete claim or claims in a patent and a disclaimer of a term in a patent, is proposed to be revised to remove the sentence ''A disclaimer which is not a disclaimer of a complete claim or claims, or term will be refused recordation.'' The language ''refused recordation'' in the current paragraph (a)(2) will not be included in the proposed § 1.321 because a disclaimer may be included in the USPTO's record even if the regulatory requirements for a disclaimer have not been met. However, a disclaimer that does not meet the regulatory requirements in § 1.321 is ineffective and is not recorded as a disclaimer even if included in the application file. Accordingly, proposed paragraphs (a) (disclaimer of any complete claim or claims in a patent), (b)(1) (terminal disclaimer filed by a patentee), (b)(2) (terminal disclaimer in an application filed on or after September 16, 2012), and (b)(3) (terminal disclaimer in an application filed before September 16, 2012) state

that the disclaimer must meet the requirements of proposed paragraphs (a)(1)–(5), (b)(1)(i)–(v), (b)(2)(i)–(v), and (b)(3)(i)–(v), respectively, to be effective. In addition, paragraphs (a)–(d) are proposed to be amended to state that only compliant disclaimers are recorded in the USPTO. Paragraph (a)(3) is proposed to be revised to add that the disclaimer must be made by the owner of the whole interest in the patent and to change ''patentee's ownership interest'' to ''disclaimant's ownership interest.''

Section 1.321(b) is proposed to be revised to add the heading ''Disclaimer or Dedication to the Public of the Entire Term or Any Terminal Part of the Term of a Patent or Any Patent to Be Granted on an Application.'' The specific requirements for filing a terminal disclaimer in a patent are set forth in proposed § 1.321(b)(1); in applications filed on or after September 16, 2012, are set forth in proposed § 1.321(b)(2); and in applications filed before September 16, 2012, are set forth in proposed § 1.321(b)(3). This proposal eliminates the need for the public to consult § 1.321(b) in effect on September 15, 2012, when filing terminal disclaimers in an application filed before September 16, 2012.

Each proposed § 1.321(b)(1)–(3) includes parallel requirements in proposed subparagraphs (i)–(v) for filing a terminal disclaimer.

Proposed § 1.321(b)(1)(i) provides that a terminal disclaimer filed in a patent must be signed by the patentee or a patent practitioner of record. Similarly, proposed § 1.321(b)(2)(i) provides that a terminal disclaimer filed in an application filed on or after September 16, 2012, must be signed by the applicant or a patent practitioner of record and further specifies that a juristic entity who is the applicant may sign the terminal disclaimer. Proposed § 1.321(b)(3)(i) provides that a terminal disclaimer filed in an application filed before September 16, 2012, must be signed by the applicant where the application has not been assigned, the applicant and an assignee of record, where each owns an undivided interest in the application, the assignee of record of the whole interest in the application, or a patent practitioner of record.

Proposed § 1.321(b)(1)(ii) requires that the terminal disclaimer identify the patent and the term of the patent that is being disclaimed and further specifies that the terminal disclaimer must disclaim the entire term or any terminal part of the term of the patent. Similarly proposed § 1.321(b)(2)(ii) and (b)(3)(ii) require that the terminal disclaimer identify the application and the term of the patent to be granted that is being disclaimed and further specify that the terminal disclaimer must disclaim the entire term or any terminal part of the term of the patent to be granted.

Proposed § 1.321(b)(1)(iii) requires that the terminal disclaimer state the present extent of the disclaimant's ownership interest and that the terminal disclaimer be made by the patentee owning the whole interest in the patent. Similarly, proposed § 1.321(b)(2)(iii) and (b)(3)(iii) require that the terminal disclaimer state the ownership interest of the disclaimant in the application and that the terminal disclaimer be made by the applicant owning the whole interest in the application.

Proposed § 1.321(b)(1)(iv), (b)(2)(iv), and (b)(3)(iv) require that the terminal disclaimer be accompanied by the fee set forth in § 1.20(d).

Proposed § 1.321(b)(1)(v), (b)(2)(v), and (b)(3)(v) require that the terminal disclaimer include a provision that the disclaimer is binding on the disclaimant and its successors and assigns.

Proposed § 1.321(c) adds the heading ''Terminal Disclaimer with Common Ownership Enforcement Provision to Obviate Nonstatutory Double Patenting'' and generally parallels current § 1.321(c). Proposed § 1.321(c) would explicitly provide for filing of a terminal disclaimer to obviate a potential nonstatutory double patenting rejection that has not yet been made. As is the case today, when a terminal disclaimer under proposed § 1.321(c) is filed to overcome a nonstatutory double patenting rejection in a reexamination proceeding, it should be filed in the reexamination proceeding and not in the patent file.

Proposed § 1.321(c)(1) incorporates the requirements of current § 1.321(c)(1) and (c)(2) which set forth the formal requirements and signature requirements for terminal disclaimers.

Proposed § 1.321(c)(2) revises the requirements of current § 1.321(c)(3) to provide that a terminal disclaimer under paragraph (c) must include a provision that the patent or any patent granted on the application for which the disclaimer is filed shall be enforceable only for and during such period that the patent or any patent granted on the application for which the disclaimer is filed is commonly owned with the reference patent or any patent granted on the reference application whose claim(s) formed or may form the basis for the nonstatutory double patenting.

Proposed § 1.321(d) adds the heading ''Terminal Disclaimer with a Joint Research Agreement Enforcement Provision to Obviate Nonstatutory Double Patenting.'' The CREATE Act became effective on December 10, 2004, and AIA 35 U.S.C. 102(c) continued the intent of the CREATE Act. Therefore, proposed § 1.321(d) states that a terminal disclaimer filed under this paragraph is only available for patents granted on or after December 10, 2004, for reexamination proceedings of patents granted on or after December 10, 2004, and for applications pending on or after December 10, 2004.

Proposed paragraph (d)(1) revises the introductory text of § 1.321(d) to permit the filing of a terminal disclaimer by a party to a joint research agreement even if the reference application or patent on which the double patenting is based is not prior art to the application or patent in which the disclaimer is filed. Proposed § 1.321(d)(1) does so by removing the requirement that the reference patent or application was disqualified as prior art as set forth in either § 1.104(c)(4)(ii) or (c)(5)(ii). Specifically, proposed paragraph (d)(1) states that, subject to the requirements in proposed paragraph (d)(2), which establishes the existence of a joint research agreement, a terminal disclaimer may be filed in a patent, in a reexamination proceeding, or in a patent application to obviate nonstatutory double patenting or potential nonstatutory double patenting of a claimed invention based on a reference patent or application where the reference patent or application and the claimed invention are not commonly owned but are subject to a joint research agreement as defined by 35 U.S.C. 102(c) in effect on March 16, 2013 or 35 U.S.C. 103(c)(2) in effect on March 15, 2013. Proposed § 1.321(d)(1) also explicitly provides for the filing of a terminal disclaimer to obviate a potential nonstatutory double patenting rejection that has not yet been made. As is the case today, when a terminal disclaimer under proposed § 1.321(d)(1) is filed to overcome a nonstatutory double patenting rejection in a reexamination proceeding, it should be filed in the reexamination proceeding and not in the patent file.

Proposed § 1.321(d)(1)(i) incorporates the requirements of current § 1.321(d)(1) and (d)(2) which set forth the formal requirements and signature requirements for terminal disclaimers.

Proposed § 1.321(d)(1)(ii) revises the requirements of current § 1.321(d)(3) to provide that a terminal disclaimer under proposed paragraph (d)(1) must include a provision waiving the right to separately enforce the patent or any patent granted on the application for which the disclaimer is filed and the reference patent or any patent granted on the reference application whose

claim(s) formed or may form the basis for the nonstatutory double patenting, and agreeing that the patent or any patent granted on the application for which the disclaimer is filed shall be enforceable only for and during such period that the patent or any patent granted on the application for which the disclaimer is filed and the reference patent or any patent granted on the reference application are not separately enforced.

Proposed § 1.321(d)(2) sets forth the requirements to establish the existence of a joint research agreement in the patent, in the reexamination proceeding, or in the patent application, as applicable, for which the terminal disclaimer under proposed paragraph (d)(1) is filed.

Proposed § 1.321(d)(2)(i) sets forth the requirements for applications or patents subject to 35 U.S.C. 102 in effect on March 16, 2013, and parallels the requirements of current § 1.104(c)(4)(ii). Accordingly, if the requirements of § 1.104(c)(4)(ii) have already been met, there is no need to take further action to meet the requirements of proposed § 1.321(d)(2)(i).

Proposed § 1.321(d)(2)(ii) sets forth the requirements for applications or patents subject to 35 U.S.C. 102, in effect prior to March 16, 2013, and parallels the requirements of current § 1.104(c)(5)(ii). Accordingly, if the requirements of § 1.104(c)(5)(ii) have already been met, there is no need to take further action to meet the requirements of proposed § 1.321(d)(2)(ii).

Proposed § 1.321(e) provides that a disclaimer may not be entered into the official file of an application or a patent involved in an interference under subpart E of 37 CFR part 41 or any proceeding under 37 CFR part 42 unless a motion requesting to file the disclaimer under §§ 41.121(a)(2), 41.121(a)(3), or 42.20 is granted by the Board. If the disclaimer is inadvertently entered without the granting of the motion, the disclaimer will be expunged. The requirement is consistent with the current practice that limits when a disclaimer may be filed in a patent during certain proceedings before the Board.

IV. Rulemaking Requirements A. Administrative Procedure Act: The changes proposed in this rulemaking involve rules of agency procedure and interpretation. *See Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 97 (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 proposed rulemaking are not required pursuant to 5 U.S.C. 553(b) or (c), or any other law. *See Perez,* 575 U.S. at 101 (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 USPTO has chosen to seek public comment before implementing the rule to benefit from the public's input.

B. Regulatory Flexibility Act: Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), whenever an agency is required by 5 U.S.C. 553 (or any other law) to publish a notice of proposed rulemaking, 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.

Except in the extremely rare circumstance of the filing of a disclaimer by a sectional interest owner, this rulemaking does not propose to impose any additional requirements or fees on applicants. This rulemaking eliminates the need for a small number of applicants each year to file a petition under 37 CFR 1.183 and pay an accompanying fee by authorizing the filing of a disclaimer by a joint researcher even if the reference patent or patent application is not prior art. This rulemaking does not propose to substantively change when an applicant may file a submission under 37 CFR 1.130 or a disclaimer under 37 CFR 1.321, although a petition under 37 CFR 1.183 accompanying the disclaimer may no longer be required. The changes proposed in this rulemaking will not have a significant economic impact on a substantial number of small entities because applicants continue to be entitled to file a disclaimer under 37 CFR 1.321 or submission under 37 CFR 1.130 if such filings are appropriate today. For the foregoing reasons, the changes proposed in this notice will not have a significant economic impact on a substantial number of small entities.

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

D. Executive Order 13563 (Improving Regulation and Regulatory Review): The USPTO has complied with Executive Order 13563. Specifically, the USPTO 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 proposed rule is not expected to be an Executive Order 13771 (Jan. 30, 2017) regulatory action because this proposed rule is not significant under Executive Order 12866 (Sept. 30, 1993).

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

G. Executive Order 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 final 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 proposed 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 expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

M. Unfunded Mandates Reform Act of 1995: The changes proposed 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 *et seq.*) requires that the USPTO consider the impact of paperwork and other information collection burdens imposed on the public. The rules of practice pertaining to terminal disclaimers have been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) under OMB control number 0651–0031.

This rulemaking does not impose any additional requirements (including information collection requirements) or fees for patent applicants or patentees. Therefore, the USPTO is not resubmitting an information collection package to OMB for its review and approval because the changes in this rulemaking do not affect the information collection requirements associated with the information collections approved under OMB control number 0651–0031 or any other information collection.

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 Paperwork Reduction Act unless that collection of information displays a currently 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, the USPTO proposes to amend part 1 of title 37 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. In § 1.130, revise paragraphs (a), introductory text of paragraph (b), and (c) to read as follows:

§ 1.130 Affidavit or declaration of attribution or prior public disclosure under the Leahy-Smith America Invents Act.

(a) *Affidavit or declaration of attribution.* The applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the disclosure was made by the inventor or a joint inventor, or the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor.

(b) *Affidavit or declaration of prior public disclosure.* The applicant or patent owner may submit an appropriate affidavit or declaration to disqualify a disclosure as prior art by establishing that the subject matter disclosed had, before such disclosure was made or before such subject matter was effectively filed, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor. An affidavit or declaration under this paragraph must identify the subject matter publicly disclosed and provide the date such subject matter was publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

* * * * *

(c) *When this section is not available.* The provisions of this section are not available if the disclosure sought to be disqualified was made more than one year before the effective filing date of the claimed invention. The provisions of this section may not be available if the disclosure sought to be disqualified is a U.S. patent or U.S. patent application publication of a patented or pending application naming another inventor, the patent or pending application claims an invention that is the same or substantially the same as the applicant's or patent owner's claimed invention, and the affidavit or declaration contends that an inventor named in the U.S. patent or U.S. patent application publication derived the claimed invention from the inventor or a joint inventor named in the

application or patent, in which case an applicant or a patent owner may file a petition for a derivation proceeding pursuant to §§ 42.401 through 42.407 of this chapter.

* * * * *

■ 3. Revise § 1.321 to read as follows:

§ 1.321 Disclaimers in a patent or an application by owner of the whole interest.

(a) *Disclaimer of any complete claim or claims in a patent.* A patentee owning the whole interest in a patent may disclaim any complete claim or claims in a patent. A notice of the disclaimer is published in the *Official Gazette* and attached to the printed copies of the specification. To be effective and recorded under this paragraph, the disclaimer must:

(1) Be signed by the patentee or a patent practitioner of record;

(2) Identify the patent and the complete claim or claims being disclaimed;

(3) State the present extent of the disclaimant's ownership interest in the patent. The disclaimer must be made by the owner of the whole interest in the patent;

(4) Be accompanied by the fee set forth in § 1.20(d); and

(5) Include a provision that the disclaimer is binding upon the disclaimant and its successors and assigns.

(b) *Disclaimer or dedication to the public of the entire term or any terminal part of the term of a patent or any patent to be granted on an application*—(1) *Terminal disclaimers or dedications filed by a patentee.* A patentee owning the whole interest in a patent may disclaim or dedicate to the public the entire term, or any terminal part of the term, of the patent granted. A notice of the disclaimer is published in the *Official Gazette* and attached to the printed copies of the specification. To be effective and recorded under this paragraph, the terminal disclaimer must:

(i) Be signed by the patentee or a patent practitioner of record;

(ii) Identify the patent and the term of the patent that is being disclaimed. The terminal disclaimer must disclaim the entire term or any terminal part of the term of the patent;

(iii) State the present extent of the disclaimant's ownership interest in the patent. The terminal disclaimer must be made by the patentee owning the whole interest in the patent;

(iv) Be accompanied by the fee set forth in § 1.20(d); and

(v) Include a provision that the disclaimer is binding upon the disclaimant and its successors and assigns.

(2) *Terminal disclaimers or dedications in applications filed under 35 U.S.C. 111(a), 363, or 385 on or after September 16, 2012.* An applicant owning the whole interest in an application may disclaim or dedicate to the public the entire term, or any terminal part of the term, of a patent to be granted. To be effective and recorded under this paragraph, the terminal disclaimer must:

(i) Be signed by the applicant or a patent practitioner of record. A juristic entity who is the applicant may sign the terminal disclaimer;

(ii) Identify the application and the term of the patent to be granted that is being disclaimed. The terminal disclaimer must disclaim the entire term or any terminal part of the term of the patent to be granted;

(iii) State the present extent of the disclaimant's ownership interest in the application. The terminal disclaimer must be made by the applicant owning the whole interest in the application;

(iv) Be accompanied by the fee set forth in § 1.20(d); and

(v) Include a provision that the terminal disclaimer is binding upon the disclaimant and its successors or assigns.

(3) *Terminal disclaimers or dedications in applications filed under 35 U.S.C. 111(a) or 363 before September 16, 2012.* An applicant and/or assignee of record owning the whole interest in an application may disclaim or dedicate to the public the entire term, or any terminal part of the term, of a patent to be granted. To be effective and recorded under this paragraph, the terminal disclaimer must:

(i) Be signed:

(A) By the applicant where the application has not been assigned;

(B) By the applicant and an assignee of record where each owns an undivided part interest in the application;

(C) By the assignee of record of the whole interest in the application; or

(D) By a patent practitioner of record;

(ii) Identify the application and the term of the patent to be granted that is being disclaimed. A terminal disclaimer must disclaim the entire term or any terminal part of the term of the patent to be granted;

(iii) State the present extent of disclaimant's ownership interest in the application. A terminal disclaimer must be made by the owner of the whole interest in the application;

(iv) Be accompanied by the fee set forth in § 1.20(d); and

(v) Include a provision that the disclaimer is binding upon the disclaimant and its successors and assigns.

(c) *Terminal disclaimer with common ownership enforcement provision to obviate nonstatutory double patenting.* Except as provided for in paragraph (d) of this section, a terminal disclaimer may be filed in a patent, in a reexamination proceeding, or in a patent application to obviate nonstatutory double patenting or potential nonstatutory double patenting of a claimed invention based on a reference patent or application. To be effective and recorded under this paragraph, the terminal disclaimer must:

(1) Comply with the provisions of paragraph (b)(1), (2), or (3) of this section as applicable; and

(2) Include a provision that the patent or any patent granted on the application for which the disclaimer is filed shall be enforceable only for and during such period that the patent or any patent to be granted on the application for which the disclaimer is filed is commonly owned with the reference patent or any patent granted on the reference application whose claim(s) formed or may form the basis for the nonstatutory double patenting.

(d) *Terminal disclaimer with a joint research agreement enforcement provision to obviate nonstatutory double patenting.* This paragraph is only applicable for patents granted on or after December 10, 2004, reexamination proceedings of patents granted on or after December 10, 2004, and for applications pending on or after December 10, 2004.

(1) Subject to paragraph (d)(2) of this section, a terminal disclaimer may be filed in a patent, in a reexamination proceeding, or in a patent application to obviate nonstatutory double patenting or potential nonstatutory double patenting of a claimed invention based on a reference patent or application where the reference patent or application and the claimed invention are not commonly owned but are subject to a joint research agreement as defined by 35 U.S.C. 102(c) in effect on March 16, 2013 or 35 U.S.C. 103(c)(2) in effect on March 15, 2013. To be effective and recorded under this paragraph, the terminal disclaimer must:

(i) Comply with the provisions of paragraph (b)(1), (2), or (3) of this section as appropriate; and

(ii) Include a provision waiving the right to separately enforce the patent or any patent granted on the application for which the disclaimer is filed and the reference patent or any patent granted on the reference application whose claim(s) formed or may form the basis for the nonstatutory double patenting,

and agreeing that the patent or any patent granted on the application for which the disclaimer is filed shall be enforceable only for and during such period that the patent or any patent granted on the application for which the terminal disclaimer is filed and the reference patent or any patent granted on the reference application are not separately enforced.

(2) A terminal disclaimer may be filed under paragraph (d)(1) of this section if the requirements of paragraph (d)(2)(i) or (ii), as applicable, have been met.

(i) For applications or patents subject to 35 U.S.C. 102 in effect on March 16, 2013.

(A) The applicant or patent owner provides, or has provided, a statement to the effect that the subject matter of the reference patent or application was developed and the claimed invention was made by or on behalf of one or more parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), that was in effect on or before the effective filing date of the claimed invention, and the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(B) The application for patent, or the patent, for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement in accordance with § 1.71(g).

(ii) For applications or patents subject to 35 U.S.C. 102 in effect prior to March 16, 2013.

(A) The applicant or patent owner provides, or has provided, a statement to the effect that the subject matter of the reference patent or application and the claimed invention were made by or on behalf of the parties to a joint research agreement, within the meaning of 35 U.S.C. 100(h) and § 1.9(e), that was in effect on or before the date the claimed invention was made, and that the claimed invention was made as a result of activities undertaken within the scope of the joint research agreement; and

(B) The application for patent, or the patent, for the claimed invention discloses or is amended to disclose the names of the parties to the joint research agreement in accordance with § 1.71(g).

(e) *Submission of a disclaimer during an interference under subpart E of part 41 or a proceeding under part 42.* A disclaimer of a complete claim or claims, or a disclaimer of the entire term or terminal part of the term (terminal disclaimer) under this section, of a patent involved in an interference under subpart E of part 41 of this chapter or a proceeding under part 42 of this chapter may not be entered into the official file or considered, or if inadvertently entered, will be expunged unless a motion requesting to file the disclaimer under §§ 41.121(a)(2), 41.121(a)(3), or 42.20 of this chapter has been granted.

Andrei Iancu,

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

[FR Doc. 2020–27676 Filed 12–29–20; 8:45 am]

BILLING CODE 3510–16–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1989–0008; FRL–10018–19–OLEM]

Proposed Deletion From the National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) is issuing a Notice of Intent to partially delete the North Penn—Area 6 site from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the Commonwealth of Pennsylvania, through its designated state agency, have determined that all appropriate response actions under CERCLA, other than operations and maintenance, monitoring and five-year reviews, where applicable, have been completed. However, this proposed deletion would not preclude future actions under Superfund.

DATES: Comments regarding this proposed listing must be submitted on or before January 29, 2021.

ADDRESSES: EPA has established a docket for this action under the Docket Identification number included in Table 1 in the **SUPPLEMENTARY INFORMATION** section of this document. Submit your comments, identified by the appropriate Docket ID number, by one of the following methods:

- *https://www.regulations.gov.* Follow on-line instructions for submitting comments. 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 *http://www2.epa.gov/dockets/commenting-epa-dockets.*
- *Email:* Table 2 in the **SUPPLEMENTARY INFORMATION** section of this document provides an email address to submit public comments for the proposed deletion action.

Instructions: Direct your comments to the Docket Identification number included in Table 1 in the **SUPPLEMENTARY INFORMATION** section of this document. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *https://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *https://www.regulations.gov* or email. The *https://www.regulations.gov* website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *https://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of

encryption, and be free of any defects or viruses.

Docket: EPA has established a docket for this action under the Docket Identification included in Table 1 in the **SUPPLEMENTARY INFORMATION** section of this document. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *https://www.regulations.gov* or in hard copy at the corresponding Regional Records Center. Location, address, and phone number of the Regional Records Center follows.

Regional Records Center:

• Region 3 (DE, DC, MD, PA, VA, WV), U.S. EPA Records Center, 1650 Arch Street, Mail code 3SD2, Philadelphia, PA 19103; 215/814–3024.

The EPA is temporarily suspending Regional Records Centers for public visitors to reduce the risk of transmitting COVID–19. Information in these repositories, including the deletion docket, has not been updated with hardcopy or electronic media. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID.

FOR FURTHER INFORMATION CONTACT:

• Huu Ngo, U.S. EPA Region 3 (DE, DC, MD, PA, VA, WV), *ngo.huu@epa.gov,* 215/814–3187.

• Chuck Sands, U.S. EPA Headquarters, *sands.charles@epa.gov,* 703/603–8857.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. NPL Deletion Criteria
III. Deletion Procedures
IV. Basis for Intended Partial Site Deletion

I. Introduction

EPA is issuing a Notice of Intent to partially delete one site from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL constitutes Appendix B of 40 CFR part 300 which is the NCP, which EPA created under section 105 of the CERCLA statute of 1980, as amended. EPA maintains the NPL as those sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466, November 1, 1995. As described in 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

EPA will accept comments on the proposal to partially delete this site for thirty (30) days after publication of this document in the **Federal Register**.

Section II of this document explains the criteria for deleting sites from the NPL. Section III of this document discusses procedures that EPA is using for this action. Section IV of this document discusses the portion of the site proposed for deletion and demonstrates how it meets the deletion criteria, including reference documents with the rationale and data principally relied upon by the EPA to determine that the Superfund response is complete.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the state, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. all appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Pursuant to CERCLA section 121(c) and the NCP, EPA conducts five-year reviews to ensure the continued protectiveness of remedial actions where hazardous substances, pollutants, or contaminants remain at a site above levels that allow for unlimited use and unrestricted exposure. EPA conducts such five-year reviews even if a site is deleted from the NPL. EPA may initiate further action to ensure continued protectiveness at a deleted site if new information becomes available that indicates it is appropriate. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to the partial deletion of the site in this proposed rule:

(1) EPA consulted with the respective state before developing this Notice of Intent for partial deletion.

(2) EPA has provided the state 30 working days for review of this proposed action prior to publication of it today.

(3) In accordance with the criteria discussed above, EPA has determined that no further response is appropriate.

(4) The state, through their designated state agency, has concurred with the proposed partial deletion action.

(5) Concurrently, with the publication of this Notice of Intent for partial deletion in the **Federal Register**, a notice is being published in a major local newspaper of general circulation near the site. The newspaper announces the 30-day public comment period concerning the Notice of Intent for partial deletion.

(6) The EPA placed copies of documents supporting the proposed partial deletion in the deletion docket, made these items available for public inspection, and copying at the Regional Records Center identified above.

If comments are received within the 30-day comment period on this document, EPA will evaluate and respond accordingly to the comments before making a final decision to partially delete the site. If necessary, EPA will prepare a Responsiveness Summary to address any significant public comments received. After the public comment period, if EPA determines it is still appropriate to partially delete the site, the EPA will publish a final Notice of Partial Deletion in the **Federal Register**. Public notices, public submissions and copies of the Responsiveness Summary, if prepared, will be made available to interested parties and included in the site information repositories listed above.

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way

alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Partial Site Deletion

The site to be partially deleted from the NPL, the location of the site, and docket number with information including reference documents with the rationale and data principally relied upon by the EPA to determine that the Superfund response is complete are specified in Table 1. The NCP permits activities to occur at a deleted site or that media or parcel of a partially deleted site, including operation and maintenance of the remedy, monitoring, and five-year reviews. These activities for the site are entered in Table 1, if applicable, under Footnote such that; 1 = site has continued operation and maintenance of the remedy, 2 = site receives continued monitoring, and 3 = site five-year reviews are conducted.

TABLE 1

Site name	City/county, state	Type	Docket No.	Footnote
North Penn—Area 6	Lansdale, PA	Partial	EPA–HQ–SFUND–1989–0008	1, 2, 3

Table 2 includes a description of the area, media or Operable Units (OUs) of the NPL site proposed for partial deletion from the NPL, and an email address to which public comments may be submitted if the commenter does not comment using *https://www.regulations.gov.*

TABLE 2

Site name	Media/parcels for partial deletion	Email address for public comments
North Penn—Area 6	1.66-acres soil and groundwater of the Second Administrative Parcel, 135 East Hancock Street.	*Ngo.huu@epa.gov.*

EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Deletion from the NPL does not preclude further remedial action. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system. Deletion of a site from the NPL does not affect responsible party liability in the unlikely event that future conditions warrant further actions.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1251 *et seq.;* 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: December 18, 2020.

Dana Stalcup,

Acting Office Director, Office of Superfund Remediation and Technology Innovation.

[FR Doc. 2020–28839 Filed 12–29–20; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 20–428; RM–11870; DA 20–1487; FRS 17346]

Television Broadcasting Services: Columbia, Missouri

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by The Curators of the University of Missouri (the University), licensee of KOMU–TV, channel 8, Columbia, Missouri, requesting the substitution of channel 27 for channel 8 at Columbia in the DTV Table of Allotments. The University states that the Commission has recognized that VHF channels have certain propagation characteristics which may cause reception issues for some viewers. The University states that since the end of the DTV transition in 2009, the station regularly receives complaints from viewers who report being able to receive all other signals in the market, including a low power television station operating on a UHF channel, but not KOMU–TV. While KOMU–TV's proposed channel 27 facility would result in a slight reduction of service to existing viewers, the University demonstrates that only 401 people are predicted to live in portions of the loss area, and that all but seven of those persons will continue to be served by at least five full power television stations. The Commission has found that population loss of less than 500 persons is de minimus and the predicted population loss as presented by the University is only 401 persons and virtually all of them will continue to be well-served by five other full power television stations.

DATES: Comments must be filed on or before January 29, 2021 and reply comments on or before February 16, 2021.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Lauren Lynch Flick, Esq., Pillsbury Winthrop Shaw Pittman LLP, 1200 Seventeenth Street NW, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Joyce Bernstein, Media Bureau, at (202) 418–1647; or Joyce Bernstein, Media Bureau, at *Joyce.Bernstein@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rulemaking,* MB Docket No. 20–428; RM–11870; DA 20–1487, adopted December 16, 2020, and released December 16, 2020. The full text of this document is available for download at *https://www.fcc.gov/edocs.*

To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to *FCC504@fcc.gov* or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a Notice of Proposed Rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, *see* 47 CFR 1.1208. There are, however, exceptions to this prohibition, which can be found in § 1.1204(a) of the Commission's rules, 47 CFR 1.1204(a).

See §§ 1.415 and 1.420 of the Commission's rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

Proposed Rule

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, and 339.

§ 73.622 [Amended]

■ 2. Amend § 73.622(i), the Post-Transition Table of DTV Allotments under Missouri, by removing channel 8 and adding channel 27 at Columbia.

[FR Doc. 2020–28613 Filed 12–29–20; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 85, No. 250

Wednesday, December 30, 2020

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Notice of Request for Renewal of a Currently Approved Information Collection; Correction

AGENCY: Office of the Assistant Secretary for Civil Rights.

ACTION: Notice; correction.

SUMMARY: The Department of Agriculture published a notice in the **Federal Register** on November 25, 2020 (OMB Control Number: 0508–0002), concerning request for comments on the renewal of a currently approved information collection. The notice contained an incorrect date.

FOR FURTHER INFORMATION CONTACT: Denise A. Banks, 202–260–3978

Correction

In the **Federal Register** of November 25, 2020, in FR Volume 85, No. 228, on page 75283, in the second column, correct the ''Expiration Date of Approval:'' to February 28, 2021.

Dated: December 15, 2020.

Devon Westhill,

Deputy Assistant Secretary for Civil Rights.

[FR Doc. 2020–28799 Filed 12–29–20; 8:45 am]

BILLING CODE 3410–18–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 22, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 29, 2021 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Focus Group Research to Inform Consumer Food Safety Education and Outreach.

OMB Control Number: 0583–NEW.

Summary of Collection: The Food Safety and Inspection Service (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.*). This statute mandates that FSIS protect the public by verifying that meat products are safe, wholesome, unadulterated, and properly labeled and packaged.

FSIS's Office of Public Affairs and Consumer Education (OPACE) develops consumer education programs concerning the safe handling, preparation, and storage of meat, poultry, and processed egg products to improve consumer food handling behaviors and minimize the incidence of foodborne illness.

Need and Use of the Information: OPACE plans to conduct two sets of focus groups with consumers to collect qualitative information on the following topics: (1) Consumers' understanding and response to food recalls and (2) consumers' understanding and use of manufacturer cooking instructions on not-ready-to-eat (NRTE) meat and poultry products. A survey questionnaire will be used to screen participants for eligibility. Without the information, FSIS will not have the needed information to effectively communicate with the public and improve consumers' food safety behaviors. The lack of information will impede the Agency's ability to provide more useful information to consumers to help reduce foodborne illness in the United States.

Description of Respondents: Individuals or households.

Number of Respondents: 1,280.

Frequency of Responses: Reporting: One time.

Total Burden Hours: 411.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–28800 Filed 12–29–20; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–129]

Certain Walk-Behind Lawn Mowers and Parts Thereof From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain walk-behind lawn mowers and parts thereof (lawn mowers) from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2019 through March 31, 2020. Interested parties are invited

to comment on this preliminary determination.

DATES: Applicable December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Marc Castillo or Fred Baker, 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) 482–0519 or (202) 482–2924.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 15, 2020.[1] We selected Ningbo Daye Garden Machinery Co., Ltd. (Ningbo Daye) as the mandatory respondent.[2] On August 11, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now December 22, 2020.[3] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[4] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are lawn mowers from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[5] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[6] No interested party commented on the scope of the investigation within the allotted time period. However, on November 6, 2020, Commerce solicited comments from interested parties regarding the overlap in the scope of the antidumping (AD) and countervailing duty (CVD) investigations of lawn mowers from China and the AD investigation of lawn mowers from the Socialist Republic of Vietnam with the scope of the AD and CVD investigations of certain vertical shaft engines and parts thereof from China.[7] Certain interested parties submitted comments and rebuttal comments. For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Determination Memorandum.[8] As a result of our analysis of comments received, we have preliminarily revised the scope of the investigation. *See* Appendix I.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a). Because China is a non-market economy within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act.

In addition, Commerce has relied on facts available under section 776(a) of the Act to determine the cash deposit rate assigned to the China-wide entity. Furthermore, pursuant to sections 776(a) and (b) of the Act, because the China-wide entity did not cooperate to the best of its ability in responding to the Commerce's request for data, Commerce preliminarily has relied upon facts otherwise available, with adverse inferences, for the China-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,* Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation.[9] Policy Bulletin 05.1 describes this practice.[10] In this investigation, we calculated producer/exporter combination rates for respondents eligible for separate rates.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Ningbo Daye Garden Machinery Co., Ltd	Ningbo Daye Garden Machinery Co., Ltd	67.95	57.36
Chongqing Dajiang Power Equipment Co., Ltd	Chongqing Dajiang Power Equipment Co., Ltd	67.95	57.39
MTD Machinery (Suzhou) Co., Ltd	MTD Machinery (Suzhou) Co., Ltd	67.95	57.39
Qianjiang Group Wenling Jennfeng Industry Inc	Sumec Hardware & Tools Co., Ltd	67.95	57.39

[1] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 37417 (June 15, 2020).

[2] *See* Memorandum, ''Less-Than-Fair-Value Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Respondent Selection,'' dated August 12, 2020.

[3] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 48506 (August 11, 2020).

[4] *See* Memorandum, ''Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Decision Memorandum for Preliminary Affirmative Determination of Sales at Less Than Fair Value,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[6] *See Initiation Notice.*

[7] *See* Memorandum, ''Request for Comments Regarding Scope Overlap,'' dated November 6, 2020.

[8] *See* Memorandum, ''Antidumping and Countervailing Duty Investigations of Lawn Mowers from the People's Republic of China and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated concurrently with this notice.

[9] *See Initiation Notice,* 85 FR at 37421.

[10] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

Producer	Exporter	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Sumec Hardware & Tools Co., Ltd	Sumec Hardware & Tools Co., Ltd	67.95	57.39
Zhejiang KC Mechanical & Electrical Co., Ltd	Sumec Hardware & Tools Co., Ltd	67.95	57.39
Zhejiang Dobest Power Tools Co., Ltd	Zhejiang Amerisun Technology Co., Ltd	67.95	57.39
Zhejiang Dobest Power Tools Co., Ltd	Zhejiang Dobest Power Tools Co., Ltd	67.95	57.39
Zhejiang YAT Electrical Appliance Co., Ltd	Zhejiang YAT Electrical Appliance Co., Ltd	67.95	57.39
Zhejiang Zhongjian Technology Co., Ltd	Zhejiang Zhongjian Technology Co., Ltd	67.95	57.39
China-Wide Entity		84.26	73.72

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of subject merchandise, as described in the scope of the investigation section, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, as discussed below. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted average amount by which normal value exceeds U.S. price, as indicated in the chart above, as follows: (1) For the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Chinese producers/exporters of subject merchandise that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the China-wide entity; and (3) for all third-county exporters of subject merchandise not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Chinese producer/exporter combination (or China-wide entity) that supplied that third-country exporter.

To determine the cash deposit rate, Commerce normally adjusts the estimated weighted-average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a companion countervailing duty (CVD) proceeding when CVD provisional measures are in effect. Accordingly, where Commerce has made a preliminary affirmative determination for domestic subsidy pass-through or export subsidies, Commerce has offset the calculated estimated weighted-average dumping margin by the appropriate rate(s). Any such adjusted rates may be found in the Preliminary Determination section's chart of estimated weighted-average dumping margins above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation, Commerce will direct CBP to begin collecting cash deposits at a rate equal to the estimated weighted-average dumping margins calculated in this preliminary determination unadjusted for the passed-through domestic subsidies or for export subsidies at the time the CVD provisional measures expire. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments on non-scope issues may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments will be provided to interested parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[11] Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the

[11] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements); *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 7, 2020, and December 9, 2020, pursuant to 19 CFR 351.210(e), MTD Products, Inc. (the petitioner) [13] and respondent Ningbo Daye,[14] respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months. In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) the preliminary determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

[13] *See* Petitioner's Letter, ''Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Request for Postponement of Final Determination,'' dated December 7, 2020.

[14] *See* Ningbo Daye's Letter, ''Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China, Case No. A–570–129: Request to Postpone Final Determination,'' dated December 9, 2020.

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 22, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation consists of certain rotary walk-behind lawn mowers, which are grass-cutting machines that are powered by internal combustion engines. The scope of the investigation covers certain walk-behind lawn mowers, whether self-propelled or non-self-propelled, whether finished or unfinished, whether assembled or unassembled, and whether containing any additional features that provide for functions in addition to mowing.

Walk-behind lawn mowers within the scope of this investigation are only those powered by an internal combustion engine with a power rating of less than 3.7 kilowatts (kw). These internal combustion engines are typically spark ignition, single or multiple cylinder, air cooled, internal combustion engines with vertical power take off shafts with a maximum displacement of 196cc. Walk-behind lawn mowers covered by this scope typically must be certified and comply with the Consumer Products Safety Commission (CPSC) Safety Standard For Walk-Behind Power Lawn Mowers under the 16 CFR part 1205. However, lawn mowers that meet the physical descriptions above, but are not certified under 16 CFR part 1205 remain subject to the scope of this proceeding.

The internal combustion engines of the lawn mowers covered by this scope typically must comply with and be certified under Environmental Protection Agency (EPA) air pollution controls title 40, chapter I, subchapter U, part 1054 of the Code of Federal Regulations standards for small non-road spark-ignition engines and equipment. However, lawn mowers that meet the physical descriptions above but that do not have engines certified under 40 CFR part 1054 or other parts of subchapter U remain subject to the scope of this proceeding.

For purposes of this investigation, an unfinished and/or unassembled lawn mower means at a minimum, a sub-assembly comprised of an engine and a cutting deck shell attached to one another. A cutting deck shell is the portion of the lawn mower—typically of aluminum or steel—that houses and protects a user from a rotating blade. Importation of the subassembly whether or not accompanied by, or attached to, additional components such as a handle, blade(s), grass catching bag, or wheel(s) constitute an unfinished lawn mower for purposes of this investigation. The inclusion in a third country of any components other than the mower subassembly does not remove the lawn mower from the scope. Lawn mowers that meet the physical description above are covered by the scope of this investigation regardless of the origin of its engine, unless such lawn mowers contain an engine that is covered by the scope of the ongoing proceedings on certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines) from China. If the proceedings on small vertical engines from China are terminated, the lawn mowers containing small vertical engines from China will be covered by the scope of this proceeding.

The lawn mowers subject to this investigation are typically at subheading: 8433.11.0050. Lawn mowers subject to this investigation may also enter under HTSUS 8407.90.1010 and 8433.90.1090. The HTSUS subheadings are provided for convenience and customs purposes only, and the written description of the merchandise under investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Product Characteristics
VII. Discussion of the Methodology
VIII. Currency Conversion
IX. Adjustment Under Section 777(A)(F) of the Act
X. Adjustment to Cash Deposit Rate for Export Subsidies
XI. ITC Notification
XII. Recommendation

[FR Doc. 2020–28852 Filed 12–29–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–810]

Stainless Steel Bar From India: Amended Final Results of Antidumping Duty Administrative Review; 2018–2019

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

SUMMARY: The Department of Commerce (Commerce) is amending the final results of the administrative review of the antidumping duty (AD) order on stainless steel bar (SS Bar) from India to correct a ministerial error.

DATES: Applicable December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Hermes Pinilla or Allison Hollander, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone: (202) 482–3477 or (202) 482–2805, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 24, 2020, Commerce published its *Final Results* of this administrative review.[1] On November 30, 2020, Venus Wire Industries Pvt. Ltd., and its affiliates Hindustan Inox, Precision Metals, and Sieves Manufacturers (India) Pvt. Ltd. (collectively, the Venus Group), one of the mandatory respondents in this administrative review, timely submitted ministerial error comments regarding Commerce's *Final Results*.[2] On December 1, 2020, the petitioners filed comments rebutting the Venus Group's assertion that Commerce committed a ministerial error.[3] Commerce is amending its *Final Results* to correct the ministerial error raised by the Venus Group.

Legal Framework

A ministerial error, as defined in section 751(h) of the Tariff Act of 1930, as amended (the Act), includes ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.''[4] With respect to final results of administrative reviews, 19 CFR 351.224(e) provides that Commerce ''will analyze any comments received and if appropriate, correct any ministerial error by amending . . .the final results of review. . . .''

Ministerial Error

In the *Final Results,* Commerce indicated that it was adjusting the Venus Group's direct material cost or DIRMAT to take into account whether the producer is the Venus Group or its unaffiliated suppliers.[5] We stated that we adjusted the Venus Group's direct material cost or DIRMAT where the producer is identified as the Venus Group.[6] However, in the *Final Results,* we incorrectly adjusted the Venus Group's direct material cost or DIRMAT regardless of whether the producer was identified as the Venus Group or one of its unaffiliated suppliers. Accordingly, Commerce determines that, in accordance with section 751(h) of the Act and 19 CFR 351.224(f), it made a ministerial error in the *Final Results.* Pursuant to 19 CFR 351.224(e), Commerce is amending the *Final Results* to reflect the correction of this ministerial error in the calculation of the final weighted-average dumping margin assigned to the Venus Group, which changes from 17.24 percent to 16.48 percent.[7] For a detailed discussion of this ministerial error, as well as Commerce's analysis, *see* Amended Final Analysis Memorandum.[8]

Amended Final Results of Review

As a result of correcting the ministerial error described above, Commerce determines that, for the period of review (POR) February 1, 2018 through January 31, 2019, the following weighted-average dumping margin exists for the Venus Group:

Producer/exporter	Weighted-average dumping margin (percent)
Venus Wire Industries Pvt. Ltd., and its affiliates Hindustan Inox, Precision Metals and Sieves Manufacturers (India) Pvt. Ltd	16.48

Disclosure

We intend to disclose the calculations performed for these amended final results in accordance with 19 CFR 351.224(b).

Antidumping Duty Assessment

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce shall determine and U.S. Customs and Border Protections (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review. We will calculate importer-specific assessment rate on the basis of the total amount of antidumping duties calculated for each importer's examined sales and the total entered values of the sales in accordance with 19 CFR 351.212.(b)(1).

We intend to issue liquidation instructions to CBP 15 days after publication of the amended final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective retroactively for all shipments of subject merchandise that entered, or withdrawn from warehouse, for consumption on or after November 24, 2020, the date of publication of the *Final Results* of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the Venus Group will be equal to the weighted-average dumping margin established in these amended final results of this review; (2) for previously reviewed or investigated companies, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 12.45 percent, the all-others rate established in the less-than-fair-value investigation.[9] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

[1] *See Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review Final Results of Antidumping Duty Administrative Review; 2018–2019,* 85 FR 74985 (November 24, 2020) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

[2] *See* Venus Group's Letter, ''Stainless Steel Bar from India: Clerical Error Comment on Final Results of Administrative Review,'' dated November 30, 2020.

[3] *See* Petitioners' Letter, ''Stainless Steel Bar from India—Petitioners' Response To Venus Group's Clerical Error Comments Regarding Final Results of Administrative Review,'' dated December 1, 2020. The petitioners are Carpenter Technology Corporation; Crucible Industries LLC; Electralloy, A Division of G.O. Carlson, Inc., North American Stainless, Universal Stainless & Alloy Products, Inc.; and Valbruna Slater Stainless, Inc. (collectively, the petitioners)

[4] *See* 19 CFR 351.224(f).

[5] *See* IDM at Comment 4.

[6] *Id.; see also* Memorandum, ''Administrative Review of the Antidumping Duty Order on Stainless Steel Bar from India: Final Analysis Memorandum for the Venus Group,'' dated November 18, 2020.

[7] *See* Memorandum, ''Ministerial Error Memorandum for the Final Results of the 2018–2019 Administerial Review of the Antidumping Duty Stainless Steel Bar from India,'' dated concurrently with, and hereby adopted by, this notice; *see* also Memorandum, ''Administrative Review of the Antidumping Duty Order on Stainless Steel Bar from India: Amended Final Analysis Memorandum for the Venus Group,'' dated concurrently with this notice (Amended Final Analysis).

[8] *Id.*

[9] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from India,* 59 FR 66915, 66921 (December 28, 1994).

Notification Regarding Administrative Protective Orders

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

Notification to Interested Parties

We are issuing and publishing these amended final results of review in accordance with sections 751(h) and 777(i) of the Act and 19 CFR 351.224(e).

Dated: December 22, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–28829 Filed 12–29–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–830]

Certain Walk-Behind Lawn Mowers and Parts Thereof From the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain walk-behind lawn mowers and parts thereof (lawn mowers) from the Socialist Republic of Vietnam (Vietnam) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Frank Schmitt or Mark Flessner, 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) 482–4880 or (202) 482–6312, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 22, 2020.[1] We selected Ducar Technology Co., Ltd. (Ducar) as the mandatory respondent.[2] On August 11, 2020, Commerce postponed the preliminary determination of this investigation, and the revised deadline is now December 22, 2020.[3] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[4] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are certain walk-behind lawn mowers and parts thereof from Vietnam. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[5] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[6] No interested party commented on the scope of the investigation within the allotted time period. However, on November 6, 2020, Commerce solicited comments from interested parties regarding the overlap in the scope of the antidumping (AD) and countervailing duty (CVD) investigations of lawn mowers and the scope of the AD and CVD investigations of certain vertical shaft engines and parts thereof from China, and certain interested parties submitted comments and rebuttal comments.[7] For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Determination Memorandum.[8] As a result of our analysis of comments received, we have preliminarily revised the scope of the investigation. *See* Appendix I.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act and constructed export prices in accordance with section 772(b) of the Act. Because Vietnam is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act.

In addition, Commerce has relied on facts available under section 776(a) of the Act to determine the cash deposit rate assigned to the Vietnam-wide entity. Furthermore, pursuant to sections 776(a) and (b) of the Act, because the Vietnam-wide entity did not cooperate to the best of its ability in responding to Commerce's request for data, Commerce has preliminarily relied upon facts otherwise available, with adverse inferences, for the Vietnam-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

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[1] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair Value Investigations,* 85 FR 37426 (June 22, 2020) (*Initiation Notice*).

[2] *See* Memorandum, ''Antidumping Investigation of Certain Walk-Behind Lawn Mowers and Parts Thereof from the Socialist Republic of Vietnam: Identification of Mandatory Respondent,'' dated July 29, 2020.

[3] *See Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 48506 (August 11, 2020).

[4] *See* Memorandum, ''Certain Walk-Behind Lawn Mowers from the Socialist Republic of Vietnam: Decision Memorandum for Preliminary Affirmative Determination of Sales at Less Than Fair Value,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[5] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[6] *See Initiation Notice.*

[7] *See* Memorandum, ''Request for Comments Regarding Scope Overlap,'' dated November 6, 2020.

[8] *See* Memorandum, ''Antidumping and Countervailing Duty Investigations of Lawn Mowers from the People's Republic of China and the Socialist Republic of Vietnam: Preliminary Scope Decision Memorandum,'' dated concurrently with this notice.

Combination Rates

In the *Initiation Notice,*[9] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[10]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Producer	Exporter	Estimated weighted-average dumping margin (percent)
Ducar Technology Co., Ltd	Ducar Technology Co., Ltd	183.87
Vietnam-Wide Entity [11]		221.34

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 subject merchandise, as described in the scope of the investigation section, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, as discussed below. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted average amount by which normal value exceeds U.S. price, as indicated in the chart above, as follows: (1) For the producer/exporter combinations listed in the table above, the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Vietnam producers/exporters of subject merchandise that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the Vietnam-wide entity; and (3) for all third-county exporters of subject merchandise not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Vietnam producer/exporter combination (or Vietnam-wide entity) that supplied that third-country exporter.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments on non-scope issues will be announced on a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[12] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information until further notice.[13] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On November 30, 2020, and December 7, 2020, pursuant to 19 CFR 351.210(e),

[9] *See Initiation Notice* at 85 FR 12506.

[10] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[11] The Vietnam-wide entity includes Techtronic Cordless GP, a producer or exporter of merchandise under consideration that was issued, but did not respond to, Commerce's Q&V Questionnaire.

[12] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[13] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

the respondent Ducar[14] and MTD Products, Inc. (the petitioner),[15] respectively, requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed 6 months. In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of the subject merchandise 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 22, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation consists of certain rotary walk-behind lawn mowers, which are grass-cutting machines that are powered by internal combustion engines. The scope of this investigation covers certain walk-behind lawn mowers, whether selfpropelled or non-self-propelled, whether finished or unfinished, whether assembled or unassembled, and whether containing any additional features that provide for functions in addition to mowing.

Walk-behind lawn mowers within the scope of this investigation are only those powered by an internal combustion engine with a power rating of less than 3.7 kilowatts. These internal combustion engines are typically spark ignition, single or multiple cylinder, air cooled, internal combustion engines with vertical power take off shafts with a maximum displacement of 196cc. Walk-behind lawn mowers covered by this scope typically must be certified and comply with the Consumer Products Safety Commission Safety Standard For Walk-Behind Power Lawn Mowers under the 16 CFR part 1205. However, lawn mowers that meet the physical descriptions above, but are not certified under 16 CFR part 1205 remain subject to the scope of this proceeding.

The internal combustion engines of the lawn mowers covered by this scope typically must comply with and be certified under Environmental Protection Agency air pollution controls title 40, chapter I, subchapter U, part 1054 of the Code of Federal Regulations standards for small non-road spark-ignition engines and equipment. However, lawn mowers that meet the physical descriptions above but that do not have engines certified under 40 CFR part 1054 or other parts of subchapter U remain subject to the scope of this proceeding.

For purposes of this investigation, an unfinished and/or unassembled lawn mower means at a minimum, a sub-assembly comprised of an engine and a cutting deck shell attached to one another. A cutting deck shell is the portion of the lawn mower—typically of aluminum or steel—that houses and protects a user from a rotating blade. Importation of the subassembly whether or not accompanied by, or attached to, additional components such as a handle, blade(s), grass catching bag, or wheel(s) constitute an unfinished lawn mower for purposes of this investigation. The inclusion in a third country of any components other than the mower subassembly does not remove the lawn mower from the scope. Lawn mowers that meet the physical description above are covered by the scope of this investigation regardless of the origin of its engine, unless such lawn mowers contain an engine that is covered by the scope of the ongoing proceedings on certain vertical shaft engines between 99cc and up to 225cc, and parts thereof (small vertical engines) from China. If the proceedings on small vertical engines from China are terminated, the lawn mowers containing small vertical engines from China will be covered by the scope of this proceeding.

The lawn mowers subject to this investigation are typically at subheading: 8433.11.0050. Lawn mowers subject to these investigations may also enter under Harmonized Tariff Schedule of the United States (HTSUS) 8407.90.1010 and 8433.90.1090. The HTSUS subheadings are provided for convenience and customs purposes only, and the written description of the merchandise under investigation is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Product Characteristics
VII. Affiliation
VIII. Discussion of the Methodology
IX. Currency Conversion
X. ITC Notification
XI. Recommendation

[FR Doc. 2020–28853 Filed 12–29–20; 8:45 am]

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[14] *See* Ducar's Letter, ''Certain Walk-Behind Lawn Mowers from Vietnam: Conditional Request for Extension of Final Determination,'' dated November 30, 2020.

[15] *See* Petitioner's Letter, ''Walk-Behind Lawn Mowers and Parts Thereof from the Socialist Republic of Vietnam: Request for Postponement of Final Determination,'' dated December 7, 2020.

DEPARTMENT OF COMMERCE

International Trade Administration

United States-Mexico-Canada Agreement (USMCA), Article 10.12; Binational Panel Review: Notice of Request for Panel Review

AGENCY: United States Section, USMCA Secretariat, International Trade Administration, Department of Commerce.

ACTION: Notice of USMCA request for panel review.

SUMMARY: A Request for Panel Review was filed on behalf of CGC Inc. with the Canadian Section of the USMCA Secretariat on November 26, 2020, pursuant to USMCA Article 10.12. Panel Review was requested of the decision to not conduct an interim review made by the CITT with respect to Certain Gypsum Board, Sheet, or Panel originating in or exported from the United States of America. The decision to not conduct an interim review was published in the *Canada Gazette* on October 31, 2020. The USMCA Secretariat has assigned case number CDA–USA–2020–10.12–01 to this request.

FOR FURTHER INFORMATION CONTACT: Vidya Desai, Acting United States Secretary, USMCA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Article 10.12 of Chapter 10 of USMCA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to provide judicial review of the trade remedy determination being challenged and then issue a binding Panel Decision. There are established *Rules of*

Procedure for Article 10.12 (Binational Panel Reviews), which were adopted by the three governments for panels requested pursuant to Article 10.12(2) of USMCA which requires Requests for Panel Review to be published in accordance with Rule 40. For the complete Rules, please see *https://can-mex-usa-sec.org/secretariat/agreement-accord-acuerdo/usmca-aceum-tmec/rules-regles-reglas/article-article-articulo_10_12.aspx?lang=eng.*

The Rules provide that:

(a) A Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with Rule 44 no later than 30 days after the filing of the first Request for Panel Review (the deadline for filing a Complaint is December 29, 2020);

(b) A Party, investigating authority or interested person who does not file a Complaint but who intends to participate in the panel review must file a Notice of Appearance in accordance with Rule 45 no later than 45 days after the filing of the first Request for Panel Review (the deadline for filing a Notice of Appearance is January 11, 2021); and

(c) The panel review shall be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

Dated: December 15, 2020.

Vidya Desai,

Acting U.S. Secretary, USMCA Secretariat.

[FR Doc. 2020–28030 Filed 12–29–20; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–876]

Fine Denier Polyester Staple Fiber From India: Final Results of Countervailing Duty Administrative Review; 2017–2018

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

SUMMARY: The Department of Commerce (Commerce) determines that Reliance Industries Limited (Reliance) received countervailable subsidies that are above *de minimis* during the period of review, November 6, 2017 through December 31, 2018.

DATES: Applicable December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Ariela Garvett, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3609.

SUPPLEMENTARY INFORMATION:

Background

On April 3, 2020, Commerce published the *Preliminary Results* of this review.[1] On April 24, 2020, Commerce tolled all deadlines in administrative reviews by 50 days.[2] On July 21, 2020, Commerce tolled all deadlines in administrative reviews by an additional 60 days,[3] thereby extending the deadline for these final results until November 19, 2020. On November 5, 2020, Commerce postponed the final results of this review by 33 days until December 22, 2020.[4]

Scope of the Order

The merchandise covered by this order is fine denier polyester staple fiber (fine denier PSF). For a complete description of the scope of this order, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the interested parties' case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A summary of the events that occurred since Commerce published the *Preliminary Results,* as well as a full discussion of the issues raised by parties for these final results, are discussed in the Issues and Decision Memorandum.[5] The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content. A list of the issues raised by interested parties and responded to by Commerce in the Issues and Decision Memorandum, is provided in the Appendix to this notice.

Methodology

Commerce conducted this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we find that there is a subsidy, *i.e.,* a government-provided financial contribution that gives rise to a benefit to the recipient, and that the subsidy is specific.[6]

For a description of the methodology underlying Commerce's conclusions, *see* the Issues and Decision Memorandum.

Changes Since the Preliminary Results

Based on our analysis of the comments received from interested parties and record information, we made certain changes to the net subsidy rate calculated for Reliance. For a discussion of these changes, *see* the Issues and Decision Memorandum.

Final Results of the Administrative Review

In accordance with section 751(a)(1) of the Act and 19 CFR 351.221(B)(5), we find the net countervailable subsidy rate for the period November 6, 2017 through December 31, 2018 to be as follows:

Company	Subsidy rate (percent *ad valorem*)
Reliance Industries Limited	4.44

Assessment and Cash Deposit Requirements

In accordance with 19 CFR 351.212(b)(2), Commerce intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results to liquidate shipments of subject merchandise. We will instruct CBP to liquidate shipments of subject merchandise produced and/or

[1] *See Fine Denier Polyester Staple Fiber from the Republic of India: Preliminary Results of Countervailing Duty Administrative Review,* 85 FR 18916 (April 3, 2020) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

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

[3] *See* Memorandum, ''Tolling of Deadlines for Antidumping and Countervailing Duty Administrative Reviews,'' dated July 21, 2020.

[4] *See* Memorandum, ''2017–2018 Countervailing Duty Administrative Review of Fine Denier Polyester Staple Fiber from India: Extension of Deadline for Final Results,'' dated November 5, 2020.

[5] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results in the 2017–2018 Countervailing Duty Administrative Review of Fine Denier Polyester Staple Fiber from India,'' dated concurrently, and hereby adopted by, this notice (Issues and Decision Memorandum).

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

exported by Reliance entered, or withdrawn from warehouse, for consumption on or after November 6, 2017 through December 31, 2018, at the *ad valorem* assessment rate listed above for Reliance.

In accordance with section 751(a)(2)(C) of the Act, we intend also to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed firms, Commerce will instruct CBP to continue to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company, as appropriate. These cash deposit rates, when imposed, shall remain in effect until further notice.

Disclosure

Commerce intends to disclose the calculations and analysis performed for these final results to interested parties within five days of the date of publication of this notice in the **Federal Register**.[7]

Administrative Protective Order

This notice also serves as a final reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 315.305(A)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

These final results are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: December 21, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Use of Facts Otherwise Available and Application of Adverse Inferences
V. Subsidies Valuation Information
VI. Analysis of Programs
VII. Discussion of the Issues
Comment 1: Sales Value Denominators
Comment 2: Whether To Apply Adverse Facts Available (AFA) To Export Sales Values
Comment 3: Discount Rates
Comment 4: Calculation of Duty Exemptions Under the Special Economic Zone (SEZ) Duty-Free Importation of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts, and Packing Materials Program and Export Promotion of Capital Goods Scheme (EPCGS)
Comment 5: Application of AFA to the SEZ Duty-Free Importation of Capital Goods and Raw Materials, Components, Consumables, Intermediates, Spare Parts, and Packing Materials Program and EPCGS
Comment 6: Land Benchmark
Comment 7: Whether the SEZ Programs, Technology Upgradation Fund Scheme (TUFS), and Merchandise Export From India Scheme (MEIS) Are Countervailable
VIII. Recommendation

[FR Doc. 2020–28789 Filed 12–29–20; 8:45 am]

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[7] *See* 19 CFR 351.224(b).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA736]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Service Pier Extension Project on Naval Base Kitsap Bangor, Washington

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

ACTION: Issuance of a modified incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a modified incidental harassment authorization (IHA) to United States Navy (Navy) to incidentally harass marine mammals incidental to the Service Pier Extension (SPE) project at Naval Base Kitsap Bangor, Washington.

DATES: This modified IHA is valid from the original date of issuance through July 15, 2021.

FOR FURTHER INFORMATION CONTACT: Robert Pauline, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct 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 and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

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). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

History of Request

On June 28, 2018, NMFS published a notice of our issuance of an IHA authorizing take of five species of marine mammals by Level A and Level B harassment incidental to the SPE project (83 FR 30406). Species authorized for take included killer whale (*Orcinus orca*), harbor porpoise (*Phocoena phocoena*), California sea lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*), and harbor seal (*Phoca vitulina*). The effective dates of that IHA were July 16, 2019 through July 15, 2020. On February 4, 2019, the Navy informed NMFS that the project was being

delayed by one full year. None of the work identified in the initial IHA had occurred and no marine mammals had been taken during the effective dates of the initial IHA (July 16, 2018 through July 1, 2019). Therefore, the Navy submitted a formal request for reissuance of the initial IHA with new effective dates of July 16, 2020 through July 15, 2021. NMFS re-issued this IHA on July 3, 2019 (84 FR 31844). The IHA covered construction work identical to what was analyzed and authorized through the initial IHA.

On October 14, 2020, NMFS received a request from the Navy for a modification to the current IHA due to an elevated harbor seal take rate. The Navy felt that without an increase in authorized take of harbor seal they would be forced to repeatedly shut down whenever animals entered into specified Level A harassment zones. This would likely prolong the duration of in-water construction activities and add increased costs to the project.

Therefore, the Navy requested a modification of the IHA to increase authorized take of harbor seal by Level A harassment. NMFS published the notice of the proposed IHA modification in the **Federal Register** on November 24, 2020 (85 FR 74989). The mitigation, monitoring, and reporting measures remain the same as prescribed in the initial IHA with minor revisions to mitigation requirements. No additional take is authorized for species other than harbor seal. Moreover, the IHA would still expire on July 15, 2021.

Description of the Specified Activity and Anticipated Impacts

The modified IHA would include the same construction activities (*i.e.,* impact pile driving, vibratory pile driving, vibratory pile removal) in the same locations that were described in the initial IHA, The monitoring and reporting measures remain the same as prescribed in the initial IHA, while minor revisions to the required mitigation measures have been authorized. NMFS refers the reader to the documents related to the initial IHA issued on June 28, 2018 (83 FR 30406), for more detailed description of the project activities. Other relevant documents include the notice of proposed IHA and request for comments (83 FR 10689; March 12, 2018), notice of reissued IHA (84 FR 31844, July 3, 2019), and notice of proposed IHA modification (85 FR 74989; November 24, 2020).

Detailed Description of the Action

A detailed description of the construction activities is found in these previous documents. The location, timing, and nature of the activities, including the types of piles and methods of installation and removal are identical to those described in the previous notices.

Public Comments

A notice of proposed IHA modification was published in the **Federal Register** on November 24, 2020 (85 FR 74989). During the 15-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission). NMFS has posted the comments online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* A summary of the comments as well as NMFS' responses are below.

Comment 1: The Commission recommended that NMFS reduce all shut-down zones for phocids during vibratory and impact pile driving and removal to at least 25 m or even 10 m.

Response: NMFS does not concur with the Commission's recommendation of decreasing shutdown zones beyond what NMFS had proposed in the **Federal Register** notice of a modified IHA. While multiple shutdowns are problematic due to habituated seals entering shutdown zones, the Navy is equally concerned about the possibility of exceeding authorized take of seals. Additional measures authorized under this IHA will decrease shutdowns to a level that is practicable for the Navy while also increasing authorized take to avoid exceeding authorized limits. When any of the three most-habituated seals enters into Level A harassment zones during either impact or vibratory driving, they will be recorded as Level A harassment takes. However, pile driving operations will be allowed to continue since the three habituated seals are responsible for most of the work stoppages and recorded takes during both impact and vibratory driving. These seals can be individually identified and monitored in order to avoid repeated takes of a single animal. Additionally, a smaller phocid Level A harassment and shutdown zone will be established and monitored based on *in situ* sound source verification (SSV) testing for impact driving. The SSV testing showed a Level A harassment isopleth of 92 m compared to a 217 m isopleth authorized in the existing IHA, resulting in lower takes of seals.

NMFS notes that the reduction in shutdown zones recommended by the Commission would not have any effect on take of harbor seals by Level A harassment. The Level A harassment zones (92 m for impact driving and 30 m for vibratory with the exception of habituated seals) would remain unchanged and takes would occur in those zones even if smaller shutdown zones were established and monitored. There could be some decrease in the number of shutdowns, but since most shutdowns are caused by the three most-habituated seals, who are exempted from the shutdowns at 92 m and 30 m under the modified IHA, any reduction would likely be minor. Furthermore, establishment and monitoring of the larger shutdown zones proposed by NMFS will limit exposure to sound levels that could result in permanent threshold shift (PTS) for seals other than the three highly-habituated animals.

Comment 2: The Commission recommended that NMFS increase the number of Level A harassment takes from 445 to 509 to account for the incidental taking of all harbor seals known to occur in the project area on the 48 remaining in-water work days.

Response: The Commission's recommendation is based on data that was collected near the time when the notice of proposed IHA was published (85 FR 74989; November 24, 2020). When NMFS was drafting the notice of proposed IHA, the Navy had recorded 58 takes of harbor seal by Level A harassment. The most up-to-date information regarding take of harbor seals after submission of the notice of proposed IHA to the **Federal Register** was provided by the Navy on November 21, 2020. The Navy reported that there had been 85 takes of harbor seal by Level A harassment up to that date with 48 days of in-water work remaining. NMFS agrees with the Commission's recommendation that eight harbor seal takes by Level A harassment should be authorized for each remaining day of in-water work resulting in 384 takes. This value has been added to the 125 takes by Level A harassment originally authorized resulting in a total of 509 Level A harassment takes. The total number of takes by both Level A harassment and Level B harassment has not changed (5,725) because the new Level A takes are assumed to occur to animals that would have previously been counted as taken by Level B harassment. Therefore, NMFS has reduced authorized Level B harassment take of harbor seal from 5,600 in the initial IHA to 5,216 in the modified IHA. The total numbers of incidental takes by Level A and Level B harassment as a percentage of population remains the same as shown in Table 2.

Comment 3: The Commission recommended that NMFS reassess the

number of Level A harassment takes authorized for harbor seals during the Navy's Transit Protection Program (TPP) Year 1 activities and whether to authorize Level A harassment takes for Year 2 activities. The Commission also recommended that NMFS modify the Navy's TPP authorizations to reduce all shut-down zones for phocids during vibratory and impact pile driving and removal and increase the number of Level A harassment takes to account for the eight harbor seals known to occur in the project area on each day of activities.

Response: NMFS will consider the Commission's input regarding existing and future IHA's pertaining to Naval Base Kitsap-Bangor.

Changes From Proposed IHA Modification

NMFS has increased authorized take of harbor seals by Level A harassment from 445 in the proposed IHA to 509 in the modified IHA while take by Level B harassment has been reduced from 5,280 to 5,216. The rationale for this change is provided in the Estimated Take section.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in the notice of proposed IHA and request for comments (83 FR 10689; March 3, 2018); notice of initial IHA issued on June 28, 2018 (83 FR 30406); notice of reissued IHA (84 FR 31844, July 3, 2019); and notice of proposed IHA modification (85 FR 74989; November 24, 2020), which remain applicable to this modified IHA as well. In addition, NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts under the initial IHA.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the initial IHA (83 FR 30406; June 28, 2018) which remains applicable to the issuance of this modified IHA. There is no new information on potential effects.

For harbor seals, observations indicate that eight identified individuals are often observed in relatively close proximity to the pile driving operations. Three of the eight animals occur more frequently, often on a daily basis. Given this, there is a higher likelihood than initially considered that these animals may incur PTS at a low-moderate level due to the repeated, longer-duration exposure to higher levels of sound.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the notice of IHA for the initial authorization (83 FR 30406; June 28, 2018). The pile installation and removal equipment that may result in take, as well as the source levels, marine mammal stocks taken, marine mammal density data and the methods of take estimation applicable to this authorization remain unchanged from the previously issued IHA. The number of authorized takes is also identical with the exception of harbor seals.

The in-water work window (when ESA-listed salmonids are least likely to be present) runs from July 16, 2020 through January 15, 2021. Pile installation started September 4, 2020 with both vibratory and impact pile drivers being employed. After in-water work commenced, protected species observers (PSOs) began recording a specific group of harbor seals that consistently entered and remained in the Level A harassment zone. (Note that the term PSO has replaced marine mammal observer (MMO) in this notice as well as the draft modified IHA, although the functions and duties of each are identical). This has resulted in excessive shutdowns. Due to these frequent shutdowns the pile installation project is behind schedule. PSOs have identified at least eight harbor seals that frequent the project area and have become habituated to the in-water construction work. These seals include four pups and four adults which have all been individually identified. Three of the pups are seen in the project area on almost a daily basis. The pups approach the work site repeatedly during the day and stay in the work area for up to 90 minutes. Two of the pups and all of the adults have had occasional behavioral reactions to pile driving activity. For example, PSOs have recorded seals occasionally exhibiting behaviors such as startled response and fast swimming away from the activity.

On October 14, 2020, NMFS received a request from the Navy for a modification to the current IHA due to an elevated harbor seal take rate. NMFS concurred that under the current take rate, the Navy would likely exceed authorized take prior to the effective end data of the IHA.

The Navy utilized NMFS' User Spreadsheet to calculate the Level A harassment isopleths associated with project activities which was developed as part of the NMFS Technical Guidance (2016) in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds. Inputs to the model for the initial IHA are shown in Table 1. This model calculated a 217-m Level A harassment isopleth for phocids (*i.e.,* harbor seals) during impact driving of 36-in steel piles. The size of this PTS harassment zone for 36-steel pile impact driving is relatively large compared to PTS zones for both impact and vibratory driving of other pile types and sizes. The large zone size and habituation of a limited number of seals has contributed to a greater phocid take rate than was initially calculated.

TABLE 1—INPUTS FOR DETERMINING DISTANCES TO CUMULATIVE PTS THRESHOLDS

[36″ Steel impact]

Spreadsheet tab used	Impact pile driving	
	Initial IHA inputs	Modified IHA
Source Level (Single Strike/shot SEL)	173 dB (assumes 8 dB attenuation) [1].	177 dB (assumes 8 dB attenuation) [2].
Weighting Factor Adjustment (kHz) [3]	Weighting override (Grebner *et al.* 2016).	Weighting override (Grebner *et al.* 2016).
Number of strikes per day	1,600	1,600.
Number of piles per day within 24-h period	2	2.
Propagation (xLogR)	15	25.

TABLE 1—INPUTS FOR DETERMINING DISTANCES TO CUMULATIVE PTS THRESHOLDS—Continued

[36″ Steel impact]

Spreadsheet tab used	Impact pile driving	
	Initial IHA inputs	Modified IHA
Distance of source level measurement (meters)	10	10.

[1] Navy 2015.
[2] Wood *et al.* 2020.
[3] For impact driving, the transmission loss (TL) model described above incorporated frequency weighting adjustments by applying the auditory weighting function over the entire 1-second SEL spectral data sets. Additional information may be found in the **Federal Register** notice of issuance of a final IHA (83 FR 30420; June 28, 2018).

The Navy conducted SSV testing in September 2020 and compared the results to values generated by the NMFS User Spreadsheet in the initial IHA. Due to some of assumptions built into the model, the User Spreadsheet generates PTS isopleths that are potentially overestimates. Testing was conducted during impact driving of four 36-in steel piles both with and without bubble curtains and recorded values were inserted into the use spreadsheet. The acoustic data for each pile strike were frequency weighted for phocidae following NMFS guidance (2016) and then averaged. This resulted in an average phocid weighted single strike SEL of 177 dB re 1μPa2s at 10 m. Using the measured transmission loss of 25 (far field) and an assumption of 1,600 strikes per day, the resulting isopleth for phocids was 92 meters (Wood *et al.* 2020).

With NMFS' approval, the Navy retroactively utilized the revised Level A harassment isopleth of 92 m and recalculated the harbor seal take. Distances to each taken animal were recorded as part of the marine mammal monitoring plan. This reduced the total take count by 29, bringing the revised total from 87 to 58 takes. Approximately 33 percent of total takes occurred during impact driving outside the 92 m zone. The Navy reduced the shutdown zone size based on SSV data and retroactively recalculated take to allow for continuation of in-water construction while public comments were being solicited through this **Federal Register** notice (85 FR 74989; November 24, 2020) and the modified IHA was being finalized.

While vibratory is the preferred method of installation, impact driving has been needed daily due at the project site, largely due to sediment conditions. Additionally, there is a 30-m shut down zone (26-m injury zone) during vibratory driving. The PSOs reported that three habituated individuals frequently approach in close proximity to the piles within the 30-m shutdown zone during vibratory driving. Given these factors, the Navy concluded that would still be needed, even if the Level A harassment isopleth during impact driving is reduced from 217 m to 92 m.

PSOs report that up to eight animals frequent the project site and are believed to be habituated by varying degrees to in-water construction activities. Some of them regularly enter and remain within Level A harassment and shutdown zones. Three of these individuals already noted above appear daily in the Level A harassment zone, while the remainder of the group of eight are observed less frequently (every other or every third day). All eight seals have been observed in the previous Level A harassment zone (217 m) on some occasions, with an average of five to six seen on each day. The Navy requested that NMFS authorize an additional four takes by Level A harassment per day. This would allow for one take per day by Level A harassment for each of the three daily visitors (three takes per day), as well as one additional Level A harassment take per day that could be incurred by any of the other five individuals if one of them entered the shutdown zone each day prior to detection, or if a few of them entered every few days. Based on the information provided, NMFS proposed that average of four harbor seal takes per day by Level A harassment would occur.

Based on the Commission's recommendation, NMFS has authorized increased take of harbor seal by Level A harassment as a precautionary measure. For example, one or more of the five less-habituated seals could become more habituated and join the three most habituated animals on daily incursions into a Level A harassment zone. If this occurred the Navy would likely exceed the authorized take limit NMFS put forth in the modified IHA proposal.

Based upon pile installation rates achieved to date as reported by the Navy, all of the days remaining within the in-water work window (48) will be needed to complete this segment of the project before the current work window closes. As described above and based on the Commission's recommendation, NMFS has authorized increased harbor take to eight per day by Level A harassment for an additional 384 takes (8 takes/day * 48 days) between now and January 15, 2021 when the in-water work window ends. The 384 takes are added to the initial 125 authorized takes for a total of 509 takes by Level A harassment. Most of these takes will occur to a smaller number of habituated individuals identified by the Navy.

The total numbers of incidental takes by Level A and Level B harassment, including proposed updated harbor seal Level A harassment and as a percentage of population, is shown in Table 2 below. The total number of takes (Level A and Level B harassment combined) has not changed because the new Level A takes are assumed to occur to animals that would have previously been counted as taken by Level B harassment. Therefore, NMFS has reduced authorized Level B harassment take of harbor seal from 5,600 in the initial IHA to 5,216.

TABLE 2—TOTAL NUMBERS OF AUTHORIZED TAKES BY LEVEL A AND LEVEL B HARASSMENT AND AS A PERCENTAGE OF POPULATION

Species	Authorized take		Percent population
	Level A	Level B	
Killer whale	0	48	19.7

TABLE 2—TOTAL NUMBERS OF AUTHORIZED TAKES BY LEVEL A AND LEVEL B HARASSMENT AND AS A PERCENTAGE OF POPULATION—Continued

Species	Authorized take		Percent population
	Level A	Level B	
Harbor porpoise	0	2,728	24.3
Steller sea lion	0	503	1.2
California sea lion	0	7,816	2.6
Harbor seal	509	5,216	n/a

Since the total number of combined takes by Level A and Level B harassment remains unchanged (5,725) from the number authorized in the existing IHA, the rationale supporting our small numbers determination for the Hood Canal stock of harbor seal is applicable here and remains valid.

Description of Mitigation, Monitoring and Reporting Measures

With the exception of the revised shutdown provisions for harbor seals discussed below, the monitoring, and reporting measures described here are identical to those included in the **Federal Register** notice announcing the initial IHA (83 FR 30406; June 28, 2018).

Use of Vibratory Installation—The Navy will employ vibratory installation to the greatest extent possible when driving steel piles to minimize high sound pressure levels associated with impact pile driving. Impact driving of steel piles will only occur when required by geotechnical conditions or to proof load-bearing piles driven by vibratory methods.

Timing Restrictions—To minimize the number of fish exposed to underwater noise and other construction disturbance, in-water work will occur during the in-water work window previously described when ESA-listed salmonids are least likely to be present (USACE, 2015), July 16–January 15.

All in-water construction activities will occur during daylight hours (sunrise to sunset) except from July 16 to September 15, when impact pile driving will only occur starting 2 hours after sunrise and ending 2 hours before sunset, to protect foraging marbled murrelets during the nesting season (April 15–September 23).

Use of Bubble Curtain—A bubble curtain will be employed during impact installation or proofing of steel piles where water depths are greater than 0.67 m (2 ft). A noise attenuation device is not required during vibratory pile driving. If a bubble curtain or similar measure is used, it will distribute air bubbles around 100 percent of the piling perimeter for the full depth of the water column. Any other attenuation measure must provide 100 percent coverage in the water column for the full depth of the pile. The lowest bubble ring shall be in contact with the mudline for the full circumference of the ring. The weights attached to the bottom ring shall ensure 100 percent mudline contact. No parts of the ring or other objects shall prevent full mudline contact.

A performance test of the bubble curtain shall be conducted prior to initial use for impact pile driving. The performance test shall confirm the calculated pressures and flow rates at each manifold ring. The contractor shall also train personnel in the proper balancing of air flow to the bubblers. The contractor shall submit an inspection/performance report to the Navy for approval within 72 hours following the performance test. Corrections to the noise attenuation device to meet the performance stands shall occur prior to use for impact driving.

Soft-Start—During impact driving the Navy is required to initiate sound from the hammer at reduced energy followed by a 30 second waiting period, then two subsequent reduced energy strike sets.

A soft-start procedure will be used for impact pile driving at the beginning of each day's in-water pile driving or any time impact pile driving has ceased for more than 30 minutes.

Establishment of Shutdown Zones and Disturbance Zones—For all impact and vibratory driving of piles, shutdown and disturbance zones will be established and monitored. All shutdown and disturbance zones remain the same as those included in the initial IHA, except for the shutdown zone for harbor seals during impact driving of steel piles for which the modifications are described below. The Navy will focus observations within 1,000 m for all species during these activities but will record all observations. During impact driving of concrete piles the Navy will focus on monitoring within 100 m but will record all observations. The Navy will monitor and record marine mammal observations within zones and extrapolate these values across the entirety of the Level B zone as part of the final monitoring report. To the extent possible, the Navy will record and report on any marine mammal occurrences, including behavioral disturbances, beyond 1,000 m for steel pile installation and 100 m for concrete pile installation.

The shutdown zones are based on the distances from the source predicted for each threshold level. Although different functional hearing groups of cetaceans and pinnipeds were evaluated, the threshold levels used to develop the disturbance zones were selected to be conservative for cetaceans (and therefore at the lowest levels); as such, the disturbance zones for cetaceans were based on the high frequency threshold (harbor porpoise). The shutdown zones are based on the maximum calculated Level A harassment radius for pinnipeds and cetaceans during installation of 36-inch steel and concrete piles with impact techniques, as well as during vibratory pile installation and removal. These actions serve to protect marine mammals, allow for practical implementation of the Navy's marine mammal monitoring plan and reduce the risk of a take. The shutdown zone during any non-pile driving activity will always be a minimum of 10 m (33 ft) to prevent injury from physical interaction of marine mammals with construction equipment.

During impact pile driving of steel piles, the shutdown, Level A, and Level B zones as shown in Table 3 will be monitored out to the greatest extent possible with a focus on monitoring within 1,000 m for steel pile and 100 m for concrete pile installation.

The Navy's IHA allows for the modification of shutdown zones if hydroacoustic monitoring is conducted. The Navy conducted a SSV test since the initial IHA was issued and it indicates that the Level A harassment isopleth for harbor seals occurs at 92 m instead of 217 m. Therefore, at the Navy's request and with concurrence from NMFS, the shutdown zone has been reduced from 220 m to 95 m during impact driving of all steel piles (*i.e.*, both 36-in and 24-in steel piles).

This is the only change to Level A or Level B harassment zone authorized as part of this modified IHA.

TABLE 3—SHUTDOWN, LEVEL A, AND LEVEL B HARASSMENT ISOPLETHS DURING IMPACT DRIVING OF STEEL PILES

Marine mammal group	Level B isopleth (meters)	Level A isopleth (meters)	Shutdown zone (meters)
Cetaceans	541	740	750
Harbor Seal	541	92	95
Sea Lions	541	12	15

The shutdown, Level A, and Level B isopleths for all other impact driving remains unchanged from the notice of the issuance of the initial IHA (83 FR 30406; June 28, 2018).

The reduced size of the shutdown zone for harbor seals along with the increase in authorized take by Level A harassment should preclude the Navy from exceeding its authorized take limit for this species. However, even with a 95-m shutdown zone during impact driving and a 30-m shutdown zone during vibratory driving, it is highly likely that the Navy will continue to experience frequent work stoppages due to frequent visits by habituated harbor seals. This will result in continued schedule delays and cost overruns and may potentially require an extra year of in-water construction activities. Given this information, it is not practicable for the Navy to shut down or delay pile driving activities every time a harbor seal is observed in a shutdown zone.

Therefore, shutdowns will be initiated for harbor seals when observed approaching or entering the Level A harassment zones as described above, except when one or more of the three habituated harbor seals identified as daily visitors approaches or enters an established shutdown zone. In such cases, a single take by Level A harassment shall be recorded for each individual seal for the entire day and operations will be allowed to continue without interruption. The behavior of these three daily visitors will be monitored and recorded as well as the duration of time spent within the harassment zones. This information will be recorded individually for each of the three seals. If any other seals, including the five habituated seals identified as frequent visitors, approaches or enters into a Level A harassment zone, shutdown must occur.

The minimum shutdown zone during any pile driving activity will always be a minimum of 10 m. Shutdown is mandatory whenever an animal is within 10 m of pile driving location regardless of the exception noted above. In such instances, in-water pile driving operations may only continue after 15 minutes have passed or the animal is seen heading away from the 10-m shutdown zone.

The revisions in the mitigation, including the shutdown exception for habituated harbor seals, are necessary to allow for the practicable completion of the Navy's specified activities. Although the predicted Level A harassment take numbers are higher than initially projected because of the behavior of the eight habituated animals, the likelihood of take by Level A harassment is lower than initially expected because the Level A harassment zone is smaller than initially predicted based on the new SSV. NMFS has considered the new take numbers and revised mitigation measures for harbor seals and determined that they will effect the least practicable adverse impact on harbor seals and their habitat. Nothing has changed since the initial IHA for other species or stocks and our analysis and conclusions remain the same.

Visual Monitoring—Monitoring must be conducted by qualified protected PSOs with minimum qualifications described in the **Federal Register** notice of the issuance of the initial IHA (83 FR 30406; June 28, 2018). During pile driving, there will be three-five PSOs working depending on the location, site accessibility and line of sight for adequate coverage.

Reporting—PSOs must record specific information as described in the **Federal Register** notice of the issuance of the initial IHA (83 FR 30406; June 28, 2018). Within 90 days after completion of pile driving and removal activities, the Navy must provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed. If no comments are received from NMFS within 30 days, the draft final 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 unanticipated event that: (1) The specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury, serious injury or mortality; (2) an injured or dead animal is discovered and cause of death is known; or (3) an injured or dead animal is discovered and cause of death is not related to the authorized activities, the Navy will follow the protocols described in the Section 3 of Marine Mammal Monitoring Report (Appendix D of the application).

Based on our evaluation of the applicant's measures in consideration of the increased estimated take for harbor seals, as well as the modified shutdown provisions for harbor seals, NMFS has re-affirmed the determination that the required mitigation measures provide the means effecting the least practicable impact on harbor seals and their habitat.

Determinations

With the exception of the revised harbor seal shutdown provisions, the Navy's in-water construction activities as well as monitoring and reporting requirements are unchanged from those covered in the initial IHA. The effects of the activity, taking into consideration the added mitigation and related monitoring measures, remain unchanged, notwithstanding the increase to the authorized amount of harbor seal take by Level A harassment. The nature of the pile driving project precludes the likelihood of serious injury or mortality. While injury could occur in a small group of habituated animals (eight or fewer), it would likely be limited to PTS at lower frequencies where pile driving energy is concentrated, and unlikely to result in significant impacts to individual fitness, reproduction, or survival of these individuals.

With approximately 48 in-water construction days remaining, NMFS has authorized an increase in harbor seal take by Level A harassment to 509. Even in consideration of the increased numbers of take by Level A harassment, the impacts of these exposures, as noted above, may result in moderate injury to a limited number of harbor seals but are not expected to accrue to the degree that the fitness of any individuals is markedly impacted. Further, given the

small number of individuals potentially impacted in this manner, no impacts on annual rates of recruitment or survival are likely to result.

Separately, as described previously, the increase in Level A harassment take corresponds to a commensurate decrease in the predicted number of Level B harassment and the total number of takes remains unchanged. Therefore, we re-affirm that small numbers of harbor seals will be taken relative to the population size of the Hood Canal stock of harbor seal.

In conclusion, there is no new information suggesting that our effects analysis or negligible impact finding for harbor seals should change.

Based on the information contained here and in the referenced documents, NMFS has reaffirmed the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the proposed authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) the Navy's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act (ESA)

No incidental take of ESA-listed species is authorized 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.

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 modification of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) 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 determined that the issuance of the modified IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued a modified IHA to the for in-water construction associated with the SPE project on Naval Base Kitsap Bangor, Washington effective until July 15, 2021. The only change is an increase in the authorized take of harbor seal take by Level A harassment from 125 to 509.

Dated: December 21, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–28850 Filed 12–29–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Patent Examiner Employment Application

The United States Patent and Trademark Office (USPTO) will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The USPTO invites comment on this information collection renewal, which helps the USPTO assess the impact of its information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on October 23, 2020 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

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

Title: Patent Examiner Employment Application.

OMB Control Number: 0651–0042.

Forms: None.

Type of Request: Extension and revision of a currently approved information collection.

Number of Respondents: 8,386 respondents per year.

Average Hours per Response: The USPTO estimates that it will take the public approximately 30 minutes (0.5 hours) to complete the patent examiner application questions. This includes the time to gather the necessary information, respond to the system prompts, and submit the completed request to the USPTO.

Estimated Total Annual Respondent Burden Hours: 4,193 hours.

Estimated Total Annual Non-Hour Cost Burden: $0.

Needs and Uses: USPTO uses the Monster Hiring Management (MHM) system to rapidly review applications for employment of entry-level patent examiners. The use of such automated online systems during recruitment allows USPTO to remain competitive, meet hiring goals, and fulfill the Agency's Congressional commitment to reduce the pendency rate for the examination of patent applications. Given the time sensitive hiring needs of the Patent Examining Corps, the MHM system provides increased speed and accuracy during the employment process.

This information collection covers respondent data gathered through the MHM system. The MHM online application collects supplemental information to a candidate's USAJOBS application. This information assists USPTO Human Resource Specialists and Hiring Managers in determining whether an applicant possesses the basic qualification requirements for a patent examiner position. From the information collected, the MHM system creates an electronic real-time candidate inventory on applicants' expertise and technical knowledge, which allows USPTO to immediately review applications from multiple applicants.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

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

Written comments and recommendations for this information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the information collection or the OMB Control Number 0651–0042.

Further information can be obtained by:

• *Email: InformationCollection@uspto.gov.* Include ''0651–0042 information request'' in the subject line of the message.

• *Mail:* Kimberly Hardy, Office of the Chief Administrative Officer, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

Kimberly Hardy,

Information Collections Officer, Office of the Chief Administrative Officer, United States Patent and Trademark Office.

[FR Doc. 2020–28869 Filed 12–29–20; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF EDUCATION

[Docket ID ED–2020–OPEPD–0096]

Administrative Priority and Definitions for Discretionary Grant Programs

AGENCY: Office of Planning, Evaluation and Policy Development, Department of Education.

ACTION: Final priority and definitions.

SUMMARY: The Secretary of Education announces a priority and definitions for discretionary grant programs that the Secretary may use in fiscal year (FY) 2021 and later years to promote the use of the Department of Education's (the Department's) discretionary grants funds to support remote learning.

DATES: The priority and definitions are effective January 29, 2021.

FOR FURTHER INFORMATION CONTACT: Kelly Terpak, U.S. Department of Education, 400 Maryland Avenue SW, Room 4W312, Washington, DC 20202. Telephone: (202) 205–5231. Email: *kelly.terpak@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Program Authority: 20 U.S.C. 1221e–3.

We published a notice of proposed priority and definitions (NPP) in the **Federal Register** on September 8, 2020 (85 FR 55439). That notice contained background information and our reasons for proposing the particular administrative priority and definitions.

We have made minor revisions to paragraphs (b) and (f) of the priority and to the definition of ''interoperable credentials,'' which we explain in the *Analysis of Comments and Changes* section of this document.

Public Comment: In response to our invitation in the NPP, 16 parties submitted comments.

We group major issues according to subject. Generally, we do not address technical and other minor changes. In addition, we do not address general comments that raised concerns not directly related to the proposed priority and definitions.

Analysis of the Comments and Changes: An analysis of the comments and of any changes in the priority and definitions since publication of the NPP follows.

Comments: A few commenters asked for clarity on how the priority would be used and encouraged the Department to prioritize certain applicants, such as institutions of higher education, for eligibility.

Discussion: As discussed in the NPP, the priority is intended to build State and local capacity to support remote learning and instruction. The Department may elect to use this priority when inviting applications for a discretionary grant program. The Department has the discretion to choose whether the priority and definitions are appropriate for the competition after considering program purpose, feasibility, and scope. The Department also has the discretion to choose how the priority would apply; for example, the priority may be used as an absolute priority (applicants must address the priority in order to be eligible to receive grant funds) or a competitive preference priority (applicants may receive additional points depending on how well they address the priority). We will only use the priority and definitions for a particular grant competition when it is relevant and appropriate. Furthermore, the Department is not required to use the priority and definitions for any particular program.

In any competition in which this priority and definitions are used, eligible entities are determined by the program statute; therefore, we cannot specify eligibility for a particular type of entity as part of the final priority.

Changes: None.

Comments: A few commenters proposed revisions to, or additional language for, the background section that accompanied the proposed priority to emphasize the impact of school closures for in-person instruction on different populations, such as students with disabilities, as well as specifics related to learning losses discussed in the cited study.

Discussion: We appreciate the feedback we received on the NPP background section, which explains our rationale for this priority and definitions. We agree with comments that emphasized the impact of school closures for in-person instruction on students with disabilities and other groups of students and believe the commenters' concerns are sufficiently addressed through paragraph (f) of the priority. Moreover, we are revising paragraph (f) so that a program may choose to focus on a specific subgroup. Additionally, we added language in parentheticals clarifying that where the commonly used terms used for the subgroups of students in paragraph (f) or similar terms are defined in the applicable authorizing program statute, these terms take on the statutory definition that applies to the particular program. For example, this priority could be used in the Alaska Native Education (ANE) program to encourage projects that provide high-quality remote learning to students who are Alaska Natives, as defined in the Elementary and Secondary Education Act, as amended (ESEA), through the use of paragraph (f)(iv) of the priority, pertaining to Native American students.

Changes: We are modifying paragraph (f) so that a program may choose to focus on specific subgroups and have clarified that the definitions of listed subgroups may be based on the program's statutory authority, as applicable.

Comments: Multiple commenters requested that we reference Section 508 of the Rehabilitation Act in the accessibility requirement paragraph that concludes the priority.

Discussion: We agree that accessibility is important in ensuring all students can access remote learning effectively, and we have indicated so in various paragraphs of the priority. Section 508 of the Rehabilitation Act applies only to Federal agencies, so recipients of Federal financial assistance are not required to comply with that law; consequently, inclusion of Section 508 in the accessibility requirement has limited applicability and is therefore unnecessary.

Changes: None.

Comments: Multiple commenters expressed concerns about the impact of remote learning for students with disabilities, including a concern that the priority did not take into account the individual needs of students identified for services pursuant to the Individuals with Disabilities Education Act (IDEA).

In addition, multiple commenters expressed support for paragraph (f) of the priority to target the needs of specific subgroups, including students with disabilities. However, one commenter recommended the Department remove the requirement that paragraph (f) of the priority be used only in conjunction with another paragraph of the priority.

Discussion: Students with disabilities throughout the country who may be eligible for services under Section 504 of the Rehabilitation Act of 1973 (Section 504) or the IDEA must have their individual learning needs met from wherever they are learning. Educators also need training and support to provide effective remote instruction. Through this priority, we will promote strategies and practices for delivering remote learning and competency-based education that effectively meet the individual needs of students with disabilities, including: Identifying the appropriate technologies, assistive technologies, or accessible educational materials needed to ensure students with disabilities have access to core or alternate curricula; enhancing communication and collaboration with parents and families to identify the most effective methodology and supports that will meet the unique and individual needs of students with disabilities; and ensuring Individualized Education Program teams and teams determining services under Section 504 collaborate with parents to identify the program, related services, accommodations, and supports the individual student will require in order to derive an educational benefit and achieve academic, functional, and behavioral educational outcomes.

Lastly, paragraph (f) of the priority is designed to target the work carried out under paragraphs (a)–(e) of the priority to a particular subgroup or subgroups of students and leverage that work to focus efforts. As such, paragraph (f) on its own would not address fully the improvements that would be supported with this remote learning priority.

Changes: None.

Comments: Multiple commenters suggested adding language on the principles of Universal Design for Learning (UDL) in all the paragraphs of the priority.

Discussion: The priority currently refers to UDL in paragraph (a) of the priority as an example. As written, the language in the other paragraphs of the priority could be inclusive of UDL as a strategy for meeting the needs of students with disabilities.

Further, the priority offers the flexibility for applicants to address UDL and similar strategies in their grant applications. There is nothing in the priority that would prohibit the use of UDL. For these reasons, it is not necessary to revise the priority to include explicit references to the strategy in all paragraphs of the priority.

Changes: None.

Comment: One commenter raised concerns that the priority did not address all student populations most impacted by remote learning, that remote learning is not culturally responsive, and that the assessments need to be research-based. This commenter also raised concern about inequitable access to technology, stating that the priority will further exacerbate the ''digital divide.'' A second commenter recommended removing the 10 percent limitation on technology costs, citing concerns about access to technology and the variance in that access across the country.

Discussion: We appreciate the concern that the remote learning priority must consider the needs of all students. We include paragraph (f) of the priority which requires ''high-quality'' remote learning for specific subgroups of students, and we think that the concept of high-quality remote learning would include considerations about what is culturally responsive, as appropriate. We also generally defer to applicants on how best to meet their communities' needs. Furthermore, the intent of the remote learning priority is to ensure that the Department provide incentives to applicants that would implement robust, effective, and engaging remote learning strategies that meet the needs of all students. In addition, while we do not explicitly require performance-based assessments to be supported by research, in paragraph (d) of the priority we do require that the assessments obtain valid and reliable results.

Paragraph (c) of the proposed priority allowed for providing access to technologies needed to serve learners. The intent of proposed paragraph (c) was to reduce the differences in access to technology. We understand that setting a limit on technology costs could be prohibitive to successfully implementing the remote learning priority and understand that applicants are best positioned to determine the sufficient amount of resources needed to invest in technology to support project objectives. As such, we are removing the cap on technology costs in paragraph (c) of the proposed priority.

Changes: We are removing the last sentence of paragraph (c) of the proposed priority.

Comments: Multiple commenters supported the priority, emphasized the need for professional learning and the usage of paragraph (b), and noted the important role institutions of higher education play in professional development. One commenter asked that the Department use paragraph (b) in all competitions as an absolute priority.

Discussion: We appreciate the support for the priority. We agree that professional learning is an important part of effective remote learning and agree that institutions of higher education, along with a number of other entities, can support professional learning for educators. With respect to using paragraph (b) as an absolute priority across all discretionary grant programs, the Department has discretion in choosing whether and how to use the priority based on its applicability to a given program's purpose, and those decisions are best made on a program-by-program basis.

Changes: None.

Comment: A couple of commenters requested that the Department expand paragraph (b), which is focused on professional learning. One commenter wanted paragraph (b) to align with the definition of ''professional development'' under the ESEA. Another commenter said the examples in the parenthetical for paragraph (b) should be expanded with additional examples to emphasize professional development focused on student engagement and not just professional development in technology use.

Discussion: We appreciate the interest in clarity and consistency in terminology in this priority and other statutes. However, the language about professional development being ''sustained and intensive'' from the definition of ''professional development'' in ESEA is not appropriate for this remote learning priority. Our intent for this priority is to help the Department's grantees pivot between in-person and remote learning as needed. While remote learning in response to the novel coronavirus 2019 (COVID–19) pandemic has been in place for an extended period, not all remote learning under this priority will be for similar time frames, and professional learning may not need to be ongoing to address educator capacity for remote learning.

In regard to the comment recommending additional examples to highlight professional learning activities beyond technology, paragraph (b) already includes a focus on professional learning with the intent of advancing student engagement and learning, but we recognize the paragraph may appear to highlight technology primarily. As such, we are reorganizing the sentence for paragraph (b) to clearly emphasize increasing student engagement, including through the use of technology.

Changes: We are revising paragraph (b) so that it more clearly states that the professional learning under this priority is focused on student engagement and learning through technology, rather than emphasizing technology.

Comments: Multiple commenters sought revisions to paragraph (d) of the priority to clarify that performance-based assessments are important, regardless of the connection to competency-based education; that the assessments must show true competency; and that assessments should not require seat time. Commenters also asked the Department to provide additional examples of assessments.

Discussion: We agree that performance-based assessments are important and purposefully highlight these kinds of assessments and seek their development under paragraph (d) of the priority. We agree that performance-based assessments can be separate from competency-based education; however, we want to emphasize competency-based education in this paragraph of the remote learning priority. Moreover, we want to encourage assessments that demonstrate competency, in keeping with the recommendation from one commenter, and we want to support assessments that accurately document students' skills. The examples included in paragraph (d) do not need to be exhaustive and are sufficient for the purposes of the priority. Lastly, we do not consider the priority or the definition of ''competency-based education,'' as written, to require a particular amount of instruction or seat time; rather, the definition of ''competency-based education'' specifically calls for assessments that demonstrate progression ''based on demonstrated mastery of what students are expected to know (knowledge) and be able to do (skills), rather than seat time or age.''

Changes: None.

Comment: One commenter stated that the ''valid and reliable assessments'' piece of paragraph (d) of the priority that focused on assessments and competency-based education should not be limited to just summative assessments.

Discussion: We appreciate the commenter's interest in not limiting assessments to summative assessments and focusing on formative assessments as well. We do not consider the inclusion of ''valid and reliable'' in describing the assessments to mean that they must only be summative assessments. Rather, paragraph (d) focuses on performance-based assessments that document students' skills and, under the definition of ''competency-based education,'' progression is based on demonstrated mastery rather than seat time. However, we want to clarify that the intent is for performance-based assessments to yield valid and reliable results and are therefore changing ''obtain'' in proposed paragraph (d) to ''yield.''

Changes: We are revising ''obtain'' in paragraph (d) of the proposed priority to ''yield.''

Comment: One commenter recommended that we clarify the terms ''hybrid/blended learning'' and ''linked open data formats'' used in the priority.

Discussion: We appreciate the interest in providing clarity in the priority and the terminology used. We decline to further define ''hybrid/blended learning,'' as this term has various meanings in the field depending on specific contexts of a particular community, and we do not think it is necessary to define the term for purposes of the priority. We also decline to define ''linked open data formats.'' We think ''open data'' is a term widely used at the Federal, State, and local levels, and by ''linked'' we emphasize the accessibility of the data. We do not consider a separate definition to be necessary and believe programs using this priority will clarify how these terms fit within their specific context.

Changes: None.

Comment: One commenter asked whether, under paragraph (f), the Department should require applicants to provide both high-quality remote learning and competency-based education in response to this paragraph, or whether applicants should have the flexibility to choose between remote learning or competency-based education, as provided in the proposed priority.

Discussion: The proposed priority would have offered applicants a choice between providing remote learning or competency-based education to specific student subgroups. While a project could support both remote learning and competency-based education, in further reviewing paragraph (f), we think ''competency-based education'' can be removed from proposed paragraph (f) because the broader priority is focused on building capacity for remote learning.

Changes: We are removing ''or competency-based education'' from paragraph (f) of the proposed priority.

Comment: One commenter proposed limiting the definition of ''remote learning'' to K–12 education given the recent publication of the higher education distance education regulations, citing concern that existing definitions in the higher education context, including the definition for ''distance education,'' that include remote learning concepts may spark confusion. Specifically, ''distance education'' is defined in the Higher Education Act of 1965, as amended (HEA), as well as in the Distance Education and Innovation regulations published in the **Federal Register** on September 2, 2020 (85 FR 54742).

Discussion: We appreciate the commenter's consideration of whether this priority and the ''remote learning'' definition is applicable in the higher education context, as our intent is to establish a priority that could be used in grant programs across the Department, including those for higher education. We recognize that there are definitions for ''distance education'' in section 103(7) of the HEA and ''distance learning'' in section 8101(14) of the ESEA. The definition of ''remote learning'' is not meant to contradict or supersede these definitions or the definition of ''distance education'' in the HEA or the higher education Distance Education and Innovation regulations; rather, it is meant to provide context for those definitions and clarify what is meant by remote learning in the context of this priority.

Changes: None.

Comment: One commenter supported the priority but asked that the definition for ''remote learning'' also reference non-technology models, such as service learning, internships, and other programs.

Discussion: We agree that remote learning can include non-technology models and highlight some of those as examples in the ''remote learning'' definition. Given that the list of examples is not exhaustive, nothing in the definition prohibits other activities in addition to the activities identified. We, therefore, do not think adding additional examples is necessary.

Changes: None.

Comments: Multiple commenters supported the inclusion of competency-based education in the priority, with one commenter recommending a stand-alone priority focused on competency-based education, arguing that competency-based education, while it can be used in conjunction with technology, does not require technology.

Discussion: We appreciate the support for inclusion of competency-based education in the priority and definitions. We agree that competency-based education is important, and the Department previously included ''competency-based learning'' in Priority 3—Fostering Flexible and Affordable Paths to Obtaining Knowledge and Skills in the Secretary's Final Supplemental Priorities and Definitions for Discretionary Grant Programs (Supplemental Priorities) published in the **Federal Register** on March 2, 2018

(83 FR 9096). As such, we do not need to create an additional, separate priority for competency-based education. Further, we decline to remove the reference to ''competency-based education'' in paragraph (a) because our intent is to encourage competency-based education in remote learning environments.

Changes: None.

Comments: Multiple commenters recommended changes to the definition of ''competency-based education,'' including adding references to credentials that are inclusive of all students, include appropriate pacing, and are student focused. An additional commenter proposed limiting the definition for ''competency-based education'' to K–12 education given the recent publication of the higher education Distance Education and Innovation regulations and concern about confusion when used in the higher education context, especially since competency-based education was not defined in those regulations.

Discussion: We appreciate comments suggesting that we revise the definition of ''competency-based education.'' We proposed to define the term as ''competency-based education,'' which was included as an example in paragraph (a) of the priority and is central to the performance-based assessments piece of paragraph (d). The definition as written is inclusive of all students, allows for demonstration of mastery as a result of self-paced learning, and provides a broad understanding of competency-based education for operationalizing within the context of the remote learning priority. The definition of ''competency-based education'' for the remote learning priority is consistent with other Department usage and definitions of ''competency-based education,'' including the Rural Tech Project (*https://www.ruraltechproject.com/*).

As to the concern about usage of the priority and the ''competency-based education'' definition in higher education, the Department has the discretion for each grant program to choose if the priority should be used in a given competition considering the program's purpose, feasibility, and scope, and, if so, how the priority would apply; for example, a program may choose to use only paragraph (a) of the priority. As noted above, competency-based education is part of an illustrative list in paragraph (a), and an applicant is not required to address all items in that list. Competency-based education is more central to paragraph (d), but the Department may choose whether to use paragraph (d) when including the remote learning priority in a particular grant competition, taking into consideration the program's statute and other relevant regulations. As noted earlier, the Department will make program-by-program decisions about when and how to use the remote learning priority, including in the higher education context. Moreover, the definition of ''competency-based education'' does not contradict or supersede any of the Distance Education and Innovation regulations; rather, it is meant to clarify what is meant by ''competency-based education'' in the context of this priority.

Changes: None.

Comment: One commenter supported the inclusion of interoperable credentials in the priority and definitions and recommended that the Department include interoperable credential requirements in all discretionary grant competitions. In the definition, the commenter proposed that we change ''common standardized frameworks'' to ''nationally recognized and widely used educational or professional learning standards.''

Discussion: We agree that interoperable credentials are important and appreciate the support for paragraph (e) of the priority. The Department has discretion in choosing whether and how to use the priority for all of our grant competitions. We decide to use a particular priority based on careful consideration of whether the priority and definitions are appropriate for each competition with regard to program purpose, feasibility, and scope.

In regard to the recommendation to refer to ''nationally recognized and widely used educational or professional learning standards'' rather than ''common standardized frameworks,'' we appreciate the interest in ensuring clarity in terminology. We note the white papers hosted on the U.S. Department of Commerce website designed to provide clarity regarding, among other things, ''credentials,'' which include a focus on ''common standardized frameworks'': ''White Paper on Interoperable Learning Records'' (*www.commerce.gov/sites/default/files/2019-09/ILR_White_Paper_FINAL_EBOOK.pdf*) and ''Learning and Employment Records: Progress and the path forward'' (*www.commerce.gov/sites/default/files/2020-09/LERwhitepaper09222020.pdf*). Moreover, we do not think the Department should endorse specific national standards related to credentialing, and, as such, we do not consider it appropriate to revise the definition as the commenter suggested. Though there are many standards that could apply to credentials, we expect applicants and grantees will choose standards that are widely accepted and meet the needs of their projects. Therefore, we are not making any changes to the reference to, or definition of, ''interoperable credentials.''

Changes: None.

Comment: In reference to competency-based education and interoperable credentials, one commenter recommended adding specific references to ''short-term credentials,'' such as micro-credentials, to clearly demonstrate that credentials are broader than traditional, time-bound programs.

Discussion: We agree that the intent behind inclusion of competency-based education and interoperable credentials in the priority and definitions is to broaden practitioners' use of credentials. As such, we are adding examples of some of these short-term credentials to highlight other less traditional credential types.

Change: In the definition for ''interoperable credentials,'' we have added references to micro-, stackable, and other types of short-term credentials.

Comment: One commenter proposed limiting the definition of ''interoperable credentials'' to K–12 education, stating that the term is not one used in the higher education context.

Discussion: We appreciate the commenter's consideration of whether the ''interoperable credentials'' definition is applicable in the higher education context, as our intent is to have a priority that could be used in grant programs across the Department, including those for postsecondary education. Credentials are more than specific postsecondary degrees; they can be smaller units and time bound. Examples of these types of credentials include micro-credentials and stackable credentials, which can be used for professional development, and we think it is important for all education sectors to think more broadly about credentials and their interoperability.

Changes: None.

Comment: A few commenters asked whether the definition of ''interoperable credentials'' creates two sets of requirements, for the credentials themselves and for data and information sharing relating to the credentials. The commenters suggested clarifying revisions. Given that the term included two distinct points, the commenters had concerns about confusion when defining ''interoperable credentials.'' The commenters proposed edits to clarify the distinction.

In addition, one of the commenters also expressed the importance of transparency related to interoperable credentials and proposed a new definition for ''credential transparency.''

Discussion: Through this definition, the Department is establishing requirements both with respect to the credentials generally and with respect to their interoperability. Although there are many types of credentials, including some that may not be interoperable, we intentionally use the term ''interoperable credentials'' in this priority because we are especially interested in promoting recognizable, transferrable, and transparent evidence of mastery. Defining the term ''interoperable credentials'' does not imply that other forms of credentials do not exist.

Credential transparency is embedded in the definition, particularly through the requirement of ''open standards,'' and, as the commenter points out, there are many organizations focused on making credentials transparent and available to users. We note the white papers hosted on the U.S. Department of Commerce website as examples of the efforts to promote credential transparency and interoperability, in this case in the context of learner employment records: ''White Paper on Interoperable Learning Records'' (*www.commerce.gov/sites/default/files/2019-09/ILR_White_Paper_FINAL_EBOOK.pdf*) and ''Learning and Employment Records: Progress and the path forward'' (*www.commerce.gov/sites/default/files/2020-09/LERwhitepaper09222020.pdf*). We, thus, do not think a separate definition or additional clarification of the definition is needed.

Changes: None.

Final Priority

Building Capacity for Remote Learning

Under this priority, an applicant must propose a project that is designed to address one or more of the following priority areas:

(a) Adopting and supporting models that leverage technology (*e.g.,* universal design for learning, competency-based education (as defined in this notice), or hybrid/blended learning) and provide high-quality digital learning content, applications, and tools.

(b) Providing personalized and job-embedded professional learning to build the capacity of educators to create remote learning experiences that advance student engagement and learning through effective use of technology (*e.g.,* synchronous and asynchronous professional learning, professional learning networks or communities, and coaching).

(c) Providing access to any of the following, in particular to serve learners without access to such technologies: Reliable, high-speed internet, learning devices, or software applications that meet all students' and educators' remote learning needs while inside the school building and in remote learning environments.

(d) Developing performance-based assessments that promote competency-based education and can be delivered remotely or in-person to students and yield valid and reliable results that accurately document students' skills (*e.g.,* inquiry/game-based assessment or data visualization tools for monitoring ongoing learning).

(e) Supporting the development of digital interoperable credentials (as defined in this notice) that make transparent the competencies achieved through remote learning experiences and allow students to access, control, and share their achievements across a variety of education and training processes (formal or informal, classroom-based, remote, or workplace-based). Information on these credentials must be publicly accessible using linked open data formats to ensure their transferability and the continuity of learning for students.

(f) Providing high-quality remote learning specifically for one or more of the following student subgroups:

(i) Students from low-income (as may be defined in the program's authorizing statute) families;

(ii) Children or students with disabilities (as may be defined in the program's authorizing statute);

(iii) English learners (as may be defined in the program's authorizing statute);

(iv) Native American (as may be defined in the program's authorizing statute) students;

(v) Homeless (as may be defined in the program's authorizing statute) students ; or

(vi) Students attending schools in rural (as may be defined in the program's authorizing statute) areas.

The remote learning environment must be accessible to individuals with disabilities in accordance with Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, as applicable. The remote learning environment must also provide appropriate remote learning language assistance services to English learners.

Types of Priorities

When inviting applications for a competition using one or more priorities, we designate the type of each priority as absolute, competitive preference, or invitational through a notice in the **Federal Register**. The effect of each type of priority follows:

Absolute priority: Under an absolute priority, we consider only applications that meet the priority (34 CFR 75.105(c)(3)).

Competitive preference priority: Under a competitive preference priority, we give competitive preference to an application by (1) awarding additional points, depending on the extent to which the application meets the priority (34 CFR 75.105(c)(2)(i)); or (2) selecting an application that meets the priority over an application of comparable merit that does not meet the priority (34 CFR 75.105(c)(2)(ii)).

Invitational priority: Under an invitational priority, we are particularly interested in applications that meet the priority. However, we do not give an application that meets the priority a preference over other applications (34 CFR 75.105(c)(1)).

This document does not preclude us from proposing additional priorities, requirements, definitions, or selection criteria, subject to meeting applicable rulemaking requirements.

Note: This document does *not* solicit applications. In any year in which we choose to use the priority and definitions, we invite applications through a notice in the **Federal Register**.

Final Definitions

The Secretary establishes the following definitions for use in any Department discretionary grant competition in which the final priority is used:

Competency-based education (also called proficiency-based or mastery-based learning) means learning based on knowledge and skills that are transparent and measurable. Progression is based on demonstrated mastery of what students are expected to know (knowledge) and be able to do (skills), rather than seat time or age.

Interoperable credentials are those credentials built using open standards so that they are shareable, verifiable, portable, and secure. The credentials describe the specific achievements, such as credential type, skill level, or other information, using common, standardized frameworks so that the data are machine readable, exchangeable, and actionable across technology systems and, when appropriate, on the web. When

credentials are interoperable, a full range of an individual's skills and achievements, earned through formal and informal learning experiences or workplace-based training, can be collected together and verified, regardless of available technology systems, reducing challenges as individuals transition between education and employment. These credentials include traditional academic credentials, as well as micro-, stackable, and other types of short-term credentials earned through short-term, professional development, or non-credit bearing educational experiences.

Remote learning means programming where at least part of the learning occurs away from the physical building in a manner that addresses a learner's education needs. Remote learning may include online, hybrid/blended learning, or non-technology-based learning (*e.g.,* lab kits, project supplies, paper packets).

Executive Orders 12866, 13563, and 13771

Regulatory Impact Analysis

Under Executive Order 12866, it must be determined whether this regulatory action is ''significant'' and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of $100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an ''economically significant'' rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement 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 stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866.

Under Executive Order 13771, for each new regulation that the Department proposes for notice and comment or otherwise promulgates that is a significant regulatory action under Executive Order 12866, and that imposes total costs greater than zero, it must identify two deregulatory actions. For FY 2021, any new incremental costs associated with a new regulation must be fully offset by the elimination of existing costs through deregulatory actions. However, Executive Order 13771 does not apply to ''transfer rules'' that cause only income transfers between taxpayers and program beneficiaries, such as those regarding discretionary grant programs. Because the priority and definitions would be used in connection with one or more discretionary grant programs, Executive Order 13771 does not apply.

We have also reviewed this final regulatory action under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency ''to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.'' The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include ''identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.''

We are issuing this final priority and definitions only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that this regulatory action is consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs are those we have determined as necessary for administering the Department's programs and activities.

Discussion of Potential Costs and Benefits

The Department believes that this regulatory action will not impose significant costs on eligible entities, whose participation in our programs is voluntary, and costs can generally be covered with grant funds. As a result, the priority and definitions will not impose any particular burden except when an entity voluntarily elects to apply for a grant. The benefits of the priority and definitions will outweigh any associated costs because they will help ensure that the Department's discretionary grant programs select high-quality applicants to implement activities that are designed to address critical remote learning needs.

Regulatory Flexibility Act Certification: The Secretary certifies that this regulatory action will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration Size Standards define proprietary institutions as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below $7,000,000. Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions are defined as small organizations if they are operated by a government overseeing a population below 50,000.

Of the impacts we estimate accruing to grantees or eligible entities, all are voluntary and related mostly to an increase in the number of applications prepared and submitted annually for competitive grant competitions. Therefore, we do not believe that the final priority and definitions will

significantly impact small entities beyond the potential for increasing the likelihood of their applying for, and receiving, competitive grants from the Department.

Paperwork Reduction Act

These final priority and definitions contain information collection requirements that are approved by OMB under OMB control number 1894–0009; the final priority and definitions do not affect the currently approved data collection.

Intergovernmental Review: This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for the Department's discretionary grant programs.

Accessible Format: On request to the program 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.

Betsy DeVos,

Secretary.

[FR Doc. 2020–28820 Filed 12–29–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ21–7–000]

City of Colton, California; Notice of Petition for Declaratory Order

Take notice that on December 16, 2020, pursuant to Rules 205 and 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.205, 385.207, and consistent with the provisions of the Transmission Owner (TO) Tariff, the City of Colton, California (Colton), submitted a petition for a declaratory order requesting that the Commission (1) accept Colton's seventh annual revision to its Transmission Revenue Balancing Account Adjustment (TRBAA); (2) approve Colton's annual update to the costs of its Existing Transmission Contract (ETC) with Southern California Edison Company for the purpose of recovery of such costs through the ETC Pass-through Clause contained in Colton's TO Tariff; (3) accept revisions to Appendix I to Colton's TO Tariff to reflect Colton's revised TRBAA, ETC costs, and updated Base and High Voltage Transmission Revenue Requirements (TRR); (4) to the extent necessary, waive the sixty-day notice requirement provided for in the Commission's regulations at 18 CFR 35.3(a); (5) waive the filing fee associated with this Petition that is provided for by Rule 207 of the Commission's Rules of Practice and Procedure, 18 CFR 385.207; and (6) grant any other relief or waivers necessary or appropriate for approval and implementation of the revisions to Colton's Base TRR (including the updated ETC cost components), TRBAA, High Voltage TRR, and modifications to Colton's TO Tariff effective as of January 1, 2021, as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

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 January 6, 2021.

Dated: December 22, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28834 Filed 12–29–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 539–015]

Lock 7 Hydro Partners, LLC; Notice of Application Accepted for Filing and Soliciting Motions To Intervene and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* 539–015.

c. *Date Filed:* April 30, 2020.

d. *Applicant:* Lock 7 Hydro Partners, LLC (Lock 7 Hydro).

e. *Name of Project:* Mother Ann Lee Hydroelectric Station Water Power Project (Mother Ann Lee Project).

f. *Location:* The project is located on the Kentucky River in Mercer, Jessamine, and Garrard Counties, Kentucky. The project does not occupy federal land.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* David Brown Kinloch, Lock 7 Hydro, 414 S Wenzel St., Louisville, Kentucky 40204; (502) 589–0975 or *kyhydropower@gmail.com.*

i. *FERC Contact:* Joshua Dub at (202) 502–8138 or *joshua.dub@ferc.gov.*

j. *Deadline for filing motions to intervene and protests:* 60 days from the issuance date of this notice.

The Commission strongly encourages electronic filing. Please file motions to intervene and protests using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–539–015.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted but is not ready for environmental analysis at this time.

l. The Mother Ann Lee Project consists of the following existing facilities: (1) A reservoir with a surface area of 777 acres and a storage capacity of 5,828 acre-feet at elevation 513.12 NGVD29 (National Geodetic Vertical Datum of 1929); (2) a 250-foot-long, 15.3-foot-high, timber crib dam with a concrete cap and an abandoned 62-foot-long lock structure on the east side; (3) a 120-foot-long, 100-foot-wide forebay; (4) a 24-foot-tall, 84-foot-wide trashrack; (5) a 93-foot-long, 25-foot-wide, 16-foot-high powerhouse integral with the dam containing three generating units with a total installed capacity of 2,210 kilowatts; (6) a 30-foot-long, 15.3-foot-high concrete spillway section from the powerhouse to the west shore; (7) an 85-foot-long substation; and (8) a 34.5 kilovolt, 4,540-foot-long transmission line. The project is estimated to generate an average of 9,200 megawatt-hours annually.

m. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested individuals an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Access Room due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, and .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified comment date for the particular application.

All filings must: (1) Bear in all capital letters the title ''PROTEST'' or ''MOTION TO INTERVENE;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. Agencies may obtain copies of the application directly from the applicant. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application.

o. Procedural schedule and final amendments: The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Scoping Document 1 for comments—January 2020
Request Additional Information (if necessary)—February 2020
Issue Scoping Document 2 (if necessary)—February 2020
Issue notice of ready for environmental analysis—March 2021

p. Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 22, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28835 Filed 12–29–20; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP21–15–000]

Algonquin Gas Transmission, LLC; Notice of Application and Establishing Intervention Deadline

Take notice that on December 8, 2020, Algonquin Gas Transmission, LLC (Algonquin), 5400 Westheimer Court, Houston, TX 77056, filed an application under sections 7(b) and 7(c) of the Natural Gas Act (NGA), and Part 157 of the Commission's regulations, requesting an amendment to the certificate of public convenience and necessity issued by the Commission to Algonquin on April 4, 2019, in Docket No. CP19–13–000 for the Yorktown M&R Replacement & Reliability Project. The certificate authorized the replacement of Algonquin's existing Yorktown Metering and Regulation (M&R) Station in Westchester County, New York with upgraded facilities to allow for additional flexibility and reliability on Algonquin's system as well as an increase in the certificated capacity of the station to 31,200 dekatherms per day (Dth/d) from the current 9,522 Dth/d. Algonquin is now seeking approval to modify the project facilities to eliminate a flow control valve and gas catalytical heater, which will reduce the certificated capacity of the Yorktown M&R Station to 18,000 Dth/d. Algonquin is also requesting an extension of time until April 4, 2022, to complete the project and place the project facilities into service, all as more

fully set forth in the application which is on file with the Commission and open for public inspection.

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.

Any questions regarding the proposed project should be directed to Lisa A. Connolly, Director, Rates and Certificates, Algonquin Gas Transmission, LLC, 5400 Westheimer Court, Houston, Texas 77056, or by phone at (713) 627–4102, by fax at (713) 627–5947, or by email at *lisa.connolly@enbridge.com.*

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: Complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

Public Participation

There are two ways to become involved in the Commission's review of this project: You can file comments on the project, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on January 12, 2021.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please submit your comments on or before January 12, 2021.

There are three methods you can use to submit your comments to the Commission. In all instances, please reference the Project docket number (CP21–15–000) in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov)* under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address below.[2] Your written comments must reference the Project docket number (CP21–15–000).

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[3] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure[4] and the regulations under the NGA[5] by the intervention deadline for the project, which is January 12, 2021. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as the your interest in the proceeding. [For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene.] For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number (CP21–15–000) in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit

[1] 18 CFR (Code of Federal Regulations) § 157.9.

[2] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[3] 18 CFR 385.102(d).

[4] 18 CFR 385.214.

[5] 18 CFR 157.10.

https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below.[6] Your motion to intervene must reference the Project docket number (CP21–15–000).

Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Motions to intervene must be served on the applicant either by mail or email at: 5400 Westheimer Court, Houston, Texas 77056 or at *lisa.connolly@enbridge.com*. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed[7] motions to intervene are automatically granted by operation of Rule 214(c)(1).[8] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[9] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. 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. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on January 12, 2021.

Dated: December 22, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28838 Filed 12–29–20; 8:45 am]

BILLING CODE 6717–01–P

[6] Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

[7] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[8] 18 CFR 385.214(c)(1).

[9] 18 CFR 385.214(b)(3) and (d).

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: EC21–37–000.
Applicants: Harry Allen Solar Energy LLC, AEP Renewables, LLC.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Harry Allen Solar Energy LLC, et al.
Filed Date: 12/21/20.
Accession Number: 20201221–5412.
Comments Due: 5 p.m. ET 1/11/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–57–000.
Applicants: HO Clarke II, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of HO Clarke II, LLC.
Filed Date: 12/21/20.
Accession Number: 20201221–5372.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: EG21–58–000.
Applicants: Indiana Crossroads Wind Farm LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Indiana Crossroads Wind Farm LLC.
Filed Date: 12/21/20.
Accession Number: 20201221–5421.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: EG21–59–000.
Applicants: Wallingford Renewable Energy LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Wallingford Renewable Energy LLC.
Filed Date: 12/22/20.
Accession Number: 20201222–5088.
Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: EG21–60–000.
Applicants: Topaz II, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Topaz II, LLC.
Filed Date: 12/22/20.
Accession Number: 20201222–5099.
Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: EG21–61–000.
Applicants: Braes Bayou Generating, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Braes Bayou Generating, LLC.
Filed Date: 12/22/20.
Accession Number: 20201222–5100.
Comments Due: 5 p.m. ET 1/12/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2566–012; ER13–2322–008; ER15–190–015 ER18–1343–008; ER19–1819–003; ER19–1820–003 ER19–1821–003.
Applicants: Duke Energy Carolinas, LLC, Broad River Solar, LLC, Carolina Solar Power, LLC, Speedway Solar NC, LLC, Stony Knoll Solar, LLC, Duke Energy Progress, LLC, Duke Energy Renewable Services, LLC.
Description: Notice of Change in Status of the Duke MBR Sellers.
Filed Date: 12/18/20.
Accession Number: 20201218–5376.
Comments Due: 5 p.m. ET 1/8/21.

Docket Numbers: ER10–3145–013; ER10–1728–014; ER10–1800–014 ER10–3116–013; ER10–3120–013; ER10–3128–013 ER10–3136–013; ER11–2036–014; ER11–2701–015 ER13–1544–011; ER16–930–008; ER19–1179–003 ER19–1473–003; ER19–1474–003; ER19–1597–003 ER20–1620–001; ER20–1629–002.
Applicants: AES Alamitos, LLC, AES Alamitos Energy, LLC, AES Energy Storage, LLC, AES ES Alamitos, LLC, AES ES Gilbert, LLC, AES ES Tait, LLC, AES Huntington Beach, L.L.C., AES Huntington Beach Energy, LLC, AES Integrated Energy, LLC, AES Laurel Mountain, LLC, AES Ohio Generation, LLC, AES Redondo Beach, L.L.C., AES Solutions Management, LLC, Indianapolis Power & Light Company, Mountain View Power Partners, LLC, Mountain View Power Partners IV, LLC, The Dayton Power and Light Company.
Description: Triennial Market Power Analysis for Central Region of AES MBR Affiliates.
Filed Date: 12/18/20.
Accession Number: 20201218–5381.

Comments Due: 5 p.m. ET 2/16/21.

Docket Numbers: ER10–3254–004.

Applicants: Cooperative Energy Incorporated (An Electric Membership Corporation).

Description: Updated Market Power Analysis of Cooperative Energy Incorporated (An Electric Membership Corporation).

Filed Date: 12/21/20.

Accession Number: 20201221–5266.

Comments Due: 5 p.m. ET 2/19/21.

Docket Numbers: ER13–1430–009; ER13–1561–009.

Applicants: Arlington Valley Solar Energy II, LLC, Centinela Solar Energy, LLC.

Description: Notice of Non-Material Change in Status of Arlington Valley Solar Energy II, LLC et al.

Filed Date: 12/18/20.

Accession Number: 20201218–5377.

Comments Due: 5 p.m. ET 1/8/21.

Docket Numbers: ER15–190–016; ER10–2034–007.

Applicants: Duke Energy Renewable Services, LLC, Duke Energy Indiana, LLC.

Description: Triennial Market Power Analysis for Central Region of Duke Companies.

Filed Date: 12/18/20.

Accession Number: 20201218–5380.

Comments Due: 5 p.m. ET 2/16/21.

Docket Numbers: ER16–1404–005.

Applicants: New York Independent System Operator, Inc.

Description: Compliance filing: NYISO Compliance: BSM Self Supply February 2020 Order to be effective 5/1/2020.

Filed Date: 12/22/20.

Accession Number: 20201222–5000.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER20–2740–003.

Applicants: Hickory Run Energy, LLC.

Description: Report Filing: Refund Report to be effective N/A.

Filed Date: 12/22/20.

Accession Number: 20201222–5016.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER20–2740–004.

Applicants: Hickory Run Energy, LLC.

Description: Compliance filing: Compliance Filing to be effective 5/12/2020.

Filed Date: 12/22/20.

Accession Number: 20201222–5015.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER20–2761–001.

Applicants: Southwest Power Pool, Inc.

Description: Report Filing: 1628R18 WFEC NITSA NOA—Supplemental Information to be effective N/A.

Filed Date: 12/22/20.

Accession Number: 20201222–5030.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–44–001.

Applicants: Altavista Solar, LLC.

Description: Tariff Amendment: Information Request Response (ER21–44-) to be effective 10/15/2020.

Filed Date: 12/22/20.

Accession Number: 20201222–5035.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–317–001.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Amendment to ER21–317–000; WMPA SA No. 5845; Queue No. AF1–300 to be effective 10/5/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5244.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–402–002.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Tariff Amendment: 2020–12–21_Shared Network Upgrades 2nd Amendment Filing to be effective 2/1/2021.

Filed Date: 12/21/20.

Accession Number: 20201221–5240.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–696–000.

Applicants: Algonquin Power Sanger LLC.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/22/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5216.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–697–000.

Applicants: Algonquin Energy Services Inc.

Description: § 205(d) Rate Filing: Market-Based Tariff Revisions to be effective 12/22/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5221.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–698–000.

Applicants: Algonquin SKIC 10 Solar, LLC.

Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariff to be effective 12/22/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5223.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–699–000.

Applicants: Algonquin SKIC 20 Solar, LLC.

Description: § 205(d) Rate Filing: Revisions to Market-Based Rate Tariff to be effective 12/22/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5224.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–700–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2020–12–21_Tariff revisions to improve Emergency Pricing to be effective 6/1/2021.

Filed Date: 12/21/20.

Accession Number: 20201221–5242.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–701–000.

Applicants: Avista Corporation.

Description: Tariff Cancellation: Avista Corp Cancellation Dry Gulch Construction Agreement to be effective 12/22/2020.

Filed Date: 12/21/20.

Accession Number: 20201221–5277.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–702–000.

Applicants: Golden Springs Development Company LLC.

Description: Appeal for Relief from Assessed Penalty of Electric of Golden Springs Development Company LLC.

Filed Date: 12/17/20.

Accession Number: 20201217–5309.

Comments Due: 5 p.m. ET 1/7/21.

Docket Numbers: ER21–703–000.

Applicants: Golden Springs Development Company LLC.

Description: Appeal for Relief from Assessed Penalty of Electric of Golden Springs Development Company LLC.

Filed Date: 12/17/20.

Accession Number: 20201217–5310.

Comments Due: 5 p.m. ET 1/7/21.

Docket Numbers: ER21–705–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Cancellation: Notice of Cancellation of WMPA, SA No. 5313, Queue No. AC2–101 RE: Withdrawal to be effective 2/1/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5012.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–706–000.

Applicants: Paulsboro Refining Company LLC.

Description: Baseline eTariff Filing: Paulsboro Refining Company LLC Market Based Rates Tariff Application to be effective 1/21/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5014.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–708–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Correction to Original ISA, SA No. 5621; Queue No. AF1–195 (amend) to be effective 3/10/2020.

Filed Date: 12/22/20.

Accession Number: 20201222–5027.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–709–000.

Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.

Description: § 205(d) Rate Filing: 2020–12–22_ATCLLC Depreciation Rate Filing to be effective 3/1/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5033.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–710–000.

Applicants: Midcontinent Independent System Operator, Inc., Northern Indiana Public Service Company.

Description: § 205(d) Rate Filing: 2020–12–22_NIPSCO Att GG True-Up Procedures Filing to be effective 4/18/2018.

Filed Date: 12/22/20.

Accession Number: 20201222–5034.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–711–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: OATT Revised Attachment H–1 (Rev Dep Rates) to be effective 1/1/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5045.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–713–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2020–12–22_SA 3501 Termination of METC–MEC North GIA (J937) to be effective 2/21/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5067.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–714–000.

Applicants: Indiana Crossroads Wind Farm LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 2/21/2021.

Filed Date: 12/22/20.

Accession Number: 20201222–5086.

Comments Due: 5 p.m. ET 1/12/21.

Docket Numbers: ER21–715–000.

Applicants: Florida Power & Light Company.

Description: § 205(d) Rate Filing: FPL & LCEC New Delivery Point Exhibit for Network Operating Agreement to be effective 11/25/2020.

Filed Date: 12/22/20.

Accession Number: 20201222–5115.

Comments Due: 5 p.m. ET 1/12/21.

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 22, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28836 Filed 12–29–20; 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: RP18–369–004.

Applicants: Sea Robin Pipeline Company, LLC.

Description: Compliance filing Second Annual Net Retrograde Filing on 12/18/20 to be effective N/A.

Filed Date: 12/18/20.

Accession Number: 20201218–5071.

Comments Due: 5 p.m. ET 12/30/20.

Docket Numbers: RP21–325–000.

Applicants: Central Kentucky Transmission Company.

Description: Compliance filing CKT Penalty Revenue Crediting Report to be effective N/A.

Filed Date: 12/21/20.

Accession Number: 20201221–5033.

Comments Due: 5 p.m. ET 1/4/21.

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 22, 2020.

Kimberly D. Bose,

Secretary.

[FR Doc. 2020–28837 Filed 12–29–20; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2020–0514; FRL–10018–29]

Atrazine, Simazine, and Propazine Registration Review; Draft Endangered Species Act Biological Evaluations; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; extension of comment period.

SUMMARY: EPA issued a notice in the **Federal Register** of November 6, 2020, opening a 60-day comment period on the draft nationwide biological evaluations for the registration review of the pesticides atrazine, simazine, and propazine relative to the potential effects on threatened and endangered species and their designated critical habitats. This document extends the comment period for 45 days, from January 5, 2021 to February 19, 2021.

DATES: Comments, identified by docket identification (ID) number EPA–HQ–OPP–2020–0514 must be received on or before February 19, 2021.

ADDRESSES: Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of November 6, 2020 (85 FR 71071) (FRL–10015–77).

FOR FURTHER INFORMATION CONTACT: Tracy Perry, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 308–0128; email address: *perry.tracy@epa.gov.*

SUPPLEMENTARY INFORMATION: This document extends the public comment period established in the **Federal Register** document of November 6, 2020 (85 FR 71071) (FRL–10015–77), which opened a 60-day public comment period for the draft nationwide biological evaluations for the registration review of the pesticides atrazine, simazine, and propazine relative to the potential effects on threatened and endangered species and their designated critical habitats. As noted in that document, the schedule for conducting the atrazine and simazine biological evaluations was negotiated as part of a partial settlement agreement pursuant to a joint

stipulation filed on October 18, 2019 and entered by the court on October 22, 2019, in *Center for Biological Diversity et al.* v. *EPA et al.* (N.D. Ca) (3:11–cv–00293). EPA stated in this settlement that it would also include propazine in this group of effects determinations. EPA is hereby extending the public comment period, which was set to end on January 5, 2021, to February 19, 2021.

After considering a number of requests to extend the comment period received from various stakeholders, EPA is extending the comment period for the following reasons: (1) The length, complexity, and highly technical nature of the draft biological evaluations; (2) the need for some stakeholders to engage experts familiar with the subject matter to assist them with providing comments; (3) the large number of stakeholders potentially impacted by the draft biological evaluations; (4) the importance of soliciting feedback from stakeholders who may be affected; and (5) the stakeholders' need for additional time to review and develop constructive comments for these complex and lengthy documents.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of November 6, 2020. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 8, 2020.

Alexandra Dapolito Dunn,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2020–28828 Filed 12–29–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0308; FRL–10017–17]

Product Cancellation Order for Certain Pesticide Registrations of Tetrachlorvinphos

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrant and accepted by the Agency, of the products listed in Table 1 of Unit II., pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows an August 6, 2020 **Federal Register** Notice of Receipt of Request from the registrant listed in Table 2 of Unit II. to voluntarily cancel these product registrations. In the August 6, 2020 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 30-day comment period that would merit its further review of these requests, or unless the registrant withdrew their request. The Agency did not receive any comments on the notice. Further, the registrant did not withdraw their request. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective December 30, 2020.

FOR FURTHER INFORMATION CONTACT: Patricia Biggio, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (703) 347–0547; email address: *biggio.patricia@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–2009–0308, 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 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 *http://www.epa.gov/dockets.*

II. What action is the Agency taking?

This notice announces the cancellation, as requested by the registrant, of products registered under FIFRA section 3 (7 U.S.C. 136a). These registrations are listed in sequence by registration number in Table 1 of this unit.

TABLE 1—PRODUCT CANCELLATIONS

EPA registration No.	Product name	Company name
2596–63	Hartz 2 in 1 Plus Long Lasting Collar for Cats	The Hartz Mountain Corporation.
2596–78	Hartz 2 in 1 Flea and Tick Powder for Cats	The Hartz Mountain Corporation.
2596–79	Hartz 2 in 1 Flea and Tick Powder for Dogs	The Hartz Mountain Corporation.

Table 2 of this unit includes the name and address of record for the registrant of the products in Table 1 of this unit. The EPA company number corresponds to the first part of the EPA registration numbers of the products listed in Table 1 of this unit.

TABLE 2—REGISTRANT OF CANCELLED PRODUCTS

EPA company No.	Company name and address
2596	The Hartz Mountain Corporation, 400 Plaza Drive, Seacaucus, NJ 07094.

III. Summary of Public Comments Received and Agency Response to Comments

During the 30-day public comment period provided, EPA received no comments in response to the August 6, 2020 **Federal Register** notice announcing the Agency's receipt of the request for voluntary cancellation of the products listed in Table 1 of Unit II.

IV. Cancellation Order

Pursuant to FIFRA section 6(f) (7 U.S.C. 136d(f)), EPA hereby approves the requested cancellation of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II. are canceled. The effective date of the cancellations that are the subject of this notice is December 30, 2020. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II. in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI. will be a violation of FIFRA.

V. What is the Agency's authority for taking this action?

Section 6(f)(1) of FIFRA (7 U.S.C. 136d(f)(1)) provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of August 6, 2020 ((volume 85 number 152) (FRL–10012–80)). The comment period closed on September 8, 2020.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

Hartz may not ''release for shipment,'' as that term is defined by 40 CFR 152.3, any product under EPA Reg. Nos. 2596–78 and 2596–79 (dust products) as of December 30, 2020 and may not sell or distribute existing stocks of its dust products after March 31, 2021, except for export consistent with FIFRA section 17 (7 U.S.C. 136o) or for proper disposal. Hartz may sell or distribute existing stocks of EPA Reg. No. 2596–63 (cat collar) until exhausted.

Persons other than the registrants may sell, distribute, or use existing stocks of canceled products until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

Authority: 7 U.S.C. 136 *et seq.*

Dated: November 19, 2020.

Mary Reaves,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2020–28827 Filed 12–29–20; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2019–0236; FRL–10017–18]

n-Methylpyrrolidone (NMP); Final Toxic Substances Control Act (TSCA) Risk Evaluation; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of the final Toxic Substances Control Act (TSCA) risk evaluation of n-Methylpyrrolidone (NMP). The purpose of conducting risk evaluations under TSCA is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation, without consideration of costs or other nonrisk factors. EPA has determined that specific conditions of use of NMP present an unreasonable risk of injury to health. For those conditions of use for which EPA has found an unreasonable risk, EPA must take regulatory action to address that unreasonable risk through risk management measures enumerated in TSCA. EPA has also determined that specific conditions of use do not present unreasonable risk of injury to health or the environment. For those conditions of use for which EPA has found no unreasonable risk to health or the environment, the Agency's determination is a final Agency action and is issued via order in the risk evaluation.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0236, is available online at *http://www.regulations.gov* or in-person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. 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 OPPT Docket is (202) 566–0280.

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

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Seema Schappelle, Office of Pollution Prevention and Toxics (7403M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8006; email address: *schappelle.seema@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may be of interest to persons who are or may be interested in risk evaluations of chemical substances under TSCA, 15 U.S.C. 2601 *et seq.* Since other entities may also be interested in this final risk evaluation, the EPA has not attempted to describe all the specific entities that may be affected by this action.

B. What is EPA's authority for taking this action?

TSCA section 6, 15 U.S.C. 2605, requires EPA to conduct risk evaluations to ''determine whether a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other nonrisk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to the risk evaluation by the Administrator, under the conditions of use.'' 15 U.S.C. 2605(b)(4)(A). TSCA sections 6(b)(4)(A) through (H) enumerate the deadlines and minimum requirements applicable to this process, including provisions that provide instruction on chemical substances that must undergo evaluation, the minimum components of a TSCA risk evaluation, and the timelines for public comment and completion of the risk evaluation. TSCA also requires that EPA operate in a manner that is consistent with the best available science, make decisions based on the weight of the scientific evidence and consider reasonably available information. 15 U.S.C. 2625(h), (i), and (k). TSCA section 6(i) directs that a determination of ''no unreasonable risk'' shall be issued by order and considered to be a final Agency action, while a determination of ''unreasonable risk'' is not considered to be a final Agency action. 15 U.S.C. 2605(i).

The statute identifies the minimum components for all chemical substance risk evaluations. For each risk evaluation, EPA must publish a document that outlines the scope of the risk evaluation to be conducted, which includes the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations that EPA expects to consider. 15 U.S.C. 2605(b)(4)(D). The statute further provides that each risk evaluation must also: (1) Integrate and assess available information on hazards and exposures for the conditions of use of the chemical substance, including information that is relevant to specific risks of injury to health or the environment and information on relevant potentially exposed or susceptible subpopulations; (2) describe whether aggregate or sentinel exposures were considered and the basis for that consideration; (3) take into account, where relevant, the likely duration, intensity, frequency, and number of exposures under the conditions of use; and (4) describe the weight of the scientific evidence for the identified hazards and exposures. 15 U.S.C. 2605(b)(4)(F)(i) through (ii) and (iv) through (v). Each risk evaluation must not consider costs or other nonrisk factors. 15 U.S.C. 2605(b)(4)(F)(iii).

The statute requires that the risk evaluation process be completed within a specified timeframe and provide an opportunity for public comment on a draft risk evaluation prior to publishing a final risk evaluation. 15 U.S.C. 2605(b)(4)

Subsection 5.1.1 of the final risk evaluation for NMP constitutes the order required under TSCA section 6(i)(1), and the ''no unreasonable risk'' determinations in that subsection are considered to be a final Agency action effective on the date of issuance of the order. In conducting risk evaluations, ''EPA will determine whether the chemical substance presents an unreasonable risk of injury to health or the environment under each condition of use within the scope of the risk evaluation . . . .'' 40 CFR 702.47. Under EPA's implementing regulations, ''[a] determination by EPA that the chemical substance, under one or more of the conditions of use within the scope of the risk evaluation, does not present an unreasonable risk of injury to health or the environment will be issued by order and considered to be a final Agency action, effective on the date of issuance of the order.'' 40 CFR 702.49(d). For purposes of TSCA section 19(a)(1)(A), the date of issuance of the TSCA section 6(i)(1) order for NMP shall be at 1:00 p.m. Eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when this notice is published in the **Federal Register**, which is in accordance with 40 CFR 23.5.

C. What action is EPA taking?

EPA is announcing the availability of the risk evaluation of the chemical substance identified in Unit II. In this risk evaluation EPA has made unreasonable risk determinations on some of the conditions of use within the scope of the risk evaluation for this chemical. For those conditions of use for which EPA has found an unreasonable risk of injury to health or the environment, EPA must initiate regulatory action to address those risks through risk management measures enumerated in 15 U.S.C. 2605(a).

EPA also is announcing the availability of the information required to be provided publicly with each risk evaluation, which is available online at *http://www.regulations.gov* in the dockets identified. 40 CFR 702.51. Specifically, EPA has provided:

- The scope document and problem formulation (in Docket ID No. EPA–HQ–OPPT–2016–0743);
- Draft risk evaluation, and final risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0236);
- All notices, determinations, findings, consent agreements, and orders (in Docket ID No. EPA–HQ–OPPT–2019–0236);
- Any information required to be provided to the Agency under 15 U.S.C. 2603 (in Docket ID No. EPA–HQ–OPPT–2016–0743 and Docket ID No. EPA–HQ–OPPT–2019–0236);
- A nontechnical summary of the risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0236);
- A list of the studies, with the results of the studies, considered in carrying out each risk evaluation (Risk Evaluation for N-methylpyrrolidone (NMP)) in Docket ID No. EPA–HQ–OPPT–2019–0236);
- The final peer review report, including the response to peer review and public comments received during peer review (in Docket ID No. EPA–HQ–OPPT–2019–0236); and
- Response to public comments received on the draft scope and the draft risk evaluation (in Docket ID No. EPA–HQ–OPPT–2019–0236).

II. TSCA Risk Evaluation

A. What is EPA's risk evaluation process for existing chemicals under TSCA?

The risk evaluation process is the second step in EPA's existing chemical review process under TSCA, following prioritization and before risk management. As this chemical is one of the first ten chemical substances undergoing risk evaluation, the chemical substance was not required to go through prioritization (81 FR 91927, December 19, 2016) (FRL–9956–47). The purpose of conducting risk evaluations is to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a relevant potentially exposed or susceptible subpopulation. As part of this process, EPA must evaluate both hazard and exposure, not consider costs or other nonrisk factors, use reasonably available information and approaches in a

manner that is consistent with the requirements in TSCA for the use of the best available science, and ensure decisions are based on the weight of the scientific evidence.

The specific risk evaluation process that EPA has established by rule to implement the statutory process is set out in 40 CFR part 702 and summarized on EPA's website at *http://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluations-existing-chemicals-under-tsca.* As explained in the preamble to EPA's final rule on procedures for risk evaluation (82 FR 33726, July 20, 2017) (FRL–9964–38), the specific regulatory process set out in 40 CFR part 702, subpart B is being followed for the first ten chemical substances undergoing risk evaluation to the maximum extent practicable.

Prior to the publication of this final risk evaluation, a draft risk evaluation was subject to peer review and public comment. EPA reviewed the report from the peer review committee and public comments and has amended the risk evaluation in response to these comments as appropriate. The public comments, peer review report, and EPA's response to comments is in Docket ID No. EPA–HQ–OPPT–2019–0236. Prior to the publication of the draft risk evaluation, EPA made available the scope and problem formulation, and solicited public input on uses and exposure. EPA's documents and the public comments are in Docket ID No. EPA–HQ–OPPT–2016–0743. Additionally, information about the scope, problem formulation, and draft risk evaluation phases of the TSCA risk evaluation for this chemical is available at EPA's website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluation-n-methylpyrrolidone-nmp-0.*

B. What is n-Methylpyrrolidone (NMP)?

n-Methylpyrrolidone (CASRN 872–50–4), also called n-methyl-2-pyrrolidone, or 1-methyl-2-pyrrolidone, is a water-miscible, organic solvent that is often used as a substitute for halogenated solvents. NMP is widely used in the chemical manufacturing, petrochemical processing and electronics industries, and in semiconductor fabrication and lithium ion battery manufacturing {FMI, 2015, 3827469}. In the commercial sector, NMP is primarily used for producing and removing paints, coatings and adhesives. Other applications include use in solvents, reagents, sealers, inks and grouts, industrial, commercial and consumer uses and disposal. CDR data shows that the total aggregate production volume for NMP decreased slightly from 164 to 160 million pounds between 2012 and 2015.

Authority: 15 U.S.C. 2601 *et seq.*

Andrew Wheeler,

Administrator.

[FR Doc. 2020–28872 Filed 12–29–20; 8:45 am]

BILLING CODE 6560–50–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 14, 2021.

A. Federal Reserve Bank of Minneapolis (Chris P. Wangen, Assistant Vice President), 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Teresa L. Kuhn, Dilworth, Minnesota;* to acquire control of voting shares of Bankshares of Hawley, Inc. (Bankshares), by becoming a trustee of Valley Premier Bank Employee Stock Ownership Plan and Trust, which owns Bankshares, and thereby indirectly owns Valley Premier Bank, all of Hawley, Minnesota.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *The Lynette G. Drake Trust, Lynette G. Drake and Alan D. Drake, as co-trustees, L Drake Commons LLC, Jeffrey Roberts, as manager, J Roberts Commons LLC, Lynette Drake, as manager; all of Bad Axe, Michigan;* to join the Roberts Family Control Group, a group acting in concert, to retain voting shares of Northstar Financial Group, Inc., and thereby indirectly retain voting shares of Northstar Bank, both of Bad Axe, Michigan, and West Michigan Community Bank, Hudsonville, Michigan.

In addition, The Jerry A. Peplinski Trust, Jerry A. Peplinski, as trustee, F Peplinski Commons LLC, Lynda Watchowski, as manager, J Peplinski Commons LLC, Frank A. Peplinski, as manager, D Peplinski Commons LLC, Jerry Peplinski, as manager, T Peplinski Commons LLC, David Peplinski, as manager, and L Watchowski Commons LLC, Terry Peplinski, as manager; all of Bad Axe, Michigan, to join the Peplinski Family Control Group, a group acting in concert, to retain voting shares of Northstar Financial Group, Inc., and thereby indirectly retain voting shares of Northstar Bank and West Michigan Community Bank.

Board of Governors of the Federal Reserve System, December 23, 2020.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2020–28857 Filed 12–29–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Approval of information collection.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) has adopted two proposals to extend for three years, with revision, the Capital Assessments and Stress Testing Reports (FR Y–14A/Q/M; OMB No. 7100–0341). The revisions are effective for the December 31, 2020, as of date.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829. Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of

Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. The OMB inventory, as well as copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are available at *https://www.reginfo.gov/public/do/PRAMain.* These documents are also available on the Federal Reserve Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears above.

Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

Report title: Capital Assessments and Stress Testing Reports.

Agency form number: FR Y–14A/Q/M.

OMB control number: 7100–0341.

Frequency: Annually, quarterly, and monthly.

Respondents: These collections of information are applicable to bank holding companies (BHCs), U.S. intermediate holding companies (IHCs), and savings and loan holding companies (SLHCs) [1] with $100 billion or more in total consolidated assets, as based on: (i) The average of the firm's total consolidated assets in the four most recent quarters as reported quarterly on the firm's Consolidated Financial Statements for Holding Companies (FR Y–9C); or (ii) if the firm has not filed an FR Y–9C for each of the most recent four quarters, then the average of the firm's total consolidated assets in the most recent consecutive quarters as reported quarterly on the firm's FR Y–9Cs. Reporting is required as of the first day of the quarter immediately following the quarter in which the respondent meets this asset threshold, unless otherwise directed by the Board.

Estimated number of respondents: FR Y–14A/Q: 36; FR Y–14M: 34.[2]

Estimated average hours per response: FR Y–14A: 1,186 hours; FR Y–14Q: 2,203 hours; FR Y–14M: 1,072 hours; FR Y–14 On-going Automation Revisions: 480 hours; FR Y–14 Attestation On-going Attestation: 2,560 hours.

Estimated annual burden hours: FR Y–14A: 42,696 hours; FR Y–14Q: 317,232 hours; FR Y–14M: 437,376 hours; FR Y–14 On-going Automation Revisions: 17,280 hours; FR Y–14 Attestation On-going Attestation: 33,280 hours.

General description of report: This family of information collections is composed of the following three reports:

- The annual FR Y–14A collects quantitative projections of balance sheet, income, losses, and capital across a range of macroeconomic scenarios and qualitative information on methodologies used to develop internal projections of capital across scenarios.[3]
- The quarterly FR Y–14Q collects granular data on various asset classes, including loans, securities, trading assets, and PPNR for the reporting period.
- The monthly FR Y–14M is comprised of three retail portfolio- and loan-level schedules, and one detailed address-matching schedule to supplement two of the portfolio and loan-level schedules.

The data collected through the FR Y–14A/Q/M reports (FR Y–14 reports) provide the Board with the information needed to help ensure that large firms have strong, firm-wide risk measurement and management processes supporting their internal assessments of capital adequacy and that their capital resources are sufficient given their business focus, activities, and resulting risk exposures. The reports are used to support the Board's annual Comprehensive Capital Analysis and Review (CCAR) and Dodd-Frank Act Stress Test (DFAST) exercises, which complement other Board supervisory efforts aimed at enhancing the continued viability of large firms, including continuous monitoring of firms' planning and management of liquidity and funding resources, as well as regular assessments of credit, market and operational risks, and associated risk management practices. Information gathered in this data collection is also used in the supervision and regulation of respondent financial institutions. Respondent firms are currently required to complete and submit up to 17 filings each year: One annual FR Y–14A filing, four quarterly FR Y–14Q filings, and 12 monthly FR Y–14M filings. Compliance with the information collection is mandatory.

Current actions: On July 8, 2020, the Board published a notice in the **Federal Register**,[4] which temporarily revised and requested public comment for 60 days on the extension, with revision, of the FR Y–14 reports. The temporary revisions captured data pertaining to certain aspects of the Coronavirus Aid, Relief, and Economic Security Act, information on firm activity associated with various Federal Reserve lending facilities, and information regarding emerging risks arising from the coronavirus disease 2019 (COVID) event. In addition to a proposal to extend these temporary revisions, the notice proposed revisions to the FR Y–14 reports intended to address questions related to the reporting of certain current expected credit losses (CECL) and capital data. The comment period for this notice expired on September 8, 2020. The Board received two comment letters from banking industry groups and one comment letter from a banking organization.

On September 17, 2020, the Board published another notice in the **Federal Register**,[5] which temporarily revised and requested public comment for 60 days on the extension, with revision, of the FR Y–14 reports. The temporary revisions implemented changes necessary to collect information used to conduct additional analysis in connection with the resubmission of firms' capital plans, including consideration of the global market shock (GMS) component, using data as of June

[1] SLHCs with $100 billion or more in total consolidated assets became members of the FR Y–14Q and FR Y–14M panels effective June 30, 2020, and become members of the FR Y–14A panel effective December 31, 2020. *See* 84 FR 59032 (November 1, 2019).

[2] The estimated number of respondents for the FR Y–14M is lower than for the FR Y–14Q and FR Y–14A because, in recent years, certain respondents to the FR Y–14A and FR Y–14Q have not met the materiality thresholds to report the FR Y–14M due to their lack of mortgage and credit activities. The Board expects this situation to continue for the foreseeable future.

[3] On October 10, 2019, the Board issued a final rule that eliminated the requirement for firms subject to Category IV standards to conduct and publicly disclose the results of a company-run stress test. See 84 FR 59032 (Nov. 1, 2019). That final rule maintained the existing FR Y–14 substantive reporting requirements for these firms in order to provide the Board with the data it needs to conduct supervisory stress testing and inform the Board's ongoing monitoring and supervision of its supervised firms. However, as noted in the final rule, the Board intends to provide greater flexibility to banking organizations subject to Category IV standards in developing their annual capital plans and consider further change to the FR Y–14 reports. See 84 FR 59032, 59063. In October 2020, the Board invited comment on a proposal that would relieve firms subject to Category IV standards of the requirement to report their company-run stress test results on the FR Y–14A and would make certain other revisions to the FR Y–14 reports. 85 FR 63222 (Oct. 7, 2020).

[4] *See* 85 FR 41040 (July 8, 2020).

[5] *See* 85 FR 58048 (September 17, 2020).

30, 2020. In addition to these temporary revisions, the notice proposed revisions to the FR Y–14 reports that would have allowed the Board to require the submission of additional FR Y–14A and FR Y–14Q data in connection with a firm's resubmission of its capital plan. The comment period for this notice expired on November 16, 2020. The Board did not receive any comments on this notice.

The Board has approved the extension of the FR Y–14 reports for three years, with revision. These revisions include adopting most of the temporary revisions announced in the July 8, 2020, with minor changes in response to public comments, for three additional months. The temporary revisions will automatically expire following the March 31, 2021, as of date. In addition, the Board has adopted the revisions related to CECL and capital data that were proposed in the July 8, 2020, notice, as well as the revisions related to FR Y–14 submission requirements in connection with a firm's resubmission of its capital plan that were proposed in the September 17, 2020, notice. All revisions are effective beginning with the December 31, 2020, as of date.

Detailed Discussion of Public Comments

General

Adoption of Temporary Revisions

The Board solicited comment on a proposal to extend the temporary revisions included in the July 8, 2020, notice for three years, while noting that the temporary revisions would automatically expire following the December 31, 2020, as of date, unless explicitly reauthorized by the Board. Two commenters recommended that the Board only reauthorize specific temporary revisions to the extent those revisions are critical, and to keep in mind firm resource constraints during the COVID event when deciding whether to reauthorize any temporary revisions. Additionally, two commenters recommended the Board provide reporting firms and the public as much notice as possible, preferably at least three months, before requiring firms to continue to report any reauthorized revisions, in order to ease the reporting burden.

Given ongoing economic uncertainty surrounding the COVID event, the Board has adopted the proposal to extend the FR Y–14 reports with most of these revisions with certain changes that are effective for the December 31, 2020, as of date. However, in order to reduce reporting burden, temporary revisions associated with Federal Reserve lending facilities that are set to expire at the end of December 2020, including the Main Street Lending Program (MSLP), will only remain in place through the December 31, 2020, as of date. All other temporary revisions will remain in place through the reports as of March 31, 2021.

Submission Frequency

The Board temporarily revised the FR Y–14Q instructions to indicate that in times of crisis, the Board may temporarily request submissions of schedules more frequently than firms are generally required to submit the schedules. One commenter stated that requiring FR Y–14Q schedules more frequently would cause reporting burden on firms, and requested that any more frequent submission of schedules be required only if firms are given at least 60 days' notice and if possible, an opportunity to provide comments.

The Board notes that requiring any FR Y–14Q schedules more frequently than firms generally are required to submit them would only be done in times of crisis, and the Board would provide firms with as much notice as possible given the circumstances.

FR Y–14 Reporting Questions

The Board did not temporarily revise or propose to revise its current process for responding to FR Y–14 reporting questions. One commenter requested that the Board expedite its responses to reporting questions associated the FR Y–14 temporary revisions given that the temporary revisions were implemented prior to the public comment period.

The Board strives to respond to all FR Y–14 reporting questions it receives from firms as soon as possible. Some questions require significant time to research. The Board notes that it has responded promptly to many questions regarding the temporary revisions to the FR Y–14.

Supplemental Collections

At times, the Board has requested that certain firms submit supplemental collections that provide alternative breakouts of FR Y–14 data that are not available from other sources in conjunction with the FR Y–14 data submitted for use in the DFAST and CCAR exercises. One commenter requested that the Board incorporate all supplemental collections into the FR Y–14 report so firms can adequately plan for the data requirements surrounding a given FR Y–14 submission.

The Board has incorporated several supplemental collections into the FR Y–14 report. For example, as finalized on September 14, 2020,[6] the Board incorporated three supplemental collections into the FR Y–14Q report (two were incorporated into Schedule F (Trading) and one was incorporated into Schedule M (Balances)). Where appropriate, the Board will continue to incorporate supplemental collections into the FR Y–14 report.

Wholesale

Submission Frequency

The Board temporarily revised FR Y–14Q, Schedule H (Wholesale) to be reported monthly instead of quarterly for firms subject to Category I–III standards. Two commenters stated that certain items on Schedule H are not available or are not collected by firms from third parties on a monthly basis, and that firm resources are already constrained as a result of the COVID event. Per the commenter, firms have not been able to make permanent technological changes and have not been able to put adequate resources towards a more streamlined solution to obtain and verify data on a monthly basis due to the fact that this reporting frequency change went into effect prior to the public comment period, as well as the fact that this revision could have expired following the December 31, 2020, as of date (*i.e.,* Schedule H would revert to being reported quarterly for all firms).

As indicated in the Schedule H instructions, the Board has identified certain items that are not required for the monthly Schedule H submissions that do not coincide with quarter ends (*e.g.,* as of July 31). The remaining items are needed on a monthly basis in order to assess the current economic status and to better understand potential shifts in the risk profiles of firms. The Board acknowledges that some items are not collected by third parties or are not available on a monthly basis. In those cases, firms should report the information available to the firm on a given as of date. In addition, the instructions for several items allow firms to report the most recently updated data or ''NA'' if updated information is not available.

Data Quality Checks

The Board performs quality checks on data submitted through regulatory reports, such as the FR Y–14 reports. Two commenters suggested that the Board should exclude certain quality checks for FR Y–14Q, Schedule H (Wholesale) data submitted on a monthly basis, as certain quality checks

[6] *See* 85 FR 56607 (September 14, 2020).

are tied to other regulatory reports that are submitted quarterly (*e.g.,* FR Y–9C). The commenters went on to say that responding to these quality checks on a monthly basis is particularly challenging as firm resources are constrained by the COVID event. One commenter stated that in some cases, values reported in certain ''Obligor Financial Data'' items (items 52 through 82) of Schedule H.1 (Corporate) do not factor into the credit decision for a given exposure, such as in cases of startup companies with limited or no available financial data. In these cases, the commenter recommends that in order to reduce burden, firms should be allowed to report ''NA'' for certain ''Obligor Financial Data'' items and not be required to address any associated data quality checks.

In order to facilitate the monthly Schedule H submission process, the Board has reduced the number of edit responses required for non-quarter end submissions. For example, the Board has not been running data quality checks for non-quarter end monthly Schedule H submissions that compare values to the FR Y–9C.

Main Street Lending Program

The Board temporarily revised FR Y–14Q, Schedule H (Wholesale) to require firms to report only their exposures to loans associated with the MSLP (*i.e.,* not include the amount participated to third parties or the unused portion of loan commitments). For other exposures reported on Schedule H, firms are required to include the amount participated to third parties, as well as the unused portion of loan commitments, as part of the reporting firm's total lending commitment. One commenter expressed concern that this divergence would cause an issue when comparing commitments on Schedule H to those reported on the FR Y–9C, which is referenced in the instructions for several Schedule H items. The commenter stated that this different treatment for commitment reporting is causing operational burden for firms, and recommends that loans associated with the MSLP be reported consistently with other loans reported on Schedule H.

The Board did not intend to require different treatment for loans associated with the MSLP compared to other commitments reported on Schedule H. In light of the concerns raised by the commenter, the Board has revised the Schedule H instructions to align the reporting of commitments to loans associated with the MSLP with other commitments reported on the schedule, effective for the December 31, 2020, as of date.

Internal Risk Rating Schedule

The Board did not temporarily revise or propose to revise FR Y–14Q, Schedule H.4 (Internal Risk Rating). One commenter suggested that the Board expand Schedule H.4 to require additional items, such as probability of default information, which would provide the Board with better context for understanding firms' internal risk ratings. The commenter also suggested that the Board revise Schedule H.4 to correspond with FR Y–14Q, Schedule L (Counterparty), as both schedules require an internal and external rating equivalent factor.

The Board notes that firms are currently allowed to provide as much detail as possible in the free text description of Schedule H.4, item 1 (''Internal Risk Rating''). For example, firms can provide information that would provide a better understanding their internal ratings, such as external rating equivalent data points. The Board intends to consider adding items to Schedule H.4 that would provide more context to the data submitted as part of a future notice. However, the Board has not expanded Schedule H.4 to correspond with Schedule L, as the data between the two schedules does not readily align.

Collateral Market Value

The current FR Y–14Q, Schedule H.1 (Corporate), item 93, ''Collateral Market Value,'' instructions require firms to report the market value of collateral as of the reporting date, and to report ''NA'' if the value of the collateral has not been updated since reported on the previous Schedule H.1 submission. The Board did not temporarily revise or propose to revise Schedule H.1, item 93. One commenter pointed out that the instructions for Schedule H.1, item 93 do not specify how to report the value of collateral that is typically recorded at book value, such as receivables and inventory comprising a borrowing base for asset-based lending. To ensure consistent reporting across firms, the commenter recommended that the Board clarify how item 93 should be reported for types of collateral that not typically recorded at market value.

For consistency across exposures, firms should continue to report in line with the current instructions. The Board has not revised the Schedule H.1, item 93 instructions to allow for reporting at book value.

Past Due Reporting

The Board did not temporarily revise or propose to revise the reporting of past due exposures in the ''# Days Principal or Interest Past Due'' items (Schedule H.1, item 32; Schedule H.2, item 37). One commenter noted that while Schedule H is reported at the facility level, there could be cases where only some of the multiple loans under a given facility are past due. Per the commenter, this creates ambiguity for reporting the number of days past due for an entire facility. The commenter recommended that the Board revise Schedule H to add more granular delinquency buckets or an item to capture the total balance past due within a given facility.

Per the instructions for the ''# Days Principal or Interest Past Due'' items, firms are required to report the longest number of days principal or interest are past due for any loan within the facility. Given the different uses of the collected data on the FR Y–14 and FR Y–9C, the Board has not revised the FR Y–14 to have similar delinquency buckets as the FR Y–9C. In addition, the Board does not currently need to capture the total balance of loans past due within a facility to conduct its analysis, and so has not added an item to collect this information.

Capital Call Subscriptions

The Board did not temporarily revise or propose to revise the reporting of capital call subscriptions on FR Y–14Q, Schedule H (Wholesale). One commenter noted that the Board previously revised Schedule H.1 (Corporate), items 20 (''Credit Facility'') and 22 (''Credit Facility Purpose'') to require firms to indicate which facilities are capital call subscriptions, effective for the September 30, 2020, as of date.[7] Per the commenter, the Board should also revise Schedule H.1 item 36 (''Security Type'') to allow firms to identify the collateral associated with capital call subscriptions. The commenter noted that this additional collateral information would enable the Board to better capture information regarding a firm's ability to require a fund manager to inject capital into a fund that is declining in value, which would more accurately reflect the true risk of these exposures. Relatedly, one commenter requested that the Board provide definitions for the allowable values to be reported in Schedule H.1, items 20 and 22, as there could be a divergence in practice across firms.

[7] *See* 85 FR 56607 (September 14, 2020).

As indicated in the instructions, the values for the descriptions and codes used in Schedule H.1, items 20 and 22 relate to the requirements referenced in the reporting for Shared National Credit data.[8] Please note that while the listing referenced in the reporting for Shared National Credit data is not the entirety of the types and purposes possible for Schedule H reporting, it does cover a majority of them. The Board intends to consider adding definitions to the FR Y–14Q, Schedule H instructions as part of a future notice.

Disposed Loans

The Board did not temporarily revise or propose to revise the reporting of disposed loans on FR Y–14Q, Schedule H (Wholesale). However, one commenter suggested that the Board revise the Schedule H instructions to allow disposed facilities to be reported with data as of the prior reporting cycle rather than as of the day of disposition.

The Board believes collecting loan disposition information as it existed at the point of disposition is critical, and accordingly has not revised the current requirements for disposed loans on Schedule H.

Par and Fair Value Items

The Board did not temporarily revise or propose to revise the reporting of par value and fair value exposure items on FR Y–14Q, Schedule H (Wholesale). However, one commenter noted that previous FR Y–14 questions and answers (Q&As) have clarified that firms should report certain fair value exposure items based on the predominate share of the committed balance. Per the commenter, the reporting based on these Q&As would enable the Board to derive the value for two par/fair value exposure items (''Lower of Cost or Market (LOCOM) Flag,'' Schedule H.1, item 86 and Schedule H.2, item 56 and ''Target Hold'' Schedule H.1, item 101) from the four par/fair value exposure items (''Committed Exposure Global Par Value'', Schedule H.1, item 105'', Schedule H.2, item 66; ''Utilized Exposure Global Par Value'', Schedule H.1, item 106; ''Committed Exposure Global Fair Value'', Schedule H.1, item 107, Schedule H.2, item 68; ''Utilized Exposure Global Fair Value'', Schedule H.1, item 108; ''Outstanding Balance Par Value'', Schedule H.2, item 67; and ''Outstanding Balance Fair Value'', Schedule H.2, item 69) that were added for the March 31, 2020, as of date.[9] Therefore, the commenter recommends that the ''LOCOM Flag'' and ''Target Hold'' items be removed from Schedule H. The commenter further stated that if the ''LOCOM Flag'' item is retained, then it is unclear how exposures should be reported in the par/fair value exposure items.

The Board notes that each par/fair value exposure item on Schedule H provides a different perspective on the exposures and gives a more holistic view of the valuation of exposures. The ''LOCOM Flag'' and ''Target Hold'' items allow for validation and categorization of loan data. Per the instructions, firms should report appropriate values of the entire credit facility for held for sale loans and loans accounted for under a fair value option for the par/fair value items. The Board further notes that reporting guidance based on FR Y–14 Q&As issued prior to the addition of the par/fair value exposure items (*i.e.,* prior to March 31, 2020) should not be applied to the par/fair value exposure items that were added for the March 31, 2020, as of date. Firms should report these items based on the Schedule H instructions.

Obligor and Guarantor Reporting

The Board did not temporarily revise or propose to revise the reporting of the legal entity that provides the primary source of repayment for a credit facility on FR Y–14Q, Schedule H (Wholesale). The current FR Y–14Q, Schedule H.1 (Corporate) instructions require firms to report the obligor in the ''Obligor Financial Data'' items (items 52 through 82) as the legal entity that provides the primary source of repayment for a credit facility identified in item 15 (''Internal Credit Facility ID''). The instructions further state that the legal entity that provides the primary source of repayment will generally be different than the guarantor, which provides secondary support for repayment. Per one commenter, the instructions regarding the obligor and guarantor create ambiguity as it is not clear whether the guarantor could ever be viewed as the primary source of repayment, which the commenter states could happen in cases where the guarantor is used in underwriting as a primary source of repayment.

Per the instructions, Schedule H.1, item 15 should reflect the legal entity providing the primary source of repayment or, if different, the legal entity used by underwriting as the primary source of repayment identified. Information surrounding the guarantor, or secondary source of repayment, is outlined and differentiated in Schedule H.1, items 44 through 48 (''Guarantor Flag'', ''Guarantor Internal ID'', ''Guarantor Name'', ''Guarantor TIN'', and ''Guarantor Internal Risk Rating'', respectively).

Loss Mitigation

Loss Mitigation Item Reporting

The Board temporarily added items and options to existing items to capture loans in forbearance or other loss mitigation programs on several FR Y–14 schedules, such as FR Y–14Q, Schedule H (Wholesale) and FR Y–14M, Schedule B (Home Equity). One commenter recommended that these items and options to existing items only be reported quarterly so that the firms would not be required to recode systems for potentially temporary changes to the FR Y–14 report. Per the commenter, quarterly reporting of these items would reduce reporting burden.

Given that these loans in forbearance or other loss mitigation programs have different risk characteristics than loans not in these programs, receiving this information on a monthly basis is critical to enable the Board to more accurately assess current banking conditions.

The Board temporarily added items to FR Y–14Q, Schedule A (Retail) and Schedule J (Retail FVO/HFS) to require firms to report loans that have completed loss mitigation or for which mitigation has expired during the reporting period. One commenter stated that it is burdensome for firms and may not provide valuable insight to commingle loans no longer in loss mitigation programs with loans currently in loss mitigation programs. The commenter recommends that the requirement to include loans no longer in loss mitigation be removed.

Given the reporting burden and commingling effect of reporting loans no longer in loss mitigation programs with loans currently in loss mitigation programs, the Board has revised the Schedule A and Schedule J instructions to require firms to exclude the balances of loans that completed their loss mitigation programs in the current month from these added items. In addition, due to questions from reporting firms, the Board has revised the loss mitigation item on Schedule J to capture the carrying value of loans in loss mitigation, as opposed to the unpaid principal balance. Both of these revisions are effective for the December 31, 2020, as of date.

The Board temporarily added items to FR Y–14Q, Schedule H (Wholesale) to

[8] *See https://www.kansascityfed.org/banking/bankerresources/complete-and-file-reports/shared-national-credit.*

[9] *See* 84 FR 70529 (December 23, 2019).

capture loans currently in loss mitigation programs or forbearance as a result of the COVID event. One commenter pointed out that the instructions for these new items does not capture loans that were classified as troubled debt restructurings (TDRs) prior to the onset of the COVID event that have been subsequently modified as a result of the COVID event. The commenter requested that the Board clarify how these modified loans should be reported on Schedule H.

To remove ambiguity, the Board has revised the instructions to the ''Modifications Flag'' items (Schedule H.1, item 109; Schedule H.2, item 70) to clarify that loans that were classified as TDRs prior to the onset of the COVID event and have been subsequently modified should be reported under Option 3 (''Other''), effective for the December 31, 2020, as of date.

Risk Mitigation Activities

The Board did not temporarily revise or propose to revise the reporting of risk mitigation activities (*e.g.,* subordinated credit protection from third parties referencing an on-balance sheet portfolio of loans) on the FR Y–14 report. However, one commenter noted that the existing FR Y–14 report does not capture the data necessary to allow risk mitigation activities to be taken into consideration by supervisory models. Per the commenter, the inclusion of risk mitigation activity data on the FR Y–14 report would allow the Board to more accurately reflect the exposure risks to firms as part of the stress test.

The Board intends to consider revising the FR Y–14 reports to capture risk mitigation activities as part of a future notice.

Retail

Paycheck Protection Program Loans

The Board temporarily added an item to FR Y–14Q, Schedule A.9 (U.S. Small Business) to capture loans fully guaranteed by the United States government, which would include Paycheck Protection Program (PPP) loans. One commenter stated that per the Schedule A.9 instructions, only ''scored'' or ''delinquency managed'' loans should be reported, and neither of those criteria apply to PPP loans. Schedule A.9 requires certain variables (*e.g.,* product type, available credit bureau score, etc.) to be reported for loans reported on the schedule. According to two commenters, many of these variables do not apply to PPP loans because they are originated outside of the typical process for firms given that they are fully guaranteed by the Small Business Association (SBA). Additionally, one commenter raised that Schedule A.9 is only supposed to capture retail exposures, but the current instructions for the new item require reporting of both retail and wholesale exposures. Given these concerns, two commenters recommend that the Board exclude PPP loans from Schedule A.9 and instead have them reported on FR Y–14Q, Schedule K (Supplemental), similar to how loans associated with the MSLP are reported.

In response, the Board notes that it is important to capture PPP loans in a consistent manner across FR Y–14 submissions for purposes of data comparability. If certain variables required for Schedule A are not available for PPP loans, then firms should only report the variables for PPP loans that they have available. The Board has not revised the reporting of PPP loans.

Historical Data Requirement

One commenter noted that the inclusion of PPP loans in Schedule A.9 has caused some firms to exceed the quantitative threshold for reporting this schedule.[10] With the initial submission of this schedule, firms are required to report historical data going back to January of 2007. One commenter stated that PPP loans are only expected to be on a firm's books for a short period of time (*i.e.,* less than one year), and that once the PPP loans are no longer reported on Schedule A.9, some firms will drop back below the reporting threshold. The commenter further stated that firms face operational challenges with gathering and validating 13 years of historical data. The commenter recommended that if the Board continues to require PPP loans to be reported on Schedule A.9, then firms should not be required to submit historical data for Schedule A.9 if they exceed the reporting threshold as a result of including PPP loans in this schedule.

The Board believes that the required historical data on Schedule A.9 are critical to adequately monitor ongoing risks, and accordingly has not revised this requirement.

Trading

Private Equity Investments

The Board did not temporarily revise or propose to revise the reporting of non-fair value private equity investments on FR Y–14Q, Schedule F (Trading). However, on December 23, 2019,[11] the Board indicated that it would assess whether the macro scenario is more appropriate than the global market shock for evaluating losses associated with non-fair value private equity investment exposures. One commenter inquired about the status of this assessment.

At this time, the Board believes the macro scenario is more appropriate than the global market shock for evaluating losses associated with non-fair value private equity investment exposures, but will continue to analyze the issue.

Separately, in an FR Y–14 question and answer (Q&A) published in March of 2020,[12] the Board clarified that firms could exclude tax oriented investments held under the equity method of accounting from the ''Other Fair Value Assets'' portion of FR Y–1Q, Schedule F (Trading). The Board further clarified that tax oriented investments held under the equity method of accounting should only be reported on Schedule F if they are included in the included in other portions of Schedule F (*i.e.,* not the ''Other Fair Value Assets'' portion). One commenter suggested that this same treatment should be applied to non-fair value private equity investments, as non-fair value private equity investments share many characteristics with fair value private equity investments, such as an illiquid nature, expected multi-year holding period, as well as the timing and amount of associated losses.

The exclusion of non-fair value tax oriented investments from Schedule F was not based on an assessment of their risk characteristics, but rather on the fact that they are neither trading positions, private equity positions, nor fair value assets, and so do not fall under the scope of Schedule F. The same rationale does not apply to non-fair value private equity positions, which do fall under the scope of Schedule F, as they are private equity positions. Given this, the Board has not revised the reporting for non-fair value private equity positions.

[10] Large and complex firms, Large Institution Supervision Coordinating Committee (LISCC) firms, and SLHCs subject to Category II–III standards with a portfolio of U.S. small business (retail) loans with an asset balance greater than $5 billion or greater than ten percent of Tier 1 capital on average for four quarters preceding the reporting quarter are required to file FR Y–14Q, Schedule A.9. Large and noncomplex firms and SLHCs subject to Category IV standards with a portfolio of U.S. small business (retail) loans with an asset balance greater than $5 billion or greater than ten percent of Tier 1 capital on average for four quarters preceding the reporting quarter are required to file FR Y–14Q, Schedule A.9.

[11] *See* 84 FR 70529 (December 23, 2019).

[12] *See https://www.federalreserve.gov/publications/y-14-qas.htm.*

Seed Capital Invested in Mutual Funds

The Board did not temporarily revise or propose to revise the reporting of seed capital invested in mutual funds. The current FR Y–14Q, Schedule F (Trading) instructions require firms to report seed capital invested in mutual funds as private equity exposures. One commenter noted that this treatment may subject firms to unfavorable stressed losses, as the underlying investments of seed capital invested in mutual funds are in liquid, marketable securities across multiple asset classes, including fixed income and equity. Given the liquid, marketable nature of these underlying investments, the commenter recommended that these exposures should not be reported as private equity exposures, but rather reported within the respective sub-schedules of Schedule F, according to the underlying exposure.

The Board intends to consider revising the reporting of seed capital invested in mutual funds as part of a future notice.

Legal authorization and confidentiality: The Board has the authority to require BHCs to file the FR Y–14 reports pursuant to section 5(c) of the Bank Holding Company Act (''BHC Act''), 12 U.S.C. 1844(c), and pursuant to section 165(i) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. 5365(i), as amended by section 401(a) and (e) of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA).[13] The Board has authority to require SLHCs to file the FR Y–14 reports pursuant to section 10(b) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)), as amended by section 369(8) and 604(h)(2) of the Dodd-Frank Act. Lastly, the Board has authority to require U.S. IHCs of FBOs to file the FR Y–14 reports pursuant to section 5 of the BHC Act, as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1) and 5365.[14] In addition, section 401(g) of EGRRCPA, 12 U.S.C. 5365 note, provides that the Board has the authority to establish enhanced prudential standards for foreign banking organizations with total consolidated assets of $100 billion or more, and clarifies that nothing in section 401 ''shall be construed to affect the legal effect of the final rule of the Board . . . entitled 'Enhanced Prudential Standard for [BHCs] and Foreign Banking Organizations' (79 FR 17240 (March 27, 2014)), as applied to foreign banking organizations with total consolidated assets equal to or greater than $100 million.'' [15] The FR Y–14 reports are mandatory. The information collected in the FR Y–14 reports is collected as part of the Board's supervisory process, and therefore, such information is afforded confidential treatment pursuant to exemption 8 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(8). In addition, confidential commercial or financial information, which a submitter actually and customarily treats as private, and which has been provided pursuant to an express assurance of confidentiality by the Board, is considered exempt from disclosure under exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).[16]

Board of Governors of the Federal Reserve System, December 22, 2020.

Margaret Shanks,

Deputy Secretary of the Board.

[FR Doc. 2020–28788 Filed 12–29–20; 8:45 am]

BILLING CODE 6210–01–P

[13] Public Law 115–174, Title IV 401(a) and (e), 132 Stat. 1296, 1356–59 (2018).

[14] Section 165(b)(2) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(2), refers to ''foreign-based bank holding company.'' Section 102(a)(1) of the Dodd-Frank Act, 12 U.S.C. 5311(a)(1), defines ''bank holding company'' for purposes of Title I of the Dodd-Frank Act to include foreign banking organizations that are treated as bank holding companies under section 8(a) of the International Banking Act of 1978, 12 U.S.C. 3106(a). The Board has required, pursuant to section 165(b)(1)(B)(iv) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(B)(iv), certain foreign banking organizations subject to section 165 of the Dodd-Frank Act to form U.S. intermediate holding companies. Accordingly, the parent foreign-based organization of a U.S. IHC is treated as a BHC for purposes of the BHC Act and section 165 of the Dodd-Frank Act. Because Section 5(c) of the BHC Act authorizes the Board to require reports from subsidiaries of BHCs, section 5(c) provides additional authority to require U.S. IHCs to report the information contained in the FR Y–14 reports.

[15] The Board's Final Rule referenced in section 401(g) of EGRRCPA specifically stated that the Board would require IHCs to file the FR Y–14 reports. *See* 79 FR 17240, 17304 (March 27, 2014).

[16] Please note that the Board publishes a summary of the results of the Board's CCAR testing pursuant to 12 CFR 225.8(f)(2)(v), and publishes a summary of the results of the Board's DFAST stress testing pursuant to 12 CFR 252.46(b) and 12 CFR 238.134, which includes aggregate data. In addition, under the Board's regulations, covered companies must also publicly disclose a summary of the results of the Board's DFAST stress testing. *See* 12 CFR 252.58; 12 CFR 238.146. The public disclosure requirement contained in 12 CFR 252.58 for covered BHCs and covered IHCs is separately accounted for by the Board in the Paperwork Reduction Act clearance for FR YY (OMB No. 7100–0350) and the public disclosure requirement for covered SLHCs is separately accounted for in by the Board in the Paperwork Reduction Act clearance for FR LL (OMB No. 7100–0380).

FEDERAL RESERVE SYSTEM

Corporation To Do Business Under Section 25A of the Federal Reserve Act

The companies listed in this notice have applied to the Board for approval, pursuant to Section 25A of the Federal Reserve Act (Edge Corporation) (12 U.S.C. 611 *et seq.*), and all other applicable statutes and regulations to establish an Edge Corporation. The Edge Corporation will operate as a subsidiary of the applicant, First-Citizens Bank & Trust Company, Raleigh, North Carolina. The factors that are to be considered in acting on the application are set forth in the Board's Regulation K (12 CFR 211.5).

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 Section 25A of the Federal Reserve 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 14, 2021.

A. Federal Reserve Bank of Richmond (Adam M. Drimer, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23219. Comments can also be sent electronically to or *Comments.applications@rich.frb.org:*

1. *First-Citizens Bank & Trust Company, Raleigh, North Carolina;* to establish FC International, Inc., Raleigh, North Carolina, as an Edge Corporation.

Board of Governors of the Federal Reserve System, December 23, 2020.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2020–28854 Filed 12–29–20; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

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 question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the 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 29, 2021.

A. Federal Reserve Bank of Atlanta (Kathryn Haney, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309. Comments can also be sent electronically to *Applications.Comments@atl.frb.org*:

1. *FirstBanc of Alabama, Inc., Talladega, Alabama;* to acquire SouthFirst Bank, Sylacauga, Alabama, and thereby engage in operating a savings association pursuant to § 225.28(b)(4)(ii) of Regulation Y.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Marathon Bancorp, Inc., Wausau, Wisconsin;* to make a loan to Marathon Bank Employee Stock Ownership Plan located in Wausau, Wisconsin, and thereby engage in extending credit and servicing loans pursuant to § 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, December 23, 2020.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2020–28862 Filed 12–29–20; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers CMS–10650 and CMS–10715]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by March 1, 2021.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10650—State Permissions for Enrollment in Qualified Health Plans in the Federally-Facilitated Exchange & Non-Exchange Entities

CMS–10715—Transparency in Coverage

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. Type of Information Collection Request: Extension of a currently approved collection; *Title of*

Information Collection: State Permissions for Enrollment in Qualified Health Plans in the Federally-Facilitated Exchange & Non-Exchange Entities; *Use:* On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA; Pub. L. 111–148) was signed into law and on March 30, 2010, the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) was signed into law. The two laws implement various health insurance policies.

This information collection request (ICR) serves as the renewal of the data collection clearance related to the ability of states to permit agents and brokers, as well as Web-brokers, to assist qualified individuals, qualified employers, or qualified employees enrolling in Qualified Health Plans in the Federally Facilitated Exchange (45 CFR 155.220) and data collection requirements related to non-exchange entities. (45 CFR 155.260). [All references to § 155.220 shall mean 45 CFR 155.220.] *Form Number:* CMS–10650; *Frequency:* Annually; *Affected Public:* Private Sector, State, Business, and Not-for Profits; *Number of Respondents:* 55,148; *Number of Responses:* 55,148; *Total Annual Hours:* 272,707. (For questions regarding this collection, contact Michele Oshman at (301–492–4407).

2. Type of Information Collection Request: New collection (Request for a new OMB control number); *Title of Information Collection:* Transparency in Coverage; *Use:* The final rules titled ''Transparency in Coverage,'' published November 12, 2020 (85 FR 72158), establish requirements for group health plans and health insurance issuers offering non-grandfathered coverage in the individual and group markets to disclose to a participant, beneficiary, or enrollee (or an authorized representative on behalf of such individual) the consumer-specific estimated cost-sharing liability for covered items or services from a particular provider, thereby allowing a participant, beneficiary, or enrollee to obtain an accurate estimate and understanding of their potential out-of-pocket expenses and to effectively shop for covered items and services. Plans and issuers are required to make such information available for covered items and services through an internet-based self-service tool, and, if requested, in paper form. The internet-based self-service tool must allow participants, beneficiaries, or enrollees to search for cost-sharing information for a covered item or service by inputting the name of a specific in-network provider in conjunction with a billing code or descriptive term, as well as other relevant factors such as location of service, facility name, or dosage. In addition, the final rules require that the tool allow the user to refine and reorder search results based on geographic proximity of in-network providers. For covered items and services provided by out-of-network providers, the tool must provide the out-of-network allowed amount, percentage of billed charges, or other rates that provide a reasonably accurate estimate of the amount a plan or issuer will pay by allowing consumers to input a billing code, descriptive code, or other relevant factor, such as location.

The final rules also require plans and issuers to publicly disclose applicable rates with in-network providers, including negotiated rates; historical data outlining the different billed charges and allowed amounts a plan or issuer has paid for covered items or services, including prescription drugs, furnished by out-of-network providers; and negotiated rates and historical net prices for covered prescription drugs furnished by in-network providers through three machine-readable files (an In-network Rate File, Allowed Amount File, and Prescription Drug File). The machine-readable files must be posted publicly on an internet website and updated on a monthly basis. *Form Number:* CMS–10715 (OMB control number 0938–1372); *Frequency:* Frequently; *Affected Public:* Public and Private sectors; *Number of Respondents:* 908; *Total Annual Responses:* 74,460; *Total Annual Hours:* 28,618,546. (For policy questions regarding this collection contact Russell Tipps at 301–492–4371).

Dated: December 23, 2020.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2020–28851 Filed 12–29–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Statement of Organization, Functions, and Delegations of Authority

Part F of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) (last amended at 75 FR 14176–14178, dated March 24, 2010), is republished to realign functions in the Center for Program Integrity (CPI).

CPI is the focal point for all national and State-wide Medicare and Medicaid programs and integrity fraud and abuse issues related to the Children's Health Insurance Program (CHIP). It promotes the integrity of the Medicare and Medicaid programs and CHIP through provider/contractor audits, policy reviews, identification and monitoring of program vulnerabilities, and provides support and technical assistance to States. In addition, it recommends modifications to programs and operations as necessary and works with CMS Centers, Offices, and the Chief Operating Officer to affect changes as appropriate, and collaborates with the Office of Legislation on the development and advancement of new legislative initiatives and improvements to deter, reduce, and eliminate fraud, waste and abuse.

Part F, Section FC. 20 (Functions) is as follows:

Center for Program Integrity

- Serves as CMS' focal point for all national and State-wide Medicare and Medicaid programs and CHIP integrity fraud and abuse issues.
- Promotes the integrity of the Medicare and Medicaid programs and CHIP through provider/contractor audits and policy reviews, identification and monitoring of program vulnerabilities, and providing support and assistance to States. Recommends modifications to programs and operations as necessary and works with CMS Centers, Offices, and the Chief Operating Officer (COO) to affect changes as appropriate. Collaborates with the Office of Legislation on the development and advancement of new legislative initiatives and improvements to deter, reduce, and eliminate fraud, waste and abuse.
- Oversees all CMS interactions and collaboration with key stakeholders relating to program integrity (*i.e.,* U.S. Department of Justice, DHHS Office of Inspector General, State law enforcement agencies, other Federal entities, CMS components) for the purposes of detecting, deterring, monitoring and combating fraud and abuse, as well as taking action against those that commit or participate in fraudulent or other unlawful activities.
- In collaboration with other CMS Centers, Offices, and the COO, develops and implements a comprehensive strategic plan, objectives and measures to carry out CMS' Medicare, Medicaid and CHIP program integrity mission and goals, and ensure program

vulnerabilities are identified and resolved.

Authority: 44 U.S.C. 3101.

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Seema Verma, having reviewed and approved this document, authorizes Lynette Wilson, who is the Federal Register Liaison, to electronically sign this document for purposes of publication in the **Federal Register**.

Dated: December 22, 2020.

Lynette Wilson,

Federal Register, Centers for Medicare & Medicaid Services.

[FR Doc. 2020–28795 Filed 12–28–20; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; OPRE Data Collection for Supporting Youth To Be Successful in Life (SYSIL) (New Collection)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting approval from the Office of Management and Budget (OMB) for a new data collection. The Supporting Youth to be Successful in Life study (SYSIL) will build evidence on how to end homelessness among youth and young adults with experience in the child welfare system by continuing work with an organization who conducted foundational work as part of the Youth At-Risk of Homelessness project (OMB Control Number: 0970–0445). SYSIL will provide important information to the field by designing and conducting a federally led evaluation of a comprehensive service model for youth at risk of homelessness.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *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:* The SYSIL evaluation includes an implementation study and an impact study, which will use a rigorous quasi-experimental design that includes a comparison group. This new information collection request includes the baseline and follow-up survey instruments for the impact study (a single instrument administered four times), and discussion guides for interviews and focus groups and the Working Alliance Inventory (WAI) for the implementation study. The data collected from the baseline and follow-up surveys will be used to describe the characteristics of the study sample of youth, develop models for estimating program impacts, and determine program effectiveness by comparing outcomes between youth in the treatment (youth receiving the Pathways program) and control groups. Data from the interviews and focus groups will provide a detailed understanding of program implementation. The study will also use administrative data from the child welfare system, homelessness management information system, and program providers. Administrative data will be used in its existing format and does not impose any new information collection or recordkeeping requirements on respondents.

Respondents: The baseline and follow-up surveys will be administered to youth in the treatment group (youth receiving the Pathways program) and youth in the control group who consent to participate in the study. Interviews will be conducted with program leadership and staff. Focus groups will be conducted with a subset of youth who are participating in the study. The WAI will be completed by Pathways youth and their caseworkers.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Avg. burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
SYSIL Youth Survey—Baseline survey	700	1	.5	350	117
SYSIL Youth Survey—Follow-up survey 1 (6 months)	630	1	.5	315	105
SYSIL Youth Survey—Follow-up survey 2 (12 months)	595	1	.5	298	99
SYSIL Youth Survey—Follow-up survey 3 (24 months)	372	1	.5	186	62
Interview guide for Pathways sites (treatment sites)	30	1	1.5	45	15
Interview guide for comparison sites	30	1	1.5	45	15
Focus group discussion guide for Pathways youth (treatment youth)	50	1	1.5	75	25
Focus group discussion guide for comparison youth	50	1	1.5	75	25
Working Alliance Inventory for Pathways youth	400	1	.08	32	11
Working Alliance Inventory for Pathways case workers	40	10	.08	32	11

Estimated Total Annual Burden Hours: 485.

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: Section 105(b)(5) of the Child Abuse Prevention and Treatment Act (CAPTA) of 1978 (42 U.S.C. 5106(b)(5)), as amended by the CAPTA Reauthorization Act of 2010 (Pub. L. 111–320).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–28886 Filed 12–29–20; 8:45 am]

BILLING CODE 4184–29–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1804]

Product Labeling for Laparoscopic Power Morcellators; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance entitled ''Product Labeling for Laparoscopic Power Morcellators.'' This guidance updates recommended ''Contraindications'' and ''Warnings'' information to be included in product labeling to reflect the state of the science and available technology regarding use of laparoscopic power morcellators (LPMs). These labeling recommendations are intended to enhance, but not replace, the physician-patient discussion of the benefits and risks of use of LPMs that uniquely pertain to individual patients.

DATES: The announcement of the guidance is published in the **Federal Register** on December 30, 2020.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–D–1804 for ''Product Labeling for Laparoscopic Power Morcellators.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled ''Product Labeling for Laparoscopic Power Morcellators'' to the Office of Policy, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Veronica Price, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2659, Silver Spring, MD 20993–0002, 301–796–6538.

SUPPLEMENTARY INFORMATION:

I. Background

Following issuance of the 2014 guidance document entitled ''Immediately in Effect Guidance Document: Product Labeling for Laparoscopic Power Morcellators,'' FDA has continued to consider new scientific information and the input of stakeholders. Additional scientific information is available that stratifies the risks of an undetected uterine cancer in women with presumed fibroids based on age.

FDA also considered scientific information pertaining to the risk of spreading benign uterine tissue beyond the uterus during gynecologic surgeries

when LPMs are used. Parasitic myomas and disseminated peritoneal leiomyomatosis, while benign, have been associated with the need for additional surgery due to symptoms such as abdominal pain and distension. Finally, FDA considered additional available mitigations for the spread of uterine tissue. Since 2014, FDA has provided marketing authorization for LPM containment systems intended to isolate and contain tissue that is considered benign. These products have been shown, through bench testing and simulated use testing, to contain such tissue during morcellation.

For these reasons, FDA is updating its recommendations, as originally described in the 2014 guidance document, concerning the content and format of certain labeling information for LPMs. Specifically, FDA is recommending that manufacturers incorporate into the labeling for these devices information providing greater specificity regarding the risks of use as it relates to age, information regarding the risk of spreading benign uterine tissue, and information regarding the use of LPM containment systems.

A notice of availability of the draft guidance appeared in the **Federal Register** of February 26, 2020 (85 FR 11093). FDA considered comments received and revised the guidance as appropriate in response to the comments, including revisions to further discuss shared decision making that should occur between a physician and patient prior to undergoing the procedure, to elaborate on the benefits and risks of LPM containment systems, and to refine one of the sample warning statements.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on product labeling for laparoscopic power morcellators. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov* and at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Product Labeling for Laparoscopic Power Morcellators'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 1400052 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following FDA regulations have been approved by OMB as listed in the following table:

21 CFR part	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
800, 801, and 809	Medical Device Labeling Regulations	0910–0485
803	Medical Devices; Medical Device Reporting; Manufacturer reporting, importer reporting, user facility reporting, distributor reporting.	0910–0437

Dated: December 22, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28816 Filed 12–29–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–3233]

Request for Nominations for Voting Members on a Public Advisory Committee; Technical Electronic Product Radiation Safety Standards 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 Technical Electronic Product Radiation Safety Standards Committee (TEPRSSC) in the Center for Devices and Radiological Health. Nominations will be accepted for current and upcoming vacancies effective 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 March 1, 2021, will be given first consideration for membership on TEPRSSC. Nominations received after March 1, 2021, will be considered for nomination to the committee as later vacancies occur.

ADDRESSES: All nominations for membership should be sent electronically by logging into FDA's Advisory Committee Membership 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: Patricio G. Garcia, Division of Management Services, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993–0002, 301–796–6875, *Patricio.Garcia@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting members to serve on TEPRSSC that include five general public representatives and five government representatives.

I. General Description of the Committee's Duties

The committee provides advice and consultation to the Commissioner of Food and Drugs (the Commissioner) on the technical feasibility, reasonableness, and practicability of performance standards for electronic products to control the emission of radiation from such products, and may recommend electronic product radiation safety standards to the Commissioner for consideration.

II. Criteria for Voting Members

The committee consists of a core of 15 voting members including the Chair. Members and the Chair are selected by the Commissioner or designee from among authorities knowledgeable in the fields of science or engineering, applicable to electronic product radiation safety. Members will be invited to serve for overlapping terms of up to 4 years. Terms of more than 2 years are contingent upon the renewal of the committee by appropriate action prior to its expiration.

III. Nomination Procedures

Any interested person may nominate one or more qualified individuals for membership on the committee. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee, including current business address and/or home 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 also 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 conflicts 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 22, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–28833 Filed 12–29–20; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; SBIR Contract Review Topic 20.

Date: January 12, 2021.

Time: 12:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1078, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rahat (Rani) Khan, Ph.D. Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1078 Bethesda, MD 20892, 301–594–7319 *khanr2@csr.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 22, 2020.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28842 Filed 12–29–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Initial Review Group; Health, Behavior, and Context Subcommittee.

Date: February 22, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NICHD/NIH, 6710B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kimberly L. Houston, M.D., Scientific Review Officer, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6701B Rockledge Drive, Room 2137C, Bethesda, MD 20892, 301–827–4902, *kimberly.houston@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: December 23, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28841 Filed 12–29–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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/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 the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Sponsor and Regulatory Oversight Support TEP.
Date: January 26, 2021.
Time: 10:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate contract proposals.
Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Shakeel Ahmad, Ph.D., Chief Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850, 240–276–6442, *ahmads@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) Review III.
Date: February 17–18, 2021.
Time: 9:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240–276–5122, *hasan.siddiqui@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–8: Research Answers to NCI Provocative Questions.
Date: February 25, 2021.
Time: 12:00 p.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Shree Ram Singh, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–672–6175, *singhshr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Research to Reduce Morbidity and Improve Care for Pediatric and AYA Cancer Survivors (R01/R21).
Date: March 4–5, 2021.
Time: 11:00 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850 (Telephone Conference Call).
Contact Person: Timothy C. Meeker, M.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850, 240–276–6464, *meekert@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Aging, Cancer Initiating Cells, and Cancer Progression (U01).
Date: March 18, 2021.
Time: 12:00 p.m. to 4:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Cancer Institute at Shady Grove 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850 (Telephone Conference Call)
Contact Person: Timothy C. Meeker, M.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W606, Rockville, Maryland 20850, 240–276–6464, *meekert@mail.nih.gov.*

(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 23, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–28840 Filed 12–29–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This notice advises the public that the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties will remain the same from the previous quarter. For the calendar quarter beginning January 1, 2021, the interest rates for overpayments will be 2 percent for corporations and 3 percent for non-corporations, and the interest rate for underpayments will be 3 percent for both corporations and non-corporations. This notice is published for the convenience of the importing public and U.S. Customs and Border Protection personnel.

DATES: The rates announced in this notice are applicable as of January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Revenue Division, Collection Refunds & Analysis Branch, 6650 Telecom Drive, Suite #100, Indianapolis, Indiana 46278; telephone (317) 298–1107.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of customs duties must be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 provides different interest rates applicable to overpayments: One for corporations and one for non-corporations.

The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2020–28, the IRS determined the rates of interest for the calendar quarter beginning January 1, 2021, and ending on March 31, 2021. The interest rate paid to the Treasury for underpayments will be the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%) for both corporations and non-corporations. For corporate overpayments, the rate is the Federal short-term rate (0%) plus two percentage points (2%) for a total of two percent (2%). For overpayments made by non-corporations, the rate is the Federal short-term rate (0%) plus three percentage points (3%) for a total of three percent (3%). These interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of customs duties

remain the same from the previous quarter. These interest rates are subject to change for the calendar quarter beginning April 1, 2021, and ending on June 30, 2021.

For the convenience of the importing public and U.S. Customs and Border Protection personnel, the following list of IRS interest rates used, covering the period from July of 1974 to date, to calculate interest on overdue accounts and refunds of customs duties, is published in summary format.

Beginning date	Ending date	Under payments (percent)	Over payments (percent)	Corporate overpayments (eff. 1–1–99) (percent)
070174	063075	6	6	
070175	013176	9	9	
020176	013178	7	7	
020178	013180	6	6	
020180	013182	12	12	
020182	123182	20	20	
010183	063083	16	16	
070183	123184	11	11	
010185	063085	13	13	
070185	123185	11	11	
010186	063086	10	10	
070186	123186	9	9	
010187	093087	9	8	
100187	123187	10	9	
010188	033188	11	10	
040188	093088	10	9	
100188	033189	11	10	
040189	093089	12	11	
100189	033191	11	10	
040191	123191	10	9	
010192	033192	9	8	
040192	093092	8	7	
100192	063094	7	6	
070194	093094	8	7	
100194	033195	9	8	
040195	063095	10	9	
070195	033196	9	8	
040196	063096	8	7	
070196	033198	9	8	
040198	123198	8	7	
010199	033199	7	7	6
040199	033100	8	8	7
040100	033101	9	9	8
040101	063001	8	8	7
070101	123101	7	7	6
010102	123102	6	6	5
010103	093003	5	5	4
100103	033104	4	4	3
040104	063004	5	5	4
070104	093004	4	4	3
100104	033105	5	5	4
040105	093005	6	6	5
100105	063006	7	7	6
070106	123107	8	8	7
010108	033108	7	7	6
040108	063008	6	6	5
070108	093008	5	5	4
100108	123108	6	6	5
010109	033109	5	5	4
040109	123110	4	4	3
010111	033111	3	3	2
040111	093011	4	4	3
100111	033116	3	3	2
040116	033118	4	4	3
040118	123118	5	5	4
010119	063019	6	6	5
070119	063020	5	5	4
070120	033121	3	3	2

Dated: December 22, 2020.

Jeffrey Caine,

Chief Financial Officer, U.S. Customs and Border Protection.

[FR Doc. 2020–28821 Filed 12–29–20; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Notice of Meeting

AGENCY: Transportation Security Administration, Department of Homeland Security (DHS).

ACTION: Notice.

SUMMARY: Pursuant to standards of the International Civil Aviation Organization (ICAO), effective June 30, 2021, all international air-cargo transported on commercial aircraft must be screened by the aircraft operator or received from another regulated entity that has applied security controls that satisfy the international standards. The Transportation Security Administration (TSA) intends to implement a new program that meets the ICAO standards for an alternative to screening and is announcing a closed meeting with representatives of e-commerce fulfillment centers, manufacturers, shippers, suppliers, warehouses, and third-party logistics providers who ship international air cargo to discuss this alternative framework. This meeting will be closed to the public. Participation is limited and all participants must be validated by TSA as a representative of one of the industries identified above and obtain clearance from TSA for access to Sensitive Security Information (SSI). In light of the COVID–19 public health crisis, the meeting will be virtual.

DATES: This meeting will occur on Wednesday, January 13, 2021, beginning at 9:00 a.m. (Eastern Standard Time). Requests to attend the meeting must be received by the individual listed in **FOR FURTHER INFORMATION CONTACT** on or before January 6, 2021.

ADDRESSES: Additional information on SSI can be found at the following link: *https://www.tsa.gov/for-industry/sensitive-security-information.* Due to the COVID–19 public health crisis, the meeting will be held virtually. See Participation at the Meeting below for information on how to register to attend the meeting. TSA will provide participation and other information to qualified participants in advance of the meeting.

FOR FURTHER INFORMATION CONTACT: Thomas Friedman, Transportation Security Administration, 6595 Springfield Center Drive, Springfield, VA 20598–6028; telephone (571) 227–3555 OR (202) 236–3786; email *Thomas.Friedman@tsa.dhs.gov* OR Air Cargo Branch, TSA at the above address.

SUPPLEMENTARY INFORMATION:

Background

Effective June 30, 2021, international standards require that all international air cargo carried by commercial air carriers (passenger and all-cargo) be screened or received from an entity that has applied security controls and/or screened the cargo. On April 10, 2020, TSA published a Request for Information (RFI): Air Cargo Security Options to Mitigate Costs of Compliance with International Security Requirements.[1] The RFI requested information from the public, specifically the air cargo industry, relating to compliance with international security standards for the transport of air cargo.[2] TSA extended the comment period for the RFI and held a public meeting on July 29, 2020, to provide information to assist the public in submitting comments and obtain feedback from the industry.[3] Through the RFI, TSA specifically sought information regarding options to reduce the burden on U.S. and foreign all-cargo aircraft operators in complying with the international standards, such as security controls implemented throughout the supply chain that provides a level of security commensurate with the screening of cargo before air transport.

Closed Meeting

On January 13, 2021, TSA will hold a closed meeting to present a new program that e-commerce fulfillment centers, manufacturers, shippers, suppliers, warehouses, and third-party logistics providers who ship international air cargo could voluntarily choose to participate in as an alternative to having their air cargo screened by a TSA-regulated commercial air carrier. This discussion requires participants to speak freely about issues that would be detrimental to transportation safety and security if disclosed.

Pursuant to the requirements in Title 49 of the United States Code (U.S.C.) sections 114(r) and 44912(d), and implementing regulations in title 49 of the Code of Federal Regulations (CFR) part 1520, this meeting will be closed to the public to protect against disclosure of SSI. SSI protections apply to information related to development of procedures and facilities ''to protect passengers and property against acts of criminal violence, aircraft privacy, and terrorism and to ensure security.''[4] All participants must either be ''covered persons'' as defined in 49 CFR 1520.7, or otherwise designated by TSA as a ''covered person'' for purposes of this event. Participants will be required to sign a non-disclosure agreement, which includes acknowledgment of TSA's SSI requirements, and ensure that any information received or otherwise communicated is properly protected. The responsibilities of participants to safeguard all SSI disclosed during or related to this meeting will continue after the conclusion of the industry day event.

Participation at the Meeting

In addition to providing invitations to relevant associations and corporate representatives known to TSA through its regular stakeholder engagements, TSA also invites representatives of manufacturers, shippers, suppliers, warehouses, e-commerce fulfillment centers, third-party logistics providers that rely on international air cargo transportation for commercial purposes. Participants will be encouraged to share their feedback about TSA's proposed alternate framework to assist industry in implementing the new ICAO standards.

Persons within these industries are encouraged to contact the individual noted in the **FOR FURTHER INFORMATION CONTACT** section of this notice for additional information. Participation in the meeting is limited to individuals that TSA determines represent industry entities potentially and directly affected by the international standards. TSA will limit participation to no more than two individuals per association or company. All participants must be approved by TSA for access to SSI and must sign a Non-Disclosure Agreement in advance of the meeting. Further attendance information will be provided to qualified participants.

The meeting on January 13, 2021, is scheduled to be a full-day meeting beginning at 9:00 a.m. (Eastern Standard

[1] *See* 85 FR 20234 (April 10, 2020).

[2] Options considered are limited to the transport of air cargo on all-cargo aircraft. All cargo transported on passenger aircraft must be screened as required by TSA's regulations, which implement 49 U.S.C. 44901(g).

[3] *See* 85 FR 37958 (June 24, 2020) and transcript available at *www.regulations.gov* under Docket No. TSA–2020–0001.

[4] *See* 49 U.S.C. 44912(d).

Time) but may end earlier if the discussion has concluded.

Stacey Fitzmaurice,

Executive Assistant Administrator, Operations Support, Transportation Security Administration.

[FR Doc. 2020–28813 Filed 12–23–20; 4:15 pm]

BILLING CODE 9110–05–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7024–N–58]

30-Day Notice of Proposed Information Collection: HUD Environmental Review Online System (HEROS); OMB Control No. 2506–0202

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 30 days of public comment.

DATES: *Comments Due Date:* January 29, 2021.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806, Email: *OIRA Submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Anna P. Guido, Reports Management Officer, QMAC, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email her at *Anna.P.Guido@hud.gov* or telephone 202–402–5535. This is not a toll-free number. Person with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at (800) 877–8339. Copies of available documents submitted to OMB may be obtained from Ms. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

The **Federal Register** notice that solicited public comment on the information collection for a period of 60 days was published on October 30, 2020 at 85 FR 68911.

A. Overview of Information Collection

Title of Information Collection: HUD Environmental Review Online System (HEROS).

OMB Approval Number: 2506–0202.

Type of Request: Revision of currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: 24 CFR part 58, ''Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities'' requires units of general local government receiving HUD assistance to maintain a written environmental review record for all projects receiving HUD funding documenting compliance with the National Environmental Policy Act (NEPA), the regulations of the Council on Environmental Quality, related federal environmental laws, executive orders, and authorities, and Part 58 procedure. Various laws that authorize this procedure are listed in 24 CFR 58.1(b). 24 CFR part 50, ''Protection and Enhancement of Environmental Quality,'' implements procedures for HUD to perform environmental reviews for projects where Part 58 is not permitted by law. Under Part 50, HUD staff complete the environmental review records, but they may use any information supplied by an applicant or contractor, provided HUD independently evaluates the information and is responsible for its accuracy and prepares the environmental finding. HEROS allows users to complete, store, and submit their environmental review records and documents online. HEROS is currently optional for Responsible Entity and other non-HUD users, who may continue to use paper-based environmental review formats.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost per response	Annual cost
Exempt/CENST reviews.	500	15	7,500	0.75	5,625	$36.50	$205,312.50
Reviews that convert to exempt.	500	8	4,000	2	8,000	36.50	292,000.00
CEST/EA reviews	250	2.8	700	4	2,800	36.50	102,200.00
Total	500	24.4	12,200	varies	16,425	36.50	599,512.50

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

(5) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority:

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Anna P. Guido,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2020–27767 Filed 12–29–20; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CR–NPS0028085; PPWOCRADI0, PCU00RP14.R50000 (211); OMB Control Number 1024–0038]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Procedures for State, Tribal, and Local Government Historic Preservation Programs

AGENCY: National Park Service, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before February 1, 2021.

ADDRESSES: Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at *OIRA_Submission@omb.eop.gov;* or via facsimile to (202)–395–5806. Please provide a copy of your comments to Phadrea Ponds, NPS Information Collection Clearance Officer, 1201 Oakridge Drive, Fort Collins, CO 80525; or by email to *phadrea_ponds@nps.gov.* Please reference OMB Control Number 1024–0038 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Seth Tinkham, Grants Management Specialist, State, Tribal, Local, Plans & Grants Division or by email at *stlpg@nps.gov;* or by telephone at 202–354–2020. 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 PRA and 5 CFR 1320.8(d)(1), we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting comments on this collection of information was published on September 25th, 2020 (85 FR 60488). No comments were received.

As part of our continuing effort to reduce paperwork and respondent burdens, we are again soliciting comments from the public and other Federal agencies on the proposed ICR that is described below. We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: This collection is authorized by Section 101(b) of the National Historic Preservation Act, as amended (54 U.S.C. 302301), which specifies the role of States, Tribes, and Local governments in the Historic Preservation Program (HPP). This information collection has an impact on State, Tribal, and local governments that wish to participate formally with the National Park Service in the HPP. Information is also requested to meet grant management and monitoring of responsibilities for States, Tribes, local government, and other eligible grant recipients under 54 U.S.C. 300101 *et seq.* and 2 CFR 200.

Each year Congress directs the NPS to use part of the annual appropriation from the Historic Preservation Fund (HPF) for the State grant program and the Tribal grant programs to assist States and Tribes in carrying out their statutory role in the HPP. Through competitive grant programs, Congress also directs NPS to provide financial assistance to a variety of eligible grant recipients to support the broad cultural resource mandates of the National Historic Preservation Act and for other purposes.

The information from this collection is required to evaluate if State, Tribal, and local governments meet minimum standards and requirements for participation in the HPP; and to meet program specific requirements as well as government- wide requirements for Federal grant programs.

The NPS uses the information collected to ensure compliance with the National Historic Preservation Act, as well as government-wide grant requirements issued and implemented through 43 CFR part 12 and 2 CFR 200.

Title of Collection: Procedures for State, Tribal, and Local Government Historic Preservation Programs.

OMB Control Number: 1024–0038.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: State, Tribal, local governments, and grant applicants or recipients who wish to participate formally in the National Historic Preservation Program and/or who wish to apply for Historic Preservation Fund grant assistance.

Total Estimated Number of Annual Respondents: 2,229.

Total Estimated Number of Annual Responses: 43,108.

Estimated Completion Time per Response: Varies from .25 hours to 166 hours depending on activity.

Total Estimated Number of Annual Burden Hours: 40,761.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion, depending on the grant program.

Total Estimated Annual Non-hour Burden Cost: None.

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.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2020–27578 Filed 12–29–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#-31293; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before December 12, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by January 14, 2021.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before December 12, 2020. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

ARKANSAS

Nevada County

Willow Oak Acres Horse Barn, 2073 US 371 West, Prescott, SG100006043

Washington County

Morrow Farmstead, 16995 Hale Mountain Rd., Morrow, SG100006044

CONNECTICUT

Fairfield County

St. Mark's Episcopal Church, 111 Oenoke Ridge, New Canaan, SG100006054

GEORGIA

Twiggs County

Pines, The, 213 Shannon Dr., Jeffersonville, SG100006053

OHIO

Clark County

Springfield Downtown Historic District, Roughly bounded by Columbia, Fountain, Main, and Limestone Streets, Springfield, SG100006049

Stark County

McKinley Park Apartments, (Apartment Buildings in Ohio Urban Centers, 1870–1970 MPS), 510 High Ave. SW, Canton, MP100006041

OKLAHOMA

Tulsa County

Greenwood Historic District, Bounded by Midland Valley RR North to Pine Street, Frisco RR, 1st St. just off of Archer St., west side of Lansing Street, Cincinnati Ave., beginning at Archer Street extending to Elgin Ave., Tulsa, SG100006059

OREGON

Multnomah County

Montgomery Ward & Company (Boundary Decrease), 2741 NW Vaughn St., Portland, BC100006040

SOUTH CAROLINA

Charleston County

Charleston Naval Hospital, 3600 Rivers Ave., North Charleston, SG100006050

Richland County

Columbia Commercial Historic District (Boundary Increase II), 1545 Sumter St., 1611, 1800, 1801, 1813 Main St., 1209 Blanding St., Columbia, BC100006058

TEXAS

Harris County

Mechanical Laboratory and Power House, 6100 Main St., Houston, SG100006045

Jefferson County

Port Arthur Downtown Historic District, Roughly bounded by West Reverend Doctor Ransom Howard St., Fort Worth Ave., Lakeshore Dr., and Waco St., Port Arthur, SG100006046

Potter County

St. Anthony's Hospital, 200 NW 7th Ave., Amarillo, SG100006047

Additional documentation has been received for the following resources:

IDAHO

Ada County

Jackson, Orville and Floy, House (Additional Documentation), (Tourtellotte and Hummel Architecture TR), 127 South Eagle Rd., Eagle, AD82000213

OREGON

Multnomah County

Alphabet Historic District (Additional Documentation), Roughly bounded by NW Lovejoy St., NW, Marshall St., NW, 17th Ave., W. Burnside St., and NW 24th Ave., Portland, AD00001293

Irvington Historic District (Additional Documentation), Roughly bounded by NE Fremont St., NE 27th Ave., NE Broadway St., NE 7th Ave., Portland, AD10000850

SOUTH CAROLINA

Richland County

Columbia Commercial Historic District (Additional Documentation), Portions of Main, Blanding, Taylor & Sumter Sts., Columbia, AD100000689

Nominations submitted by Federal Preservation Officers:

The State Historic Preservation Officer reviewed the following nomination and responded to the Federal Preservation Officer within 45 days of receipt of the nomination and supports listing the property in the National Register of Historic Places.

MONTANA

Broadwater County

Spokane Hill Airway Beacon, (Sentinels of the Airways: Montana's Airway Beacon System, 1934–1979 MPS), Approximately 5 mi. northwest of Winston, Winston vicinity, MP100006048

Authority: Section 60.13 of 36 CFR part 60.

Dated: December 16, 2020.

Sherry Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2020–28843 Filed 12–29–20; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–652 and 731–TA–1524–1526 (Final)]

Silicon Metal From Bosnia and Herzegovina, Iceland, Kazakhstan, and Malaysia; Scheduling of the Final Phase of Countervailing Duty and Anti-Dumping Duty Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping and countervailing duty investigation Nos. 701–TA–652 and 731–TA–1524–1526 (Final) pursuant to the Tariff Act of 1930 (''the Act'') to determine whether

an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of silicon metal from Bosnia and Herzegovina and Iceland, provided for in subheadings 2804.69.10 and 2804.69.50 of the Harmonized Tariff Schedule of the United States, preliminarily determined by the Department of Commerce (''Commerce'') to be sold at less than fair value, imports of silicon metal from Kazakhstan, preliminarily determined by Commerce to be subsidized by the government of Kazakhstan, and imports of silicon metal from Malaysia, alleged to be sold at less than fair value.

DATES: December 7, 2020.

FOR FURTHER INFORMATION CONTACT: Lawrence Jones ((202) 205–3358), Nitin Joshi ((202–708–1669), U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Scope.—For purposes of these investigations, Commerce has defined the subject merchandise as all forms and sizes of silicon metal, including silicon metal powder. Silicon metal contains at least 85.00 percent but less than 99.99 percent silicon, and less than 4.00 percent iron, by actual weight. Semiconductor grade silicon (merchandise containing at least 99.99 percent silicon by actual weight and classifiable under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2804.61.00) is excluded from the scope of this investigation.

Silicon metal is currently classifiable under subheadings 2804.69.10 and 2804.69.50 of the HTSUS. While the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope remains dispositive.

Background.—The final phase of these investigations is being scheduled pursuant to sections 705(b) and 731(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b) and 1673d(b)), as a result of affirmative preliminary determinations by Commerce that imports of silicon metal from Kazakhstan are being subsidized by the government of Kazakhstan, and that imports of silicon metal from Bosnia and Herzegovina and Iceland are being sold in the United States at less than fair value within the meaning of § 733 of the Act (19 U.S.C. 1673b). These investigations were requested in petitions filed on June 30, 2020, by Globe Specialty Metals, Inc., Beverly, Ohio, and Mississippi Silicon LLC, Burnsville, Mississippi.

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on February 9, 2021, and a public version will be issued thereafter, pursuant to § 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on February 22, 2021. Information about the place and form of the hearing, including about how to participate in and/or view the hearing, will be posted on the Commission's website at *https://www.usitc.gov/calendarpad/calendar.html.* Interested parties should check the Commission's website periodically for updates. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before February 17, 2021. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on February 19, 2021. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.23 of the Commission's rules; the deadline for filing is February 16, 2021. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.25 of the Commission's rules. The deadline for filing posthearing briefs is March 1, 2021. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before March 1, 2021. On March 18, 2021, the

Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 22, 2021, but such final comments must not contain new factual information and must otherwise comply with § 207.30 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

Additional written submissions to the Commission, including requests pursuant to § 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 22, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–28818 Filed 12–29–20; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1132 (Modification)]

Certain Motorized Vehicles and Components Thereof; Notice of Commission Determination To Modify Remedial Orders; Termination of Modification Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to adopt with modification the findings of the presiding Administrative Law Judge (''ALJ'') in the Recommended Determination (''RD'') and to modify the limited exclusion order (''LEO'') and cease and desist orders (''CDOs'') (collectively, ''the remedial orders'') issued in this investigation to exempt the respondents' redesigned product from the scope of the remedial orders. The modification proceeding is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–4716. 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.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.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: The Commission instituted this investigation on September 13, 2018, based on a complaint, as amended, filed by FCA US LLC of Auburn Hills, Michigan (''Complainant''). *See* 83 FR 46517 (Sept. 13, 2018). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337) (''section 337'') based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain motorized vehicles and components thereof by reason of: (1) Infringement of U.S. Trademark Registration Nos. 4,272,873; 2,862,487; 2,161,779; 2,794,553; and 4,043,984 (collectively, ''the Asserted Trademarks''); (2) trademark dilution and unfair competition in violating the complainant's common law trademark rights; and (3) trade dress infringement. *See id.* The notice of investigation names Mahindra & Mahindra Ltd. of Mumbai, India and Mahindra Automotive North America, Inc. of Auburn Hills, Michigan (collectively, ''Respondents'') as respondents in this investigation. *See id.* The Office of Unfair Import Investigations is also a party to this investigation. *See id.*

On November 8, 2019, the ALJ issued a final initial determination (''FID'') finding a violation of section 337. Specifically, the FID determined that Respondents' Roxor vehicle (2018–2019 model) infringes FCA's asserted trade dress but not its Asserted Trademarks. The FID also determined that Complainant did not establish trademark dilution.

On June 11, 2020, the Commission determined to affirm the FID's determination of a violation of section 337. *See* 85 FR 36613–14 (June 17, 2020). The Commission issued an LEO barring entry of articles that infringe the asserted trade dress and CDOs against both Respondents. The Commission declined to adjudicate Respondents' proposed redesigned vehicles and required Respondents to obtain a ruling (via an advisory opinion or a modification proceeding) from the Commission prior to any importation of redesigned vehicles or components thereof.

On June 18, 2020, Respondents filed a petition for an expedited modification proceeding. On July 20, 2020, the Commission determined to institute a modification proceeding under section 337(k) (19 U.S.C. 1337(k)) and Commission Rule 210.76 (19 CFR 210.76) to adjudicate trade dress infringement with respect to respondents' redesigned vehicle (''the Post-2020 ROXOR''). *See* 85 FR 44923–24 (July 24, 2020).

On October 20, 2020, the ALJ issued his RD finding no trade dress infringement by Respondents' Post-2020 ROXOR vehicle. On October 30, 2020, Complainant filed comments on the RD requesting that the Commission decline to adopt the RD's findings. On November 6, 2020, Respondents and the Commission's Investigative Attorney filed responses in opposition to Complainant's comments.

Having reviewed the record of the underlying violation investigation, as well as the record of the modification proceeding, including the RD and the parties' comments and responses thereto, the Commission has determined to modify the LEO and CDOs to include an explicit exemption with respect to Respondents' Post-2020 ROXOR vehicle adjudicated in this modification proceeding. As explained in the Commission Opinion issued concurrently herewith, the Commission adopts the RD's findings with modification and affirms the RD's conclusion that the Post-2020 ROXOR vehicle does not infringe Complainant's

asserted trade dress. The modification proceeding is terminated.

The Commission's vote on this determination took place on December 22, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: December 22, 2020.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2020–28822 Filed 12–29–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of the Extended Benefit (EB) Program for Alaska, Connecticut, Kansas, Massachusetts, New Hampshire, Ohio, Oregon, South Carolina, and Washington

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: This notice announces a change in benefit period eligibility under the EB program for Alaska, Connecticut, Kansas, Massachusetts, New Hampshire, Ohio, Oregon, South Carolina, and Washington.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202) 693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov.*

SUPPLEMENTARY INFORMATION: The following changes have occurred since the publication of the last notice regarding the States' EB status:

• Based on the data released by the Bureau of Labor Statistics on November 20, 2020, the seasonally-adjusted total unemployment rate for Alaska, Connecticut, Ohio, Oregon and Washington fell below the 8.0% threshold necessary to remain ''on'' a high unemployment period in EB, and starting December 13, 2020, the maximum potential entitlement for claimants in these states in the EB program will decrease from 20 weeks to 13 weeks.

• Based on the data released by the Bureau of Labor Statistics on November 20, 2020, the seasonally-adjusted TUR for Kansas and South Carolina fell below the 6.5% threshold necessary to remain ''on'' in EB. The payable period in EB will end on December 12, 2020.

• It has been determined that Massachusetts' Unemployment Compensation law provides for the temporary adoption of the optional TUR trigger during periods of 100 percent Federal financing of EB, and Public Law 116–127 authorized 100 percent Federal funding through December 31, 2020. As such, based on data released by the Bureau of Labor Statistics on June 19, 2020, the seasonally-adjusted total unemployment rate for Massachusetts rose above the 8.0 percent threshold to trigger ''on'' to a high unemployment period in EB. Therefore a payable period for Massachusetts under the high unemployment period is retroactive to July 5, 2020, and eligibility for claimants has been extended from up to 13 weeks of potential duration to up to 20 weeks of potential duration in the EB program.

• Based on the data submitted by New Hampshire for the week ending November 14, 2020, New Hampshire's 13-week insured unemployment rate (IUR) was 4.77 percent, falling below the 5.00 percent threshold necessary to remain ''on'' EB. Therefore, the EB period for New Hampshire ends on December 5, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

The trigger notice covering state eligibility for the EB program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.as.*

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13 (c) (1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

Signed in Washington, DC.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–28793 Filed 12–29–20; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Change in Status of the Extended Benefit (EB) Program for Delaware, Minnesota, Mississippi, and Vermont

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

This notice announces a change in benefit period eligibility under the EB program for Delaware, Minnesota, Mississippi, and Vermont.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance Room S–4524, Attn: Thomas Stengle, 200 Constitution Avenue NW, Washington, DC 20210, telephone number (202) 693–2991 (this is not a toll-free number) or by email: *Stengle.Thomas@dol.gov.*

SUPPLEMENTARY INFORMATION: The following changes have occurred since the publication of the last notice regarding the States' EB status:

• Delaware completed the mandatory 13-week ''on'' period for a High Unemployment Period (HUP) stipulated by 20 CFR 615.11 on December 19, 2020, and based on the most recent data released by the Bureau of Labor Statistics, the state no longer meets the criteria for the HUP. As such, beginning December 20, 2020, the maximum potential entitlement for claimants in the EB program will decrease from 20 weeks to 13 weeks.

• Based on the data submitted by Minnesota for the week ending November 28, 2020, Minnesota's 13-week insured unemployment rate (IUR) was 4.80 percent, falling below the 5.0 percent IUR threshold necessary to remain ''on'' EB. Therefore, the EB period for Minnesota ends on December 19, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

• Based on the data submitted by Mississippi for the week ending November 28, 2020, Mississippi's 13-week IUR was 4.70 percent, falling below the 5.0 IUR percent threshold necessary to remain ''on'' EB. Therefore, the EB period for Mississippi ends on

December 19, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

• Based on the data submitted by Vermont for the week ending November 28, 2020, Vermont's 13-week IUR was 4.90 percent, falling below the 5.0 percent IUR threshold necessary to remain ''on'' EB. Therefore, the EB period for Vermont ends on December 19, 2020. The state will remain in an ''off'' period for a minimum of 13 weeks.

The trigger notice covering state eligibility for the EB program can be found at: *http://ows.doleta.gov/unemploy/claims_arch.as*

Information for Claimants

The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the U.S. Department of Labor. In the case of a state beginning an EB period, the State Workforce Agency will furnish a written notice of potential entitlement to each individual who has exhausted all rights to regular benefits and is potentially eligible for EB (20 CFR 615.13(c)(1)).

Persons who believe they may be entitled to EB, or who wish to inquire about their rights under the program, should contact their State Workforce Agency.

Signed in Washington, DC.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2020–28794 Filed 12–29–20; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Agency Information Collection Activities; Comment Request; Representative Payee Report, Representative Payee Report (Short Form), and Physician's/Medical Officer's Statement

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is soliciting comments concerning a proposed extension of the information collection request (ICR) titled, ''Representative Payee Report, Representative Payee Report (Short Form), and Physician's/Medical Officer's Statement.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by March 1, 2021.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free by contacting Anjanette Suggs by telephone at (202) 354–9660 (this is not a toll-free number) or by email at *suggs.anjanette@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Office of Workers' Compensation Program, Division of Coal Mine Workers' Compensation, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; by email: *suggs.anjanette@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Anjanette Suggs by telephone at (202) 354–9660 (this is not a toll-free number) or by email at *suggs.anjanette@dol.gov.*

SUPPLEMENTARY INFORMATION: The DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the OMB for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

Benefits due to a DOL Black Lung beneficiary are paid to a representative payee on behalf of the beneficiary when he or she is unable to manage the benefits due to incapability or incompetence or because the beneficiary is a minor. The Representative Payee Report (Form CM–623) and Representative Payee Report Short Form (Form CM–623S) are used to ensure that benefits paid to a representative payee are used for the beneficiary's well-being. The Physician's/Medical Officer's Statement (Form CM–787) is used to determine the beneficiary's capability to manage monthly black lung benefits. The Black Lung Benefits Act, 30 U.S.C. 922, authorizes this information collection.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention 1240–0020.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. The DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

The DOL is particularly interested in comments that:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OWCP.

Type of Review: Extension.

Title of Collection: Representative Payee Report, Representative Payee Report (Short Form), and Physician's/Medical Officer's Statement.

Form: Representative Payee Report (CM–623), Representative Payee Report (Short Form) (CM–623S) and

Physician's/Medical Officer's Statement (CM–787).

OMB Control Number: 1240–0020.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1,325.

Frequency: Annual.

Total Estimated Annual Responses: 1,325.

Estimated Average Time per Response: Varies.

Estimated Total Annual Burden Hours: 679 hours.

Total Estimated Annual Other Cost Burden: $0.

Authority: 44 U.S.C. 3506(c)(2)(A).

Anjanette Suggs,

Agency Clearance Officer.

[FR Doc. 2020–28897 Filed 12–29–20; 8:45 am]

BILLING CODE 4510–CK–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Application for Refund of Retirement Deductions, SF 3106 and Current/Former Spouse(s) Notification of Application for Refund of Retirement Deductions Under FERS, SF 3106A

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a revised information collection request (ICR), Application for Refund of Retirement Deductions, Federal Employees Retirement System, SF 3106 and Current/Former Spouse's Notification of Application for Refund of Retirement Deductions under FERS, SF 3106A.

DATES: Comments are encouraged and will be accepted until March 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

—*Federal Rulemaking Portal:http://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this 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: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection (OMB No. 3206–0121). The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of 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.

Standard Form 3106, Application for Refund of Retirement Deductions under FERS is used by former Federal employees under FERS, to apply for a refund of retirement deductions withheld during Federal employment, plus any interest provided by law. Standard Form 3106A, Current/Former Spouse(s) Notification of Application for Refund of Retirement Deductions under FERS, is used by refund applicants to notify their current/former spouse(s) that they are applying for a refund of retirement deductions, which is required by law.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Application for Refund of Retirement Deductions (FERS) and Current/Former Spouse's Notification of Application for Refund of Retirement Deductions under FERS.

OMB Number: 3206–0170.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: SF 3106 = 8,000; SF 3106A = 6,400.

Estimated Time per Respondent: SF 3106 = 30 minutes; SF 3106A = 5 minutes.

Total Burden Hours: 4,533.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–28900 Filed 12–29–20; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0121, Application for Deferred Retirement (for Persons Separated on or After October 1, 1956), OPM 1496A

AGENCY: Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a revised information collection request (ICR), Application for Deferred Retirement (for Persons Separated on or after October 1, 1956), OPM 1496A.

DATES: Comments are encouraged and will be accepted until March 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

—*Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this 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: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or

sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 606–4808.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection (OMB No. 3206–0121). The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of 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.

OPM Form 1496A is used by eligible former Federal employees to apply for a deferred Civil Service annuity.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Application for Deferred Retirement (for Persons Separated on or After October 1, 1956).

OMB Number: 3206–0121.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 2,800.

Estimated Time per Respondent: 1 hour.

Total Burden Hours: 2,800.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2020–28899 Filed 12–29–20; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90775; File No. SR–NYSE–2020–86]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change for a New Rule 5.2(j)(8)

December 22, 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 18, 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 (1) a new Rule 5.2(j)(8) establishing ''generic'' listing standards for Exchange-Traded Products that are permitted to operate in reliance on Rule 6c–11 under the Investment Company Act of 1940, and (2) a new Rule 7.18(d)(2) that would govern trading halts for listed Exchange-Traded Products. 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

The Exchange proposes a new Rule 5.2(j)(8) establishing ''generic'' listing standards for Exchange-Traded Products (''ETPs'') [4] that are permitted to operate in reliance on Rule 6c–11 under the Investment Company Act of 1940 (the ''1940 Act''). The Exchange also proposes a new Rule 7.18(d)(2) that would govern trading halts for listed ETPs.

Background

Currently, the Exchange trades securities, including ETPs, on its Pillar trading platform on an unlisted trading privileges (''UTP'') basis, subject to Pillar Platform Rules 1P–13P.[5] ETPs traded on a UTP basis on the Exchange are not assigned to a Designated Market Maker (''DMM'') but are available for Floor brokers to trade in Floor-based crossing transactions.[6]

The Exchange's rules permit it to list ETPs under Rules 5P and 8P. Specifically, Rules 5P (Securities Traded) and 8P (Trading of Certain Exchange-Traded Products) provide for the listing of certain ETPs on the Exchange that (1) meet the applicable requirements set forth in those rules, and (2) do not have any component NMS Stock that is listed on the Exchange or is based on, or represents an interest in, an underlying index or reference asset that includes an NMS Stock listed on the Exchange. ETPs listed under Rules 5P and 8P would be ''Tape A'' listings and traded pursuant to the rules applicable to NYSE-listed securities. Accordingly, once an ETP is listed, it would be assigned to a DMM pursuant to Rule 103B and the assigned

[4] Rule 1.1(k) defines ''Exchange Traded Product'' as a security that meets the definition of ''derivative securities product'' in Rule 19b–4(e) under the Act. ETPs include, for example, securities listed and traded on the Exchange pursuant to the following Exchange rules: Rule 5.2(j)(3) (Investment Company Units); Rule 5.2(j)(5) (Equity Gold Shares); Rule 5.2(j)(6) (Index-Linked Securities); Rule 8.100 (Portfolio Depositary Receipts); Rule 8.200 (Trust Issued Receipts); Rule 8.201 (Commodity-Based Trust Shares); Rule 8.202 (Currency Trust Shares); Rule 8.203 (Commodity Index Trust Shares); Rule 8.204 (Commodity Futures Trust Shares); Rule 8.600 (Managed Fund Shares); and Rule 8.700 (Managed Trust Securities).

[5] ''UTP Security'' is defined as a security that is listed on a national securities exchange other than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges. *See* Rule 1.1.

[6] *See* Securities Exchange Act Release No. 82945 (March 26, 2018), 83 FR 13553, 13568 (March 29, 2018) (SR–NYSE–2017–36) (approving Exchange rules to trade securities on a UTP basis on the Pillar trading platform).

DMM would have obligations vis-à-vis such securities as specified in Rule 104, including facilitating the opening, reopening, and closing of such securities.[7]

The Commission recently adopted Rule 6c–11 under the 1940 Act to permit ETPs that are exchange traded funds (''ETF'') shares (''Exchange-Traded Fund Shares'') and that satisfy certain conditions to operate without obtaining an exemptive order from the Commission under the 1940 Act.[8] The regulatory framework provided in Rule 6c–11 streamlines procedures and reduces the costs and time frames associated with bringing ETFs to market, thereby enhancing competition among ETF issuers and reducing costs for investors.[9]

The Exchange proposes new Rule 5.2(j)(8) to establish generic listing standards allowing the Exchange to list and trade Exchange-Traded Fund Shares in a manner consistent with Rule 6c–11. Proposed Rule 5.2(j)(8) is based on NYSE Arca, Inc. (''NYSE Arca'') Rule 5.2–E(j)(8).[10] In addition, the Exchange proposes a new Rule 7.18(d)(2) based on NYSE Arca Rule 7.18–E(d)(2) that would govern trading halts for listed ETPs.

Proposed Rule Change

The Exchange proposes standards that would pertain to Exchange-Traded Fund Shares to qualify for listing and trading pursuant to Rule 19b–4(e), as follows.

Proposed Rule 5.2(j)(8)(a) would provide that the Exchange would consider for trading, whether by listing or on a UTP basis, Exchange-Traded Fund Shares that meet the criteria of proposed Rule 5.2(j)(8). Proposed Rule 5.2(j)(8)(a) is based on NYSE Arca Rule 5.2–E(j)(8)(a) without any differences.

Proposed Rule 5.2(j)(8)(b) would specify applicability of proposed Rule 5.2(j)(8) and would provide that it is applicable only to Exchange-Traded Fund Shares. Proposed Rule 5.2(j)(8)(b) would further provide that, except to the extent inconsistent with proposed Rule 5.2(j)(8) or unless the context otherwise requires, Exchange rules would be applicable to the trading on the Exchange of such securities and that Exchange-Traded Fund Shares would be included within the definition of NMS Stock as defined in Rule 1.1. Proposed Rule 5.2(j)(8)(b) is based on NYSE Arca Rule 5.2–E(j)(8)(b) without any differences.

Proposed Rule 5.2(j)(8)(c) would set forth the proposed rule's applicable definitions, which are based on NYSE Arca Rule 5.2–E(j)(8)(c) without any differences, as follows:

- Proposed Rule 5.2(j)(8)(c)(1) would define the term ''1940 Act'' to mean the Investment Company Act of 1940, as amended.
- Proposed Rule 5.2(j)(8)(c)(2) would define the term ''Exchange-Traded Fund'' as having the same meaning as the term ''exchange-traded fund'' as defined in Rule 6c–11(a)(1) under the 1940 Act.[11]
- Proposed Rule 5.2(j)(8)(c)(3) would define the term ''Exchange-Traded Fund Share'' to mean a share of stock issued by an Exchange-Traded Fund.[12]
- Proposed Rule 5.2(j)(8)(c)(4) would define the term ''Reporting Authority'' to mean with respect to a particular series of Exchange-Traded Fund Shares, the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Exchange-Traded Fund Shares (if the Exchange is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, any current index or portfolio value, the current value of the portfolio of any securities required to be deposited in connection with issuance of Exchange-Traded Fund Shares, the amount of any dividend equivalent payment or cash distribution to holders of Exchange-Traded Fund Shares, net asset value, or other information relating to the issuance, redemption or trading of Exchange-Traded Fund Shares. A series of Exchange-Traded Fund Shares may have more than one Reporting Authority, each having different functions.

Proposed Rule 5.2(j)(8)(d) would specify the limitations on Exchange liability and relates to limitations of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions. Specifying such limitations of liability is standard in the Exchange's rules governing the listing of Exchange-Traded Products and the proposed rule text is substantively identical to Rules 5.2(j)(3)(D), 8.100(f), 8.201(f), 8.200(f), 8.202(f), 8.203(f), 8.204(g), 8.300(f), 8.400(f), 8.500(e), 8.600(e), and 8.700(g). Proposed Rule 5.2(j)(8)(d) is based on NYSE Arca Rule 5.2–E(j)(8)(d) without any differences.

Proposed Rule 5.2(j)(8)(e) would provide that the Exchange may approve Exchange-Traded Fund Shares for listing and/or trading (including on a UTP basis) pursuant to Rule 19b–4(e) under the Exchange Act provided that each series of Exchange-Traded Fund Shares must be eligible to operate in reliance on Rule 6c–11 under the 1940 Act and must satisfy the requirements of proposed Rule 5.2(j)(8)(as described below) upon initial listing and, except for subparagraph (1)(A) of proposed Rule 5.2(j)(8)(e), on a continuing basis. As further proposed, an issuer of such securities must notify the Exchange of any failure to comply with such requirements. Proposed Rule 5.2(j)(8)(e) is based on NYSE Arca Rule 5.2–E(j)(8)(e) without any differences.

Proposed Rule 5.2(j)(8)(e)(1) sets forth the initial and continued listing standards for Exchange-Traded Fund Shares to be listed on the NYSE and would provide that Exchange-Traded Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c–11(c) on an initial and continued listing basis. Proposed Rule 5.2(j)(8)(e)(1) is based on NYSE Arca

[7] *See* Securities Exchange Act Release No. 87056 (September 23, 2019), 84 FR 51205 (September 27, 2019) (SR–NYSE–2019–34) (order approving amendments to Rule 104 to specify DMM requirements for ETPs listed on the Exchange pursuant to Rules 5P and 8P).

[8] *See* Release Nos. 33–10695; IC–33646; File No. S7–15–18 (ETFs) (September 25, 2019), 84 FR 57162 (October 24, 2019) (the ''Rule 6c–11 Release'').

[9] The Commission observed that the ''rule will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs.'' *See* Rule 6c–11 Release, at 57163. The Commission also stated the following regarding the rule's impact: ''We believe rule 6c–11 will establish a regulatory framework that: (1) Reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market.'' *Id.* at 57204.

[10] *See* Securities Exchange Act Release No. 88625 (April 13, 2020), 85 FR 21479 (April 17, 2020) (SR–NYSEArca–2019–81) (Notice of filing of Amendment No. 2 and Order granting accelerated approval of proposed rule change, as modified by Amendment No. 2, to adopt NYSE Arca Rule 5.2–E(j)(8) establishing generic listing standards for Exchange-Traded Fund Shares).

[11] Rule 6c–11(a)(1) defines ''exchange-traded fund'' as a registered open-end management company: (i) That issues (and redeems) creation units to (and from) authorized participants in exchange for a basket and a cash balancing amount if any; and (ii) Whose shares are listed on a national securities exchange and traded at market-determined prices. The terms ''authorized participant,'' ''basket'' and ''creation unit'' are defined in Rule 6c–11(a).

[12] The definition of Exchange-Traded Fund Shares is the same as the definition of ''exchange-traded fund shares'' in Rule 6c–11(a) under the 1940 Act.

Rule 5.2–E(j)(8)(e)(1) without any differences.

Proposed Rule 5.2(j)(8)(e)(1)(A) provides that, for each series of Exchange-Traded Fund Shares, the Exchange will establish a minimum number of Exchange-Traded Fund Shares required to be outstanding at the time of commencement of trading on the Exchange. Proposed Rule 5.2(j)(8)(e)(1)(A) is based on NYSE Arca Rule 5.2–E(j)(8)(e)(1)(A) without any differences.

Proposed Rule 5.2(j)(8)(e)(2) would set forth the standards for suspension of trading or removal of Exchange-Traded Fund Shares from listing on the Exchange and would provide that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares under any of the following circumstances:

(A) If the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c–11;

(B) if the investment company no longer complies with the requirements set forth in Rule 5.2(j)(8);

(C) if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares; or

(D) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable (*see* proposed Rule 5.2(j)(8)(e)(2)(D)).

Proposed Rule 5.2(j)(8)(e)(2) is based on NYSE Arca Rule 5.2–E(j)(8)(e)(2) without any differences.

Proposed Rule 5.2(j)(8)(f) would provide that transactions in Exchange-Traded Fund Shares would occur during the trading hours specified in Rule 7.34(a) for Exchange-listed securities. Proposed Rule 5.2(j)(8)(f) is based on NYSE Arca Rule 5.2–E(j)(8)(f) with a difference to cross reference the Exchange's rule governing the hours of trading. In addition, unlike NYSE Arca, Exchange-listed securities trade on the Exchange only during Core Trading Hours.

Proposed Rule 5.2(j)(8)(g) would provide that the Exchange would implement and maintain written surveillance procedures for Exchange-Traded Fund Shares. This proposed rule is based, for example, on Commentary .01(f) to Rule 5.2(j)(3) (for Investment Company Units); Commentary .03 to Rule 8.600 (for Managed Fund Shares); and Commentary .04 to Rule 8.700 (for Managed Trust Securities). Proposed Rule 5.2(j)(8)(g) is based on NYSE Arca Rule 5.2–E(j)(8)(g) without any differences.

Proposed Rule 5.2(j)(8)(h) would provide that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange would require that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing. Proposed Rule 5.2(j)(8)(h) is based on NYSE Arca Rule 5.2–E(j)(8)(h) without any differences.

Proposed Commentary .01 to Rule 5.2(j)(8) would provide that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered approved for listing solely under Rule 5.2(j)(8) if such security is eligible to operate in reliance on Rule 6c–11 under the 1940 Act. Once so approved for listing, the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2(j)(8). Any requirements for listing as specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or an approval order or notice of effectiveness of a separate proposed rule change that differ from the requirements of Rule 5.2(j)(8) will no longer be applicable to such security. Commentary .01 to proposed Rule 5.2(j)(8) is based on Commentary .01 to NYSE Arca Rule 5.2–E(j)(8) without any differences.[13]

The Exchange believes that proposed Commentary .01 to Rule 5.2(j)(8) harmonizes the Exchange's listing standards for all ETFs that will be listed on the Exchange, even if they were previously listed pursuant to different continued listing requirements. Specifically, as noted in the Rule 6c–11 Release, one year following the effective date of Rule 6c–11, the Commission will be rescinding those portions of its prior ETF exemptive orders under the 1940 Act that grant relief related to the formation and operation of certain ETFs. The Exchange believes that once this occurs, all ETFs will be subject to the same requirements under Rule 6c–11 and will no longer be subject to any differing requirements that may have been set forth in the exemptive orders issued before the effective date of Rule 6c–11.

Proposed Commentary .02 to Rule 5.2(j)(8) is based on Commentary .02 to NYSE Arca Rule 5.2–E(j)(8)(a) without any differences, and would establish the following requirements that each series of Exchange-Traded Fund Shares based on an index would be required to meet on an initial and continued listing basis:

(1) If the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a ''fire wall'' around the personnel who have access to information concerning changes and adjustments to the index and the index will be calculated by a third party who is not a broker-dealer or fund adviser, and

(2) Any advisory committee, supervisory board, or similar entity that advises a Reporting Authority or that makes decisions on the index composition, methodology and related matters, must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index.[14]

In addition, with respect to series of Exchange-Traded Fund Shares that are actively managed, if the investment adviser to the investment company issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such portfolio. Personnel who make decisions on the portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable portfolio. The Reporting Authority that provides information relating to the portfolio of a series of Exchange-Traded Fund Shares must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of such portfolio.[15]

The Exchange notes that Exchange-Traded Fund Shares will be subject to all Exchange rules applicable to equities trading. With respect to Exchange-Traded Fund Shares, all obligations relating to product description and prospectus delivery requirements will continue to apply in accordance with

[13] There are currently no securities listed on the Exchange that would be eligible for approval under proposed Commentary .01 to Rule 5.2(j)(8).

[14] *See* proposed Commentary .02(a) to Rule 5.2(j)(8)). Proposed Commentary .02(a) is based on Commentary .01(b)(1) to Rule 5.2(j)(3) and Commentary .02(b)(1) and (b)(3) to Rule 5.2(j)(3).

[15] *See* proposed Commentary .02(b) to Rule 5.2(j)(8)). Proposed Commentary .02(b) is based in part on Commentary .06 to Rule 8.600.

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, which are not changing as a result of Rule 6c–11 under the 1940 Act.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.[16] Trading in Exchange-Traded Fund Shares will be halted if the circuit breaker parameters in Rule 7.12 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 Exchange-Traded Fund Shares inadvisable. These may include: (1) The extent to which certain information about the Exchange-Traded Fund Shares that is required to be disclosed under Rule 6c–11(c) of the 1940 Act is not being made available, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

The Exchange proposes a new Rule 7.18(d)(2) modeled on NYSE Arca Rule 7.18–E(d)(2) that would govern trading halts for listed ETPs (which would include Exchange-Traded Fund Shares). Proposed Rule 7.18(d)(2) would provide that, with respect to an ETP listed on the Exchange for which a Net Asset Value (''NAV'') (and in the case of Managed Fund Shares under NYSE Rule 8.600 and Managed Trust Securities under NYSE Rule 8.700, a Disclosed Portfolio) is disseminated, if the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio) is not being disseminated to all market participants at the same time, it will halt trading in the affected Exchange Traded Product on the NYSE until such time as the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio, as applicable) is available to all market participants.

In addition, the Exchange may halt trading in ETPs if there is an interruption or disruption in the dissemination of an underlying index value, if applicable, if there are major interruptions in securities trading in U.S. or global markets, or in the presence of other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market.

Minimum Price Variation

As provided in NYSE Rule 7.6, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE 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.

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange will implement and maintain written surveillance procedures to monitor trading in Exchange-Traded Fund Shares on the NYSE.[17] The Exchange or FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of the Intermarket Surveillance Group (''ISG'') or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to FINRA's TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board's Electronic Municipal Market Access (''EMMA'') system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted below, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A–3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.2.

Pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. As provided for under proposed Rule 5.2(j)(8)(e)(2), if the investment company or series of Exchange-Traded Fund Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5(m).

The Exchange will implement and maintain written surveillance procedures to monitor issuer compliance with the requirements of proposed Rule 5.2(j)(8) for Exchange-Traded Funds on the NYSE. For example, the Exchange will use intraday alerts that will notify Exchange personnel of trading activity throughout the day that may indicate that certain disclosures are not being made accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c–11 and the requirements of Rule 5.2(j)(8).

Proposed Rule 5.2(j)(8)(e)(2)(i) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that the investment company is no longer eligible to operate in reliance on Rule 6c–11. The Exchange's awareness for purposes of determining whether to suspend trading or delist a series of Exchange-Traded Fund Shares may result from notification by the investment company or by the Exchange learning, through its own efforts, of non-compliance with Rule 5.2(j)(8).[18] In addition, the Exchange will periodically review issuer websites to monitor whether disclosures are being made for a series of Exchange-Traded Fund Shares as required by Rule 6c–11(c)(1). The Exchange also notes that proposed Rule 5.2(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange that it is no longer eligible to operate in reliance on Rule 6c–11 or that it does not comply with the requirements of proposed Rule 5.2(j)(8). The Exchange will rely on the

[16] *See* NYSE Rule 7.12.

[17] The Exchange notes that the surveillance procedures applicable to Exchange-Traded Fund Shares on the NYSE would be substantially similar to those in place for Investment Company Units, Exchange-Traded Fund Shares, and Managed Fund Shares, among other product types, on NYSE Arca.

[18] As proposed, Rule 5.2(j)(8) does not impose index dissemination requirements, the Exchange does not plan to conduct a specific index dissemination surveillance for securities listed pursuant to such rule.

foregoing procedures to become aware of any non-compliance with the requirements of Rule 5.2(j)(8). Proposed Rule 5.2(j)(8)(e)(2)(i) is based on NYSE Arca Rule 5.2–E(j)(8)(e)(2)(i) without any differences.

Firewalls

Commentary .01(b)(1) and Commentary .02(b) to NYSE Rule 5.2(j)(3) (applicable to Investment Company Units) and Commentary .06 to NYSE Rule 8.600 (applicable to Managed Fund Shares) require the establishment and maintenance of a ''firewall'' around personnel who have access to information concerning changes to an index or the composition and/or changes to a fund's portfolio; and that specified persons or entities be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio.

In the Rule 6c–11 Release, the Commission, in the context of index-based ETFs with affiliated index providers (''self-indexed ETFs''), noted the federal securities law provisions that currently relate to implementation by funds of appropriate measures to deal with misuse of non-public information.[19] The Exchange notes that these federal securities law requirements will continue to apply to issues of index and actively-managed ETFs and the proposed generic listing rules for Exchange-Traded Fund Shares are consistent with such requirements.

The Exchange notes that proposed Commentary .02(a) to Rule 5.2(j)(8) provides that, with respect to series of Exchange-Traded Fund Shares that are based on an index, if the underlying index is maintained by a broker-dealer or fund adviser, the broker-dealer or fund adviser will erect and maintain a ''fire wall'' around the personnel who have access to information concerning changes and adjustments to the index and the index shall be calculated by a third party who is not a broker-dealer or fund advisor. In addition, proposed Commentary .02(b) to Rule 5.2(j)(8) provides that, with respect to series of Exchange-Traded Fund Shares that are actively managed if, the investment adviser to the Exchange-Traded Fund issuing Exchange-Traded Fund Shares is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such Exchange-Traded Fund portfolio. Personnel who make decisions on the applicable Exchange-Traded Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the applicable Exchange-Traded Fund portfolio. Proposed Commentary .02(a) to Rule 5.2(j)(8)(k) is based on Commentary .02(a) to NYSE Arca Rule 5.2–E(j)(8) without any differences.

As noted, proposed Rule is based on recently adopted NYSE Arca Rule 5.2–E(j)(8).[20] The Exchange believes that adopting the same generic standards for Exchange-Traded Fund Shares would facilitate efficient procedures for ETFs that are permitted to operate in reliance on Rule 6c–11. The Exchange further believes that the proposed rule is, like its NYSE Arca counterpart, fully consistent with, and will further, the Commission's goals in adopting Rule 6c–11.

For all of the reasons stated above, the proposal is therefore consistent with the requirements of the Act.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,[21] in general, and furthers the objectives of Sections 6(b)(5) of the Act,[22] 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

By facilitating efficient procedures for listing Exchange-Traded Fund Shares that are permitted to operate in reliance on Rule 6c–11, the generic listing rules in proposed Rule 5.2(j)(8) described above based on NYSE Arca Rule 5.2–E(j)(8) recently approved by the Commission are consistent with, and will further, the Commission's goals in adopting Rule 6c–11. In addition, by allowing Exchange-Traded Fund Shares to be listed and traded on the Exchange without a prior Commission approval order or notice of effectiveness pursuant to Section 19(b) of the Act, proposed Rule 5.2(j)(8) will significantly reduce the time frame and costs associated with bringing these securities to market, thereby promoting market competition among issuers of Exchange-Traded Fund Shares, to the benefit of the investing public. In addition, the proposed rule change would fulfill the intended objective of Rule 19b–4(e) under the Act by permitting Exchange-Traded Fund Shares that satisfy the proposed listing standards to be listed and traded without separate Commission approval.

Proposed Rule 5.2(j)(8)(d) would specify the limitations on Exchange liability and relates to limitation of the Exchange, the Reporting Authority, or any agent of the Exchange as a result of specified events and conditions. As provided in proposed Rule 5.2(j)(8)(e), the Exchange may approve Exchange-Traded Fund Shares for listing and trading on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on Rule 6c–11[23] under the 1940 Act and must satisfy the requirements of Rule 5.2(j)(8) on an initial listing and, except for subparagraph (1)(A) of Rule 5.2(j)(8)(e), a continuing basis. An issuer of such securities must notify the Exchange of any failure to comply with such requirements. These requirements will ensure that Exchange-listed Exchange-Traded Fund Shares continue to operate in a manner that fully complies with the portfolio transparency requirements of Rule 6c–11(c). As provided in proposed Rule 5.2(j)(8)(e)(1), Exchange-Traded

[19] *See* Rule 6c–11 Release at 57168–57169. *See also* 17 CFR 270.38a–1 (Rule 38a–1 under the 1940 Act) (requiring funds to adopt policies and procedures reasonably designed to prevent violation of federal securities laws); 17 CFR 270.17j-1(c)(1) (Rule 17j–1(c)(1) under the Investment Company Act) (requiring funds to adopt a code of ethics containing provisions designed to prevent certain fund personnel (''access persons'') from misusing information regarding fund transactions); section 204A of the Investment Advisers Act of 1940 (''Advisers Act'') (15 U.S.C. 80b–204A) (requiring an adviser to adopt policies and procedures that are reasonably designed, taking into account the nature of its business, to prevent the misuse of material, non-public information by the adviser or any associated person, in violation of the Advisers Act or the Exchange Act, or the rules or regulations thereunder); section 15(g) of the Exchange Act (15 U.S.C. 78o(f)) (requiring a registered broker or dealer to adopt policies and procedures reasonably designed, taking into account the nature of the broker's or dealer's business, to prevent the misuse of material, nonpublic information by the broker or dealer or any person associated with the broker or dealer, in violation of the Exchange Act or the rules or regulations thereunder).

[20] *See* note 10, *supra.*

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

[23] Rule 6c–11(c) sets forth certain conditions applicable to exchange-traded funds, including information required to be disclosed on the fund's website.

Fund Shares will be listed and traded on the Exchange subject to the requirement that the investment company issuing a series of Exchange-Traded Fund Shares is eligible to operate in reliance on the requirements of Rule 6c–11(c) under the 1940 Act on an initial and continued listing basis. As provided in proposed Rule 5.2(j)(8)(e)(2) (Suspension of trading or removal), the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5(m) of, a series of Exchange-Traded Fund Shares if the Exchange becomes aware that it is no longer eligible to operate in reliance on Rule 6c–11 or does not comply with the requirements set forth in Rule 5.2(j)(8); if, following the initial twelve-month period after commencement of trading on the Exchange of a series of Exchange-Traded Fund Shares, there are fewer than 50 beneficial holders of such series of Exchange-Traded Fund Shares; or if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

As provided in proposed Rule 5.2(j)(8)(g), the Exchange will implement and maintain written surveillance procedures for Exchange-Traded Fund Shares on the NYSE. The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules. Proposed Rule 5.2(j)(8)(h) provides that, upon termination of an investment company issuing Exchange-Traded Fund Shares, the Exchange requires that Exchange-Traded Fund Shares issued in connection with such entity be removed from Exchange listing.

Proposed Commentary .01 to Rule 5.2(j)(8) provides that a security that has previously been approved for listing on the Exchange pursuant to the generic listing requirements specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or pursuant to a proposed rule change approved or subject to a notice of effectiveness by the Commission, may be considered approved for listing solely under Rule 5.2(j)(8) if such security is eligible to operate in reliance on Rule 6c–11 under the 1940 Act. Once so approved for listing, the continued listing requirements applicable to such previously-listed security will be those specified in paragraph (e) of Rule 5.2(j)(8). Any requirements for listing as specified in Rule 5.2(j)(3) or Commentary .01 to Rule 8.600, or an approval order or notice of effectiveness of a separate proposed rule change that differ from the requirements of Rule 5.2(j)(8) will no longer be applicable to such security. The Exchange believes proposed Commentary .01 to Rule 5.2(j)(8) will streamline the listing process for such securities, consistent with the regulatory framework adopted in Rule 6c–11 under the 1940 Act.

Proposed Commentary .02 to Rule 5.2(j)(8) would provide requirements to be met on an initial and continued listing basis by series of Exchange-Traded Fund Shares that are based on an index or are actively managed regarding the erection and maintenance of a ''fire wall'' as well as implementation and maintenance of procedures designed to prevent the use and dissemination of material non-public information regarding the applicable index or portfolio. The Exchange believes the provisions of the proposed rule will address possible concerns regarding misuse of material non-public information regarding an index underlying a series of Exchange-Traded Fund Shares or the portfolio for a series of Exchange-Traded Fund Shares, as applicable.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and is consistent with the protection of investors and the public interest because the Exchange will have in place surveillance procedures that are adequate to properly monitor trading in the Exchange-Traded Fund Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. FINRA, on behalf of the Exchange, will communicate as needed regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components with other markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. In addition, the Exchange may obtain information regarding trading in Exchange-Traded Fund Shares and certain of their applicable underlying components from markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Additionally, FINRA, on behalf of the Exchange, is able to access, as needed, trade information for certain fixed income securities that may be held by a series of Exchange-Traded Fund Shares reported to FINRA's TRACE. FINRA also can access data obtained from the Municipal Securities Rulemaking Board's EMMA system relating to municipal bond trading activity for surveillance purposes in connection with trading in a series of Exchange-Traded Fund Shares, to the extent that a series of Exchange-Traded Fund Shares holds municipal securities. As noted above, the issuer of a series of Exchange-Traded Fund Shares will be required to comply with Rule 10A–3 under the Act for the initial and continued listing of Exchange-Traded Fund Shares, as provided under Rule 5.2.

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in a series of Exchange-Traded Fund Shares.[24] Trading in Exchange-Traded Fund Shares will be halted if the circuit breaker parameters in NYSE Rule 7.12 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 Exchange-Traded Fund Shares inadvisable. Proposed NYSE Rule 7.18(d)(2), which is based on NYSE Arca Rule 7.18–E(d)(2) without any differences, would permit the Exchange to halt trading in listed ETPs (which would include Exchange-Traded Fund Shares) for which an NAV (and in the case of Managed Fund Shares under NYSE Rule 8.600 and Managed Trust Securities under NYSE Rule 8.700, a Disclosed Portfolio) is disseminated when the Exchange becomes aware that the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio) is not being disseminated to all market participants at the same time until such time as the NAV (or in the case of Managed Fund Shares or Managed Trust Securities, the Disclosed Portfolio, as applicable) is available to all market participants.

The Exchange will obtain a representation from the issuer of a series of Exchange-Traded Fund Shares that the NAV per share of such series will be calculated daily and will be made available to all market participants at the same time. The Exchange will monitor for compliance with the continued listing requirements. If the Exchange-Traded Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Rule 5.5(m). The Exchange will utilize existing procedures to monitor issuer compliance with the requirements of proposed Rule 5.2(j)(8). 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 certain disclosures are not being made

[24] *See* NYSE Rule 7.12.

accurately or that other unusual conditions or circumstances are present that could be detrimental to the maintenance of a fair and orderly market. The Exchange will require periodic certification from the issuer of a series of Exchange-Traded Fund Shares that it is in compliance with Rule 6c–11 and the requirements of Rule 5.2(j)(8). In addition, the Exchange, on a periodic basis will review issues of Exchange-Traded Fund Shares listed on the Exchange for compliance with the requirements of Rule 6c–11(c)(1). Proposed Rule 5.2(j)(8)(e) would require an issuer of Exchange-Traded Fund Shares to notify the Exchange if it is no longer eligible to operate in reliance on Rule 6c–11 or that it does not comply with the requirements of proposed Rule 5.2(j)(8) (except for subparagraph (1)(A) of Rule 5.2(j)(8)(e)).

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,[25] 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, the Exchange believes that the proposed rule change would facilitate the listing and trading of Exchange-Traded Fund Shares and result in an efficient process surrounding the listing and trading of Exchange-Traded Fund Shares, which will enhance competition among market participants, to the benefit of investors and the marketplace. The Exchange also believes that the proposed change will reduce the time frame for bringing Exchange-Traded Fund Shares to market, thereby reducing the burdens on issuers and other market participants and promoting competition. In turn, the Exchange believes that the proposed change would make the process for listing Exchange-Traded Fund Shares more competitive by applying uniform listing standards to Exchange-Traded Fund Shares.

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.

[25] 15 U.S.C. 78f(b)(8).

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–2020–86 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–2020–86. 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–2020–86, and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28804 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90796; File No. SR–BX–2020–032]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Amend Options 4, Section 5, To Limit Short Term Options Series Intervals Between Strikes Which Are Available for Quoting and Trading on BX

December 23, 2020.

On November 6, 2020, Nasdaq BX, Inc. (''BX'' 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 Options 4, Section 5, ''Series of Options Contracts Open for Trading'' to seek to limit Short Term Options Series intervals between strikes which are available for quoting and trading on BX. The proposed rule change was published for comment in the **Federal Register** on November 16, 2020.[3]

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90384 (November 9, 2020), 85 FR 73113 (November 16, 2020). Comments on the proposed rule change can be found at *https://www.sec.gov/comments/sr-bx-2020-032/srbx2020032.htm.*

[4] 15 U.S.C. 78s(b)(2).

self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 31, 2020. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,[5] designates February 14, 2021, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–BX–2020–032).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28894 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90785]

Acknowledgement of Receipt of Notice of Registration as a National Securities Exchange Pursuant to Section 6(g) of the Securities Exchange Act of 1934 by the Minneapolis Grain Exchange, LLC

December 22, 2020.

Section 6(g) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] provides that an exchange that lists or trades security futures products may register as a national securities exchange solely for the purposes of trading security futures products by filing a written notice with the Securities and Exchange Commission (''Commission'') if: (1) The exchange is a board of trade, as that term is defined by the Commodity Exchange Act (''CEA''),[2] that has been designated a contract market by the Commodity Futures Trading Commission (''CFTC'') and such designation is not suspended by order of the CFTC; and (2) such exchange does not serve as a market place for transactions in securities other than security futures products or futures on exempted securities or groups or indexes of securities or options thereon that have been authorized under Section 2(a)(1)(C) of the CEA.[3] Rule 6a–4 under the Exchange Act[4] requires that such an exchange submit written notice of registration to the Commission on Form 1–N.[5] Under Exchange Act Section 6(g)(2)(B), an exchange's registration as a national securities exchange becomes effective contemporaneously with the submission of the written notice on Form 1–N.[6]

On December 11, 2020, the Minneapolis Grain Exchange, LLC (''MGEX'') filed a Form 1–N with the Commission.[7] Pursuant to Section 6(g)(3) of the Exchange Act,[8] the Commission hereby acknowledges receipt of the Form 1–N submitted by MGEX. Copies of the Form 1–N, including all exhibits, are available in the Commission's Public Reference Room.

For questions regarding this Release, please contact David Dimitrious, Senior Special Counsel, at (202) 551–5131, Michou Nguyen, Special Counsel, at (202) 551–7768, or Eli Kozminsky, Attorney-Adviser, at (202) 551–7695; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28810 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78f(g).

[2] 7 U.S.C. 1a(2).

[3] 7 U.S.C. 2(a)(1)(C).

[4] 17 CFR 240.6a–4.

[5] Under Rule 202.3(b)(3) of the Commission's Informal and Other Procedures, upon receipt of a Form 1–N, the Division of Market Regulation (now the Division of Trading and Markets) examines the notice to determine whether all necessary information has been supplied and whether all other required documents have been furnished in proper form. 17 CFR 202.3(b)(3).

[6] 15 U.S.C. 78f(g)(2)(B).

[7] This Form 1–N is being filed by MGEX in connection with a Commission exemptive order issued under Section 36 of the Exchange Act. *See* Securities Exchange Act Release No. 90510 (November 20, 2020), 85 FR 77297 (December 1, 2020) (''Exemptive Order''). The Exemptive Order relates to listing and trading contracts for sale for future delivery on the SPIKES Index on MGEX consistent with the terms and conditions set forth in the order.

[8] 15 U.S.C. 78f(g)(3).

[9] 17 CFR 200.30–3(a)(75).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90794; File No. SR–FICC–2020–017]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Designation of Longer Period for Commission Action and Longer Period for Comment on Proposed Rule Change To Modify the Calculation of the MBSD VaR Floor To Incorporate a Minimum Margin Amount

December 23, 2020.

On November 20, 2020, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule change SR–FICC–2020–017 to introduce a new ''Minimum Margin Amount'' to complement the existing VaR Floor calculation.[3] The proposed rule change was published for comment in the **Federal Register** on December 10, 2020.[4] As of December 23, 2020, the Commission has received five comment letters to the proposed rule change.[5]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On November 27, 2020, FICC also filed the proposal contained in the proposed rule change as advance notice SR–FICC–2020–804 with the Commission pursuant to Section 806(e)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act''), 12 U.S.C. 5465(e)(1), and Rule 19b–4(n)(1)(i) of the Act, 17 CFR 240.19b–4(n)(1)(i).

[4] Securities Exchange Act Release No. 90568 (December 4, 2020), 85 FR 79541 (December 10, 2020) (SR–FICC–2020–017) (''Notice'').

[5] *See* Letter from Kelli McMorrow, Head of Government Affairs, American Securities Association, dated December 18, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017.htm* (''ASA Letter''); Letter from Pete Mills, Senior Vice President, Mortgage Bankers Association, dated December 17, 2020, to Jay Clayton, Chairman, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8155338-226778.pdf* (''MBA Letter''); Letter from Christopher Killian, Managing Director, Securities Industry and Financial Markets Association, dated December 16, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8154310-226759.pdf* (''SIFMA Letter''); Letter from Curtis Richins, President & CEO, Mortgage Capital Trading, Inc., dated December 15, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8156568-226839.pdf* (''MCT Letter''); and Letter from James Tabacchi, Chairman, Independent Dealer and Trader Association, dated December 10, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8127766-226454.pdf* (''IDTA Letter''). *See* comments on the proposed rule change (SR–

Continued

Section 19(b)(2) of the Act[6] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for the proposed rule change is January 24, 2020.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider and take action on the proposed rule change.

Accordingly, pursuant to Section 19(b)(2) of the Act[7] and for the reasons stated above, the Commission designates March 10, 2020 as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change (File No. SR–FICC–2020–017).

The Commission also seeks to extend the comment period to help further inform its analysis of the proposed rule change. The comment period for the proposed rule change ends on December 31, 2020.[8] As of December 23, 2020, the Commission has received five comment letters to the proposed rule change.[9] The Commission is extending the comment period for the proposed rule change to allow interested persons additional time to analyze the issues and prepare their comments. Accordingly, the Commission designates January 29, 2021 as the date comments should be submitted on or before.

Specifically, the Commission invites interested persons to provide views, data, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act and the applicable rules or regulations thereunder. Please note that comments previously received on the substance of the proposed rule change will be considered together with comments submitted in response to this notice. Therefore, while commenters are free to submit additional comments at this time, they need not re-submit earlier comments.

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–FICC–2020–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2020–017. 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 FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2020–017 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28892 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

FICC–2020–017), *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017.htm.* Because the proposal contained in the proposed rule change was also filed as an advance notice, *supra* note 3, the Commission is considering all public comments received on the proposal regardless of whether the comments were submitted to the advance notice or the proposed rule change.

[6] 15 U.S.C. 78s(b)(2).

[7] *Id.*

[8] Notice, 85 FR at 79548.

[9] *See supra* note 5.

[10] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90797; File No. SR–OCC–2020–014]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Approving Proposed Rule Change To Adopt the OCC Third-Party Risk Management Framework and Retire the OCC Counterparty Credit Risk Management Framework

December 23, 2020.

I. Introduction

On November 4, 2020, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2020–014 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4[2] thereunder to adopt a proposed Third-Party Risk Management Framework (''TPRMF'') and retire OCC's current Counterparty Credit Risk Management Policy (''CCRMP'').[3] The Proposed Rule Change was published for public comment in the **Federal Register** on November 18, 2020.[4] The Commission has received no comments regarding the Proposed Rule Change. This order approves the Proposed Rule Change.

II. Background

In 2017, OCC adopted the CCRMP, which outlines the key components of OCC's framework for identifying, measuring, monitoring, and managing OCC's exposures to its counterparties.[5] OCC requested confidential treatment of the CCRMP when it was proposed.[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, 85 FR at 73582.

[4] Securities Exchange Act Release No. 90406 (Nov. 12, 2020), 85 FR 73582 (Nov. 18, 2020) (File No. SR–OCC–2020–014) (''Notice of Filing'').

[5] *See* Securities Exchange Act Release No. 82312 (Dec. 13, 2017), 82 FR 60242 (Dec. 19, 2017) (File No. SR–OCC–2017–009) (''CCRMP Approval Order'').

[6] *See* Securities Exchange Act Release No. 81949 (Oct. 26, 2017), 82 FR 50719 (Nov. 1, 2017) (File No. SR–OCC–2017–009).

OCC proposes to remove the confidential CCRMP from its rules and replace it with the proposed TPRMF, which OCC would make publically available. As described in more detail below, the proposed TPRMF includes some, but not all of the substance of the existing CCRMP. OCC represents that the details not carried forward into the proposed TPRMF reside in OCC's procedures, and that removing such procedural details from OCC's rules would eliminate redundancy that could lead to confusion.[7] The proposed TPRMF includes information about the risk management lifecycle for Clearing Members, Financial Institutions,[8] and Financial Market Utilities (''FMUs'') [9]—all of which are currently addressed in the existing CCRMP—as well as information about the risk management lifecycle for Exchanges [10] and vendors. OCC also proposes to make conforming changes to its Risk Management Framework Policy, Liquidity Risk Management Framework, Margin Policy, and Collateral Risk Management Policy, all of which reference the CCRMP.

Removal of redundancies. As noted above, the proposed TPRMF does not include procedural details, found in the existing CCRMP, that are addressed elsewhere in OCC's rules, policies, and procedures. With regard to access and participation, for example, OCC's approach to risk management for Clearing Members, Financial Institutions and FMUs would not change under the proposed TPRMF, but the requirement that OCC monitor for a low probability of defaulting on obligations and assessing potential risks presented by indirect participants would reside in OCC's procedures, not the proposed TPRMF. Additionally, specific information related to the qualification and approval of Clearing Members and Financial Institutions is publicly available in the OCC By-Laws and Rulebook.[11] Similarly, with regard to counterparty credit risk, OCC's procedures require the measurement and reporting of credit risk as part of OCC's ongoing monitoring processes. In terms of managing counterparty credit risk, OCC proposes to describe the utilization of its Watch Level reporting in the proposed TPRMF, but to retain flexibility to respond to unforeseen circumstances by defining the details of its Watch Level tiers in procedure documents.

Overall third-party risk management. The proposed TPRMF defines the set of risks that OCC faces from third-party relationships, including financial, operational, information technology, security, legal, and regulatory risks. In the context of the proposed TPRMF, financial risks would include the failure of Clearing Members to meet obligations to OCC as well as the failure of third-parties supporting daily settlement processes and OCC's access to collateral and liquidity. The proposed TPRMF describes OCC's processes for identifying, measuring, monitoring, and managing risks from third-parties at on-boarding, through ongoing monitoring, and finally, at off-boarding. The proposed TPRMF describes OCC's processes for managing risks presented by Clearing Members, Financial Institutions, and vendors as well as risks presented through OCC's links to FMUs and Exchanges.

The proposed TPRMF also describes OCC's processes regarding the escalation of identified risks through working groups that have defined decision-making authorities, functions, and responsibilities. Specifically, the proposed TPRMF describes the roles of the Credit and Liquidity Risk Working Group (''CLRWG''), the Exchange Working Group (''EWG''), and the Vendor Risk Working Group (''VRWG'') in managing risks presented by third-parties. Under the proposed TPRMF, each working group would be responsible for escalating matters to OCC's Management Committee (''MC''), which, in specific circumstances, would be responsible for escalating matters to the Risk Committee of OCC's Board of Directors (''RC'').

Further, the proposed TPRMF defines certain authorities relating to the management of Clearing Member, Financial Institution, and vendor relationships. For example, the proposed TPRMF states that OCC's Chief Executive Officer and Chief Operating Officer each has authority to approve the onboarding of Financial Institutions and FMUs. Similarly, the proposed TPRMF states that vendor agreements are executed by OCC officers (*i.e.,* a Vice President or above).

Risks posed by Clearing Members, Financial Institutions, and vendors. The proposed TPRMF describes OCC's framework for managing risk throughout the relationship lifecycle (*i.e.,* at on-boarding, monitoring, and off-boarding) for Clearing Members, Financial Institutions, and vendors. The proposed TPRMF defines the teams responsible for managing the risks posed by Clearing Members, Financial Institutions, and vendors at the various lifecycle stages. For example, OCC's Financial Risk Management team would be responsible for monitoring and reporting financial and operational risks posed by Clearing Members.

The proposed TPRMF also describes the basis for OCC's evaluation of Clearing Members, Financial Institutions, and vendors with which it has relationships. For example, the proposed TPRMF states that OCC's evaluation of Clearing Member relationships is based on financial resources, operational capacity, personnel, and facilities pursuant to OCC's membership standards. Similarly, the proposed TPRMF states that OCC's evaluation of Financial Institution relationships is based on financial resources and operational capacity, such as whether a relationship is structured to allow prompt access to assets and whether a custodian is a supervised and regulated institution that adheres to generally accepted accounting practices, maintains safekeeping procedures, and has controls that fully protect these assets. Further, the proposed TPRMF states that OCC's evaluation of vendor relationships is based on a vendor's financial health and operational capacity, and that the level of due diligence and monitoring of a specific vendor is based on the inherent risk posed by OCC's relationship with the vendor.

Link-specific risk management. Similar to the management of risks posed by Clearing Members, Financial Institutions, and vendors, the proposed TPRMF describes OCC's framework for managing risk for FMUs and Exchanges throughout the relationship lifecycle. The proposed TPRMF defines the teams responsible for managing the risks posed by FMUs and Exchanges at the various lifecycle stages. For example, OCC's Business Operations, Financial

[7] *See* Notice of Filing, 85 FR at 73586. In proposing the replacement of the CCRMP with the TPRMF, OCC provided certain internal procedures related to third-party risk management, for which OCC requested confidential treatment. *See id.* at 73582.

[8] In the context of the proposed TPRMF, ''Financial Institutions'' include clearing banks, custodians, liquidity providers, and investment counterparties. *See* Notice of Filing, 85 FR at 73582–83.

[9] Under the proposed TPRMF, FMUs may include any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among Financial Institutions or between Financial Institutions and the person. *See* Notice of Filing, 85 FR at 73583, n. 12.

[10] Under the proposed TPRMF, Exchange relationships may include options exchanges, futures markets, OTC Trade Sources or Loan Markets. *See* Notice of Filing, 85 FR at 73583, n. 13.

[11] *See e.g.* OCC By-Laws, Art. V (Clearing Members), available at *https://www.theocc.com/getmedia/3309eceb-56cf-48fc-b3b3-498669a24572/occ_bylaws.pdf* (last visited November 25, 2020); OCC Rules, Ch. III (Financial Requirements), available at *https://www.theocc.com/getmedia/9d3854cd-b782-450f-bcf7-33169b0576ce/occ_rules.pdf* (last visited November 25, 2020).

Risk Management, Legal, and Third-party Risk Management teams are responsible for evaluating FMU relationships at on-boarding while OCC's Product and Business Development team is responsible for evaluating Exchange relationships at on-boarding.

The proposed TPRMF also describes the basis for OCC's evaluation of FMUs and Exchanges with which it has relationships. For example, the proposed TPRMF states that OCC's evaluation of FMU relationships is based on financial condition, operational capabilities, and any legal or regulatory risks associated with the relationship. The proposed TPRMF states that OCC's review of Exchange relationships on an ongoing basis includes the assessment of an Exchange's operational performance, overall financial condition, and ability to meet contractual obligations.

III. Discussion and Commission Findings

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[12] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act [13] as well as Rules 17Ad–22(e)(3)(i) and (20) [14] thereunder, as described in detail below.

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires, among other things, that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements.[15] Based on its review of the record, and for the reasons described below, the Commission believes that replacing the existing CCRMP with the proposed TPRMF as described above is consistent with assuring the safeguarding of securities and funds as well as promoting prompt and accurate clearance and settlement.

The CCRMP outlines OCC's framework for: (1) The identification of credit risk, (2) counterparty access and participation standards, (3) the measurement of counterparty exposures, (4) the monitoring and managing of counterparty exposures, and (5) voluntary termination of counterparty relationships.[16] The Commission continues to believe that the formalization of the components captured in the existing CCRMP is consistent with the requirement that OCC's rules be designed to assure the safeguarding of securities and funds which are in OCC's custody or control or for which it is responsible.[17] As described above, the proposed TPRMF carries forward the substance of the existing CCRMP with the exception of certain procedural details already addressed elsewhere in OCC's rules, policies, and procedures. The proposed TPRMF also includes components that are not part of the existing CCRMP, such as the management of operational risk posed by relationships with Financial Institutions—namely, whether a relationship is structured to allow prompt access to assets and whether a custodian is a supervised and regulated institution that adheres to generally accepted accounting practices, maintains safekeeping procedures, and has controls that fully protect these assets. The Commission believes that the addition of such components to OCC's rules is consistent with the assurance of safeguarding of securities and funds in OCC's custody or control or for which it is responsible.

While the existing CCRMP provides a framework for addressing credit risk specifically,[18] the proposed TPRMF addresses financial risk more broadly, which includes risks related to daily settlement. Further, the proposed TPRMF specifically addresses risk posed by OCC's relationships with entities more directly involved in the clearance and settlement of securities transactions. For example, the proposed TPRMF addresses risks posed by OCC's relationship with other FMUs. One such relationship is OCC's reliance on the National Securities Clearing Corporation to effect delivery of, and payment for, securities underlying certain physically settled stock options and single stock futures cleared by OCC.[19] The Commission believes that replacement of the narrowly focused CCRMP with the broader proposed TPRMF that includes specific rules addressing risks related to OCC's relationship with other FMUs is consistent with the promotion of prompt and accurate clearance and settlement.

Based on the foregoing, the Commission believes that the Proposed Rule Change is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[20]

B. Consistency With Rule 17Ad–22(e)(3)(i) Under the Exchange Act

Rule 17Ad–22(e)(3)(i) requires each covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to maintain a sound risk management framework for comprehensively managing legal, credit risk, liquidity, operational, general business, investment, custody, and other risks that arise or are borne by the covered clearing agency, which includes risk management policies, procedures, and systems designed to identify, monitor, and manage the range of risks that arise in or are borne by the covered clearing agency, that are subject to review on a specified periodic basis and approved by the board of directors annually.[21]

As noted above, the existing CCRMP provides a framework for addressing credit risk specifically,[22] but the proposed TPRMF addresses a broader range of risks. Specifically, the proposed TPRMF outlines OCC's approach to identifying, measuring, monitoring, and managing financial, operational, information technology, security, legal, and regulatory risks posed by Clearing Members, Financial Institutions, FMUs, Exchanges, and vendors. The proposed TPRMF describes, among other things, OCC's processes regarding the escalation of identified risks through working groups all the way up to the RC as appropriate. Further, the proposed TPRMF defines which teams within OCC are responsible for managing risks posed by specific types of third parties as well as the basis for evaluating relationships with such third parties. The Commission believes, therefore, that the replacement of the existing CCRMP with the proposed TPRMF is consistent with the requirements of Rule

[12] 15 U.S.C. 78s(b)(2)(C).

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 17 CFR 240.17Ad–22(e)(3)(i) and (20).

[15] 15 U.S.C. 78q–1(b)(3)(F).

[16] *See* CCRMP Approval Order, 82 FR at 60245.

[17] *See id.*

[18] *See id.*

[19] *See* Securities Exchange Act Release No. 81266 (Jul. 31, 2017), 82 FR 36484 (Aug. 4, 2017) (File No. SR–OCC–2017–013).

[20] 15 U.S.C. 78q–1(b)(3)(F).

[21] 17 CFR 240.17Ad–22(e)(3)(i).

[22] *See* CCRMP Approval Order, 82 FR at 60245.

17Ad–22(e)(3)(i) under the Exchange Act.[23]

C. Consistency With Rule 17Ad–22(e)(20) Under the Exchange Act

Rule 17Ad–22(e)(20) requires each covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to identify, monitor, and manage risks related to any link the covered clearing agency establishes with one or more other clearing agencies, financial market utilities (''FMUs''), or trading markets.[24] As described above, the proposed TPRMF outlines OCC's approach to identify, measure, monitor, and manage risks arising from relationships with FMUs and Exchanges. Just as with the management of risks from third parties more broadly, the proposed TPRMF defines which teams within OCC are responsible for managing risks posed by FMUs and Exchanges. Further, the proposed TPRMF describes the basis for OCC's evaluation of FMUs and Exchanges with which it has relationships. The proposed TPRMF also states that OCC's Chief Executive Officer and Chief Operating Officer each has authority to approve the onboarding of FMUs. The Commission believes, therefore, that the proposed adoption of the proposed TPRMF is consistent with the requirements of Rule 17Ad–22(e)(20) under the Exchange Act.[25]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[26] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[27] that the Proposed Rule Change (SR–OCC–2020–014) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28895 Filed 12–29–20; 8:45 am]

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[23] 17 CFR 240.17Ad–22(e)(3)(i).

[24] 17 CFR 240.17Ad–22(e)(20).

[25] *Id.*

[26] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90782; File No. SR–ICEEU–2020–017]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the ICE Clear Europe Clearing Rules

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2020, ICE Clear Europe Limited (''ICE Clear Europe'' or the ''Clearing House'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I and II below, which Items have been prepared primarily by ICE Clear Europe. ICE Clear Europe filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] so that the proposal was immediately effective upon filing with the Commission. On December 21, 2020, ICE Clear Europe filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 (hereafter the ''proposed rule change''), from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe Limited (''ICE Clear Europe'') submitted the proposed rule change to amend its Clearing Rules (the ''Rules'')[5] to address certain requirements under the European Union General Data Protection Regulation (''GDPR'')[6] in the event that at the end of current transition period (ending December 31, 2020) (the ''Transition Period'') the United Kingdom (''UK'') exits the European Union (''EU'') in circumstances where: (i) No trade agreement has been agreed between the UK and the EU27 which stipulates that EU data protection law, among other laws, shall continue to apply in the UK UK [sic] (a ''trade agreement''); and (ii) the UK's data protection laws have not been found to provide for an adequate level of protection for the personal data of individuals in the EU pursuant to a decision made by the European Commission under Article 45 of the GDPR (an ''adequacy decision''). The proposed rule change is intended to supplement existing Rule provisions to reflect the judgment in a recent EU judicial decision. Amendment No. 1 was intended to (i) restate the description of the proposed rule change to clarify that ICE Clear Europe is now implementing certain amendments previously filed in 2019[7] (the ''2019 Filing'') and (ii) amend Exhibit 5 of the Initial Filing to provide a comparison of the proposed Rule changes (including those previously filed amendments in the 2019 Filing) to the current Rules in effect. The proposed rule changes in the initial filing were otherwise unchanged.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed changes is to implement the amendments to Rule 106 and the adoption of Exhibit 5, Annex A and Annex B to the Rules that were submitted in the 2019 Filing (but not implemented at that time) and further to add certain supplemental data protection clauses to the Standard Contractual Clauses in Exhibit 5 of the Rules that address certain requirements under the GDPR relating to personal data.

The amendments would be relevant upon the end of the Transition Period, in circumstances where: (i) No trade agreement has been agreed between the UK and the EU27; and (ii) the UK has

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] Capitalized terms used but not defined herein have the meanings specified in the Rules.

[6] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

[7] Exchange Act Release No. 34–85247 (SR–ICEEU–2019–004) (Mar. 5, 2019), 84 FR 8769 (Mar. 11, 2019). This earlier filing also generally addresses the situation where the UK would be treated as a 'third country' for GDPR purposes.

not been the subject of an adequacy decision, such that the UK thereby becomes a third country under the GDPR.

Amendments previously submitted by the Clearing House in the 2019 Filing, and which are now proposed to be implemented, generally address the situation where the UK would be treated as a 'third country' for GDPR purposes. In that case, in certain circumstances, it may be necessary or advisable to take certain additional steps to avoid a greater risk that transfers of personal data from EU27-based Clearing Members to ICE Clear Europe violate the GDPR, including the use of certain Standard Contractual Clauses, which were endorsed and published in a decision of the European Commission, that will govern transfer of personal data to ICE Clear Europe in order to comply with the GDPR. Because such changes were not needed during the Transition Period, ICE Clear Europe did not implement the changes submitted in the 2019 Filing.[8] At this time, in light of the end of the Transition Period, ICE Clear Europe is proposing to implement the changes in the 2019 Filing to amend Rule 106 and add Exhibit 5, Annex A, and Annex B to the Rules as described in the 2019 Filing in the circumstances described above.

In addition, ICE Clear Europe is proposing additional amendments, beyond those in the 2019 Filing, in the instant filing that are intended to take into account the recent Court of Justice of the European Union decision in the *Schrems II*[9] case. That decision, among other matters, recognized that transfer of personal data outside of the EU may be permissible if governed by the Standard Contractual Clauses, subject to certain additional protections and conditions, including in some cases the use of supplementary measures, to achieve the required level of data protection. In light of this decision, and given the possibility that the Transition Period will end without a trade agreement between the UK and the EU27 and/or an EU adequacy decision with respect to UK data protection requirements, ICE Clear Europe believes that it would be prudent to put in place additional safeguards with respect to transfers of personal data from EU27-based Clearing Members to ICE Clear Europe such that it can be certain that such transfers are subject to appropriate safeguards within the meaning of the GDPR.

In the event that the Transition Period ends without a trade agreement between the UK and the EU27 and/or an EU adequacy decision with respect to UK data protection requirements, the amendments set out in the Initial Filing would be incorporated into the Rules.[10] In addition, the new Appendix to Exhibit 5 of the Rules would set out additional safeguards to the Standard Contractual Clauses that address the conditions that must be met in order to rely upon such clauses as set out in *Schrems II.* Specifically, the Appendix would state that the data importer (in this case, ICE Clear Europe) would have to assess whether the laws applicable to it provide adequate protection under EU data protection law. To the extent that the laws do not, (1) the data importer would adopt supplementary measures to protect the personal data received under Standard Contractual Clauses from the data exporter in accordance with EU data protection laws and (2) in the event that the data importer receives a legally binding request for access to the data by a public authority, the data importer would (i) promptly notify the data exporter of the request, (ii) comply with its internal policies governing disclosure, (iii) not make disproportionate disclosures and (iv) upon request from the data exporter, provide general information on such requests received in the preceding 12 month period.

(b) Statutory Basis

ICE Clear Europe believes that the proposed amendments are consistent with the requirements of Section 17A of the Act[11] and the regulations thereunder applicable to it, including the standards under Rule 17Ad–22.[12] In particular, Section 17A(b)(3)(F) of the Act[13] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, the safeguarding of securities and funds in the custody or control of the clearing agency or for which it is responsible, and the protection of investors and the public interest. The amendments clarify certain rights and obligations of the Clearing House and Clearing Members with respect to personal data obtained in connection with clearing activity in light of legal considerations under the GDPR that may apply to Clearing Members and ICE Clear Europe at the end of the Transition Period if there is no trade agreement and the EU has not issued an adequacy decision. In such circumstances, to the extent EU–27 based Clearing Members must in practice export personal data to ICE Clear Europe in order to clear transactions at ICE Clear Europe, the proposed Rule changes will facilitate the continued transfer of personal data for that purpose in the scenario described above and avoid increased risk of violations of GDPR requirements in connection with such transfers. The changes will thus facilitate continued clearing by EU27 Clearing Members in compliance with applicable law and promote the prompt and accurate clearance and settlement of transactions by such persons. As such, the amendments are consistent with the protection of investors and the public interest. (ICE Clear Europe does not believe the amendments will have any effect on the safeguarding of securities and funds in the custody or control of the Clearing House or for which it is responsible.)

Moreover, the amendments are consistent with Rule 17Ad–22(e)(1),[14] which requires that each covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions. As discussed herein, the amendments are designed to facilitate continued compliance by ICE Clear Europe and its Clearing Members with requirements of GDPR that will apply at the end of the Transition Period if there is no trade agreement and the EU has not issued an adequacy decision, in light of the additional requirements of the *Schrems II* decision. Specifically, the Rule change will facilitate EU-based Clearing Members' continued ability to export personal data as necessary in connection with clearing without violating GDPR should the Transition Period end without a trade agreement and without an adequacy decision. The amendments thereby facilitate continued clearing for EU-based persons in accordance with EU regulations relating to data protection. ICE Clear Europe does not expect that the amendments will adversely impact its ability to comply with the Act or any standards under Rule 17Ad–22.[15]

[8] See ICE Clear Europe Circular C19/053 (March 15, 2019), available at *https://www.theice.com/publicdocs/clear_europe/circulars/C19053.pdf.*

[9] Case C–311/18 Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems.

[10] The instant filing would correct a typographical error in the definition of Standard Contractual Clauses in Rule 106(m) and Exhibit 5 of the Rules as set out in the Initial Filing.

[11] 15 U.S.C. 78q–1.

[12] 17 CFR 240.17Ad–22.

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] 17 CFR 240.17Ad–22(e)(1).

[15] 17 CFR 240.17Ad–22.

(B) Clearing Agency's Statement on Burden on Competition

ICE Clear Europe does not believe the proposed rule changes would have any impact, or impose any burden, on competition not necessary or appropriate in furtherance of the purpose of the Act. The amendments are considered prudent in order for ICE Clear Europe to ensure that there will be no interruption in the receipt of personal data from its EU27-based Clearing Members (or increased risk to such Clearing Members in the provision of such data). ICE Clear Europe does not believe the amendments will in themselves materially affect the cost of, or access to, clearing as they are generally consistent with GDPR requirements with which entities based in the EU must already comply. To the extent the amendments impose certain additional costs on Clearing Members and Sponsored Principals that may differ from current practices, these result from the requirements imposed by the GDPR, and are generally applicable to Clearing Members and Sponsored Principals throughout the European Union. (In addition, Clearing Members and Sponsored Principals are already required under the Rules to ensure that their transmission of data is lawful. As a result, the amendments are therefore not expected to impose significant additional burdens.) As a result, ICE Clear Europe does not believe the proposed rule changes impose any burden on competition that is inappropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule changes have not been solicited or received. ICE Clear Europe will notify the Commission of any written comments received by ICE Clear Europe.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) Significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) [17] thereunder.

ICE Clear Europe has requested that the Commission waive both the five-day pre-filing requirement and the 30-day delayed operative date under Rule 19b–4(f)(6)(iii) [18] so that the proposed rule changes may become effective and operative upon filing with the Commission. ICE Clear Europe believes that waiver of both would facilitate continued compliance with the GDPR requirements which will apply at the end of the Transition Period, in circumstances where no trade agreement has been agreed and there is no adequacy decision. The Transition Period is currently scheduled to end on December 31, 2020, and it is uncertain whether any trade agreement may be entered into between the EU and UK and/or whether any adequacy determination would be made by the EU by that time. Regardless of the 30-day operative delay, the amendments will not have any effect any sooner than the end of the Transition Period. ICE Clear Europe does not believe that any delay in implementing the amendments will benefit Clearing Members, their customers or any other market participants. Any delay is also likely to be inconsistent with market expectations in light of the date upon which the Transition Period is scheduled to end. As a result, in ICE Clear Europe's view, immediate effectiveness is consistent with the protection of investors and the public interest.

The Commission believes that the delay of the operation of the proposed rule change, through the five-day pre-filing requirement and the 30-day delayed operative date, could impede continued compliance with the GDPR requirements given that the Transition Period could end sooner than the 30-day delayed operative date of the proposed rule change. The Commission therefore believes that waiving the five-day pre-filing requirement and 30-day operative delay would provide certainty to ICE Clear Europe and EU27-based Clearing Members regarding the application of the GDPR and allow EU27-based Clearing Members to continue clearing at ICE Clear Europe after the end of the Transition Period in the circumstances discussed above. Moreover, the Commission believes that the proposed rule change would not impose any significant burden on competition because it results from the requirements imposed by the GDPR that are generally applicable to Clearing Members and Sponsored Principals throughout the European Union. Thus, the Commission believes that the proposed rule change, and waiving the five-day pre-filing requirement and 30-day operative delay, would not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) affect the safeguarding of funds or securities in the custody or control of ICE Clear Europe or for which it is responsible. Therefore, the Commission waives the five-day pre-filing requirement and designates the proposed rule change as operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ICEEU–2020–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICEEU–2020–017. 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

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the five-day pre-filing requirement and the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Europe and on ICE Clear Europe's website at *https://www.theice.com/clear-europe/regulation.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICEEU–2020–017 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28809 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90793; File No. SR–NASDAQ–2020–090]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Equity 4, Section 4703

December 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Equity 4, Section 4703, as described below.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Equity 4, Section 4703(h), which describes Orders with ''Reserve Size,''[3] to clarify its existing practice relating to replenishments of such Orders. As set forth in Section 4703(h), ''Reserve Size'' is an Order Attribute that permits a Participant to stipulate that an Order Type that is Displayed may have its displayed size replenished from additional non-displayed size.[4]

The Exchange established the Reserve Orders with the intention that it would always act as a provider of liquidity upon replenishment. Indeed, this is what participants have come to expect from the operation of Reserve Orders.

In late 2016, however, a rule filing introduced a rare circumstance where a Reserve Order, upon replenishment of its Displayed Order component, theoretically could become a liquidity remover under the existing Exchange Rules.

An example of the rare theoretical circumstance is as follows. Order 1 is a Price to Comply Order to buy at $10.00 resting on the Nasdaq book with 100 shares displayed and 3,000 shares in reserve (for a total order size of 3,100 shares). Order 2 is an Order to sell 100 shares at $10.00, which executes against the 100 displayed shares from Order 1 upon entry. Order 3 is a Post Only order to sell 1,000 shares at $10.00 that is entered and posts to the Book before Order 1 has been replenished. Following the rules of the Post Only Order Type, Order 3 does not execute against the non-displayed interest resting at $10.00, but instead posts at the locking price. Therefore, upon replenishment, the new 100 shares of Order 1 would lock Order 3 at $10.00. As directed by the rule governing Price to Comply Orders,[5] Order 1 would execute against Order 3 at $10.00 as a liquidity taker.

The Exchange did not account for this scenario when drafting its rules. In fact, the Exchange does not presently handle this scenario as described above. Instead, upon replenishment, the Exchange reprices the new displayed Price to Comply Order such that it does not execute against Order 3 as a liquidity taker.

However, the Exchange now proposes to eliminate any unintended inconsistency as to how it handles this scenario and make clear in its Rules that a Reserve Order is an adder of liquidity after posting on the Nasdaq Book in all circumstances. Specifically, the Exchange proposes to amend the Rule to state that if the new Displayed Order would lock an Order that posted to the Nasdaq Book before replenishment can occur, the Displayed Order will post at the locking price if the resting Order is Non-Display or will be repriced, ranked, and displayed at one minimum price increment lower (higher) than the locking price if the resting order to sell (buy) is Displayed.[6] [7]

[3] Securities Exchange Act Release No. 34–79290 (November 10, 2016), 81 FR 81184 (November 17, 2016) (SR–NASDAQ–2016–111).

[4] An Order with Reserve Size may be referred to as a ''Reserve Order.''

[5] Pursuant to Equity 4, Section 4702(b)(1)(A), a ''Price to Comply Order'' is an Order Type designed to comply with Rule 610(d) under Regulation NMS by avoiding the display of quotations that lock or cross any Protected Quotation in a System Security during Market Hours. The Price to Comply Order is also designed to provide potential price improvement. When a Price to Comply Order is entered, the Price to Comply Order will be executed against previously posted Orders on the Exchange Book that are priced equal to or better than the price of the Price to Comply Order, up to the full amount of such previously posted Orders, unless such executions would trade through a Protected Quotation.

[6] The Exchange notes that a Reserve Order that does not execute fully upon initial order entry will behavior in the same manner as described in this Proposal if the Displayed portion of the Reserve Order would lock or cross a resting Displayed Order upon entry.

[7] If a Displayed Order posts to the Nasdaq Book and locks a resting Non-Displayed Order with the Trade Now attribute enabled, then consistent with the definition of Trade Now, as set forth in Equity

Again, in the above example, the proposed rule will prevent Order 1 from becoming a liquidity remover because upon replenishment, the new Displayed Order will not attempt to execute against Order 3, but instead it will post to the Nasdaq Book and display at a price of $9.99, while the remaining 2,900 non-display shares in reserve will remain posted at $10.00.

By posting new Displayed Orders without attempting to execute, the Displayed Order will avoid removing liquidity upon replenishment.[8]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The proposed rule change is consistent with the Act because it will help ensure that the Exchange's Rule governing Reserve Orders will be consistent with the original intention of the Exchange and the expectation of participants that such Orders, after posting on the Nasdaq Book, will always be liquidity providers and not liquidity takers. It would also ensure that the Exchange's Order Types operate the same way during a race condition as they do during normal conditions. The proposal would eliminate any ambiguity under the existing rules as to whether a Reserve Order would take liquidity when a locking order posts to the Exchange book prior to the Reserve Order completing its replenishment (or prior to the Displayed portion of a Reserve Order posting to the Exchange Book for the first time). Thus, the proposal would ensure that the Exchange's Rules are transparent and clear about how the System processes Reserve Orders.

Finally, the proposal is consistent with the Act because it would correct a non-substantive typographical error in the Rule text, which will improve its readability and clarity, to the benefit of the public and investors.

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. Again, Exchange intends for the proposed rule change to only eliminate an inconsistency as to how it handles a rare circumstance that causes the System to process Reserve Orders in an unintended manner. The Exchange does not anticipate this proposal will have any impact on competition whatsoever.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period *up to 90 days* (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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–NASDAQ–2020–090 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–2020–090. 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–2020–090 and should be submitted on or before January 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28891 Filed 12–29–20; 8:45 am]

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4, Section 4703(m), the Trade Now functionality would apply and the Non-Displayed Order would be able to execute against the locking Displayed Order as a liquidity taker. If a locked Non-Displayed Order does not have the Trade Now attribute enabled, then new incoming orders will be eligible to execute against the Displayed Order.

[8] The Exchange proposes to correct a non-substantive typographical error in the existing rule text by removing the word ''the'' from the following sentence: ''For example, if a Price to Comply Order with Reserve Size . . . and the 150 shares. . . .''

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–291, OMB Control No. 3235–0328]

Proposed Collection and Comment Request for Form ID

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Form ID

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Commission

is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Form ID (OMB Control No. 3235–0328) must be completed and filed with the Commission by all individuals, companies, and other organizations who seek access to file electronically on the Commission's primary electronic filing system, EDGAR. Those seeking access to file on EDGAR typically include those who are required to make certain disclosures pursuant to the federal securities laws. The information provided on Form ID is an essential part of the security of EDGAR. Form ID is a not a public document because it is used solely for the purpose of screening applicants and granting access to EDGAR. Form ID must be submitted whenever an applicant seeks an EDGAR identification number and access codes to file on EDGAR. The Commission may consider enhancing the EDGAR access process to require filers that already have EDGAR identification numbers but do not have EDGAR access codes to submit a Form ID to obtain access codes to file on EDGAR. If these enhancements become effective, we estimate that approximately 48,493 filers will file Form ID annually and that it will take approximately 0.15 hours per response to prepare for a total of 7,274 annual burden hours. The estimate includes the number of filers without identification numbers and filers with identification numbers that seek to obtain access codes for purposes of submitting electronic filings on EDGAR.

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.

Written comments are invited on: (i) Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) the accuracy of the agency's estimate of the burden imposed by the collection of information; (iii) ways to enhance the quality, utility, and clarity of the information collected; and (iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o Cynthia Roscoe, 100 F Street NE, Washington, DC 20549 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 23, 2020.

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28831 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90780; File No. SR–NASDAQ–2020–091]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Effective Date of the Temporary Amendments Concerning Exchange Rule 1.1210 From December 31, 2020, to April 30, 2021

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the effective date of the temporary amendments set forth in SR–NASDAQ–2020–073 from December 31, 2020, to April 30, 2021. Due to the impacts of COVID–19 on the administration of the Financial Industry Regulatory Authority, Inc. (''FINRA'') qualification examinations at test centers, SR–NASDAQ–2020–073 extended the 120-day period that certain individuals can function as a principal without having successfully passed an appropriate qualification examination through December 31, 2020.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the effective date of the temporary amendments set forth in SR–NASDAQ–2020–073 from December 31, 2020, to April 30, 2021. The proposed rule change would extend the 120-day period that certain individuals can function as a principal without having successfully passed an appropriate qualification examination through April 30, 2021,[3] and would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. This proposed rule change is based on filings recently submitted by FINRA [4] and is intended to harmonize the Exchange's registration rules with those of FINRA so as to promote uniform standards across the securities industry.

In response to COVID–19, earlier this year FINRA began providing temporary relief by way of frequently asked questions (''FAQs'') [5] to address disruptions to the administration of

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] If the Exchange seeks to provide additional temporary relief from the rule requirements identified in this proposed rule change beyond April 30, 2021, the Exchange will submit a separate rule filing to further extend the temporary extension of time.

[4] *See* Exchange Act Release No. 89732 (September 1, 2020), 85 FR 55535 (September 8, 2020) (SR–FINRA–2020–026) and Exchange Act Release No. 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043) (collectively, the ''FINRA Filings''). The Exchange notes that the FINRA Filings also provide temporary relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filings.

[5] *See https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe.*

FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.[6]

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04[7] prior to February 2, 2020, would be given until May 31, 2020, to pass the appropriate principal qualification examination.[8] On May 19, 2020, FINRA extended the relief to pass the appropriate examination until June 30, 2020. On June 29, 2020, FINRA again extended the temporary relief providing that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to May 4, 2020, would be given until August 31, 2020, to pass the appropriate principal qualification examination.

On October 29, 2020, the Exchange filed with the Commission a proposed rule change for immediate effectiveness to adopt temporary Supplementary Material .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under Exchange Rule 1.1210 of General 4 (Registration Requirements).[9] Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under Exchange Rule 1.1210.04 have until December 31, 2020, to pass the appropriate qualification examination.

The COVID–19 conditions necessitating the extension of relief provided in SR–NASDAQ–2020–073 persist and in fact appear to be worsening.[10] One of the impacts of COVID–19 continues to be serious interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations.[11] Although Prometric has been reopening its test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain examinations that have been deemed essential by the local government.[12] Furthermore, Prometric has had to close some reopened test centers due to incidents of COVID–19 cases. The initial nationwide closure in March along with the inability to fully reopen all Prometric test centers due to COVID–19 have led to a significant backlog of individuals who are waiting to sit for FINRA examinations that are not available online.[13]

In addition, firms are continuing to experience operational challenges with much of their personnel working from home due to shelter-in-place orders, restrictions on businesses and social activity imposed in various states, and adherence to other social distancing guidelines consistent with the recommendations of public health officials.[14] As a result, firms continue to face potentially significant disruptions to their normal business operations that may include a limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19. Such potential disruptions may be further exacerbated, and may even affect client services, if firms cannot continue to keep principal positions filled, as they may have difficulty finding other qualified individuals to transition into these roles or may need to reallocate employee time and resources away from other critical responsibilities at the firm.

These ongoing, extenuating circumstances make it impracticable for members to ensure that the individuals whom they have designated to function in a principal capacity, as set forth in Exchange Rule 1.1210.04, are able to successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule, or to find other qualified staff to fill this position. The ongoing circumstances also require individuals to be exposed to the health risks associated with taking an in-person examination, because the General Securities Principal examination is not available online. Therefore, the Exchange is proposing to extend the effective date of the temporary relief provided through SR–NASDAQ–2020–073 until April 30, 2021. The proposed rule change would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. Any individuals designated to function as a principal on or after January 1, 2021, would need to successfully pass an appropriate qualification examination within 120 days.

The Exchange believes that this proposed continued extension of time is tailored to address the needs and constraints on a member's operations during the COVID–19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID–19 on members by providing continued flexibility so that members can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by the member's continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Exchange rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(5) of the Act,[16] 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

[6] At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March Prometric closed all of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May. At this time, not all of these Prometric test centers have reopened at full capacity.

[7] Exchange Rule 1.1210.04 is the corresponding rule to FINRA Rule 1210.04.

[8] FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. Exchange Rule 1.1210.04 provides the same allowance to members.

[9] *See* Exchange Act Release No. 90359 (November 5, 2020), 85 FR 71979 (November 12, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–073).

[10] *See, e.g.,* Meryl Kornfield, Jacqueline Dupree, Marisa Iati, Paulina Villegas, Siobhan O'Grady and Hamza Shaban, *New daily coronavirus cases in U.S. rise to 145,000, latest all-time high,* Wash. Post, November 11, 2020, *https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/.*

[11] Information about the continued impact of COVID–19 on FINRA-administered examinations is available at *https://www.finra.org/rules-guidance/key-topics/covid-19/exams.*

[12] Information from Prometric about its safety practices and the impact of COVID–19 on its operations is available at *https://www.prometric.com/corona-virus-update. See also supra* note 11.

[13] Earlier this year, an online test delivery service was launched for candidates seeking to take qualification examinations remotely. Only certain qualification examinations are available online. *See supra* note 11. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[14] *See, e.g.,* Centers for Disease Control and Prevention, How to Protect Yourself & Others, *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.*

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest.

The proposed rule change is intended to minimize the impact of COVID–19 on member operations by further extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under Exchange Rule 1.1210.04 until April 30, 2021. The proposed rule change does not relieve members from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable Exchange rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, the Exchange believes that the proposed rule change is a sensible accommodation that will continue to afford members the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

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. As set forth in SR–NASDAQ–2020–073, the proposed rule change is intended to provide temporary relief given the impacts of the COVID–19 pandemic crisis and to also maintain consistency with the rules of other self-regulatory organizations (''SROs'') with respect to the registration requirements applicable to members and their registered personnel. In that regard, the Exchange believes that any burden on competition would be clearly outweighed by providing members with temporary relief in this unique environment while also ensuring clear and consistent requirements applicable across SROs and mitigating any risk of SROs implementing different standards in these important areas. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID–19 pandemic that is equally applicable to the changes the Exchange proposes.[17] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the proposed extension of time will help minimize the impact of the COVID–19 outbreak on members' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. The Exchange further stated that the ongoing extenuating circumstances of the COVID–19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules. The Exchange also explained that shelter-in-place orders, quarantining, restrictions on business and social activity and adherence to social distancing guidelines consistent with the recommendations of public officials remain in place in various states.[20] In addition, the Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local government.[21] Although, as the Exchange noted, FINRA has launched an online test delivery service to help address this backlog, the General Securities Principal (Series 24) Examination is not available online.[22] Nevertheless, the Exchange explained that the proposed rule change will provide needed flexibility to ensure that these positions remain filled and is tailored to address the constraints on members' operations during the COVID–19 pandemic without significantly compromising critical investor protection.[23]

The Commission observes that the Exchange's proposal, like the FINRA Filings on which it is based,[24] provides only an extension to temporary relief from the requirement to pass certain qualification examinations within the 120-day period in the rules. As proposed, this relief would extend the 120-day period that certain individuals can function as principals through April 30, 2021. If a further extension of temporary relief from the rule requirements identified in this proposal beyond April 30, 2021 is required, the Exchange noted that it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.[25] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.[26] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[27]

[17] *See supra* note 4.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] *See supra* note 14.

[21] *See supra* notes 11 and 12. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID–19 cases.

[22] *See supra* note 13. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[23] The Exchange states that members remain subject to the continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Nasdaq rules.

[24] *See supra* note 4.

[25] *See supra* note 3.

[26] As noted above by Nasdaq, this proposal is an extension of temporary relief provided in a prior filing where Nasdaq also requested and the Commission granted a waiver of the 30-day operative delay. *See supra* note 9, 85 FR at 71981–82.

[27] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NASDAQ–2020–091 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–2020–091. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. 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–2020–091 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28808 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90798; File No. SR–BOX–2020–40]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Rule 16000 Series

December 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2020, BOX Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Rule 16000 Series, the Exchange's compliance rule (''Compliance Rule'') regarding the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan'')[3] to be consistent with a conditional exemption granted by the Commission from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Allocation Exemption'').[4] The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the Rule 16000 Series to be consistent with the Allocation Exemption. The Commission granted the relief conditioned upon the Participants' adoption of Compliance Rules that implement the alternative approach to reporting allocations to the Central Repository described in the Allocation Exemption (referred to as the ''Allocation Alternative'').

(1) Request for Exemptive Relief

Pursuant to Section 6.4(d)(ii)(A) of the CAT NMS Plan, each Participant must, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if the order is executed, in whole or in part: (1) An Allocation Report;[5] (2) the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable; and the (3) CAT-Order-ID of any contra-side order(s). Accordingly, the Exchange and the other Participants implemented Compliance Rules that require their Industry Members that are executing brokers to submit to the Central Repository, among other things, Allocation Reports and the SRO-

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[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth in the Compliance Rule.

[4] *See* Securities Exchange Act Rel. No. 90223 (October 19, 2020), 85 FR 67576 (October 23, 2020) (''Allocation Exemptive Order'').

[5] Section 1.1 of the CAT NMS Plan defines an ''Allocation Report'' as ''a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.''

Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.

On August 27, 2020, the Participants submitted to the Commission a request for an exemption from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Exemption Request'').[6] In the Exemption Request, the Participants requested that they be permitted to implement the Allocation Alternative, which, as noted above, is an alternative approach to reporting allocations to the Central Repository. Under the Allocation Alternative, any Industry Member that performs an allocation to a client account would be required under the Compliance Rule to submit an Allocation Report to the Central Repository when shares/contracts are allocated to a client account regardless of whether the Industry Member was involved in executing the underlying order(s). Under the Allocation Alternative, a ''client account'' would be any account that is not owned or controlled by the Industry Member.

In addition, under the Allocation Alternative, an ''Allocation'' would be defined as: (1) The placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations). Pursuant to this definition and the proposed Allocation Alternative, an Industry Member that performs an Allocation to an account that is not a client account, such as proprietary accounts and events including step outs,[7] or correspondent flips,[8] would not be required to submit an Allocation Report to the Central Repository for that allocation, but could do so on a voluntary basis. Industry Members would be allowed to report Allocations to accounts other than client accounts; in that instance, such Allocations must be marked as Allocations to accounts other than client accounts.

(A) Executing Brokers and Allocation Reports

To implement the Allocation Alternative, the Participants requested exemptive relief from Section 6.4(d)(ii)(A)(1) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members that are executing brokers, who do not perform Allocations, to record and report to the Central Repository, if the order is executed, in whole or in part, an Allocation Report. Under the Allocation Alternative, when an Industry Member other than an executing broker (*e.g.,* a prime broker or clearing broker) performs an Allocation, that Industry Member would be required to submit the Allocation Report to the Central Repository. When an executing broker performs an Allocation for an order that is executed, in whole or in part, the burden of submitting an Allocation Report to the Central Repository would remain with the executing broker under the Allocation Alternative. In certain circumstances this would result in multiple Allocation Reports—the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

The Participants stated that granting exemptive relief from submitting Allocation Reports for executing brokers who do not perform an Allocation, and requiring the Industry Member other than the executing broker that is performing the Allocation to submit such Allocation Reports, is consistent with the basic approach taken by the Commission in adopting Rule 613 under the Exchange Act. Specifically, the Participants stated that they believe that the Commission sought to require each broker-dealer and exchange that touches an order to record the required data with respect to actions it takes on the order.[9] Without the requested exemptive relief, executing brokers that do not perform Allocations would be required to submit Allocation Reports. In addition, the Participants stated that, because shares/contracts for every execution must be allocated to an account by the clearing broker in such circumstances, there would be no loss of information by shifting the reporting obligation from the executing broker to the clearing broker.

(B) Identity of Prime Broker

To implement the Allocation Alternative, the Participants also requested exemptive relief from Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if an order is executed, in whole or in part, the SRO-Assigned Market Participant Identifier of the prime broker, if applicable. Currently, under the CAT NMS Plan, an Industry Member is required to report the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker in connection with the execution of an order, and such information would be part of the order's lifecycle, rather than in an Allocation Report that is not linked to the order's lifecycle.[10] Under the Allocation Alternative, the identity of the prime broker would be required to be reported by the clearing broker on the Allocation Report, and, in addition, the prime broker itself would be required to report the ultimate allocation, which the Participants believe would provide more complete information.

The Participants stated that associating a prime broker with a specific execution, as is currently required by the CAT NMS Plan, does not reflect how the allocation process works in practice as allocations to a prime broker are done post-trade and are performed by the clearing broker of the executing broker. The Participants also stated that with the implementation of the Allocation Alternative, it would be duplicative for the executing broker to separately identify the prime broker for allocation purposes.

The Participants stated that if a particular customer only has one prime broker, the identity of the prime broker can be obtained from the customer and account information through the DVP accounts for that customer that contain the identity of the prime broker. The Participants further stated that Allocation Reports related to those executions would reflect that shares/

[6] *See* letter from the Participants to Vanessa Countryman, Secretary, Commission, dated August 27, 2020 (the ''Exemption Request'').

[7] ''A step-out allows a broker-dealer to allocate all or part of a client's position from a previously executed trade to the client's account at another broker-dealer. In other words, a step-out functions as a client's position transfer, rather than a trade; there is no exchange of shares and funds and no change in beneficial ownership.'' *See* FINRA, Trade Reporting Frequently Asked Questions, at Section 301, available at: *https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq.*

[8] Correspondent clearing flips are the movement of a position from an executing broker's account to a different account for clearance and settlement, allowing a broker-dealer to execute a trade through another broker-dealer and settle the trade in its own account. *See, e.g.,* The Depository Trust & Clearing Corporation, Correspondent Clearing, available at: *https://www.dtcc.com/clearing-services/equities-tradecapture/correspondent-clearing.*

[9] *See* Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45748 (August 1, 2012).

[10] The Participants did not request exemptive relief relating to the reporting of the SRO-Assigned Market Participant Identifier of clearing brokers.

contracts were allocated to the single prime broker. The Participants believe that there is no loss of information through the implementation of the Allocation Alternative compared to what is required in the CAT NMS Plan and that this approach does not decrease the regulatory utility of the CAT for single prime broker circumstances.

In cases where a customer maintains relationships with multiple prime brokers, the Participants asserted that the executing broker will not have information at the time of the trade as to which particular prime broker may be allocated all or part of the execution. Under the Allocation Alternative, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts where the shares/contracts were ultimately allocated. To determine the prime broker for a customer, a regulatory user would query the customer and account database using the customer's CCID to obtain all DVP accounts for the CCID at broker-dealers. The Participants state that when a customer maintains relationships with multiple prime brokers, the customer typically has a separate DVP account with each prime broker, and the identities of those prime brokers can be obtained from the customer and account information.

(C) Additional Conditions to Exemptive Relief

In the Exemption Request, the Participants included certain additional conditions for the requested relief. Currently, the definition of Allocation Report in the CAT NMS Plan only refers to shares. To implement the Allocation Alternative, the Participants proposed to require that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Specifically, Participants would require the reporting of the following in each Allocation Report: (1) The FDID for the account receiving the allocation, including subaccounts; (2) the security that has been allocated; (3) the identifier of the firm reporting the allocation; (3) the price per share/contracts of shares/contracts allocated; (4) the side of shares/contracts allocated; (4) the number of shares/contracts allocated; and (5) the time of the allocation.

Furthermore, to implement the Allocation Alternative, the Participants proposed to require the following information on all Allocation Reports: (1) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (2) trade date; (3) settlement date; (4) IB/correspondent CRD Number (if applicable); (5) FDID of new order(s) (if available in the booking system); [11] (6) allocation instruction time (optional); (7) if the account meets the definition of institution under FINRA Rule 4512(c); [12] (8) type of allocation (allocation to a custody account, allocation to a DVP account, step out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (9) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (10) if an allocation was cancelled, a cancel flag, which indicates that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(2) Proposed Rule Changes To Implement Exemptive Relief

On October 29, 2020, the Commission granted the exemptive relief requested in the Exemption Request. The Commission granted the relief conditioned upon the adoption of Compliance Rules that implement the reporting requirements of the Allocation Alternative. Accordingly, the Exchange proposes the following changes to its Compliance Rule to implement the reporting requirements of the Allocation Alternative.

(A) Definition of Allocation

The Exchange proposes to add a definition of ''Allocation'' as new paragraph (c) to Rule 16010.[13] Proposed paragraph (c) of Rule 16010 would define an ''Allocation'' to mean ''(1) the placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations).'' The SEC stated in the Allocation Exemption that this definition of ''Allocation'' is reasonable.

(B) Definition of Allocation Report

The Exchange proposes to amend the definition of ''Allocation Report'' set forth in Exchange Rule 16010(c) to reflect the requirements of the Allocation Exemption. Exchange Rule 16010(c) defines the term ''Allocation Report'' to mean:

> a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided, for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.

The Exchange proposes to amend this definition in two ways: (1) Applying the requirements for Allocation Reports to contracts in addition to shares; and (2) requiring the reporting of additional elements for the Allocation Report.

(i) Shares and Contracts

The requirements for Allocation Reports apply only to shares, as the definition of ''Allocation Report'' in Rule 16010(c) refers to shares, not contracts. In the Allocation Exemption, the Commission stated that applying the requirements for Allocation Reports to contracts in addition to shares is appropriate because CAT reporting requirements apply to both options and equities. Accordingly, the SEC stated that the Participants would be required to modify their Compliance Rules such that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Therefore, the Exchange proposes to amend Rule 16010(c) (to be renumbered as Rule 16010(d)) to apply to contracts, as well as shares. Specifically, the Exchange proposes to add references to contracts to the definition of ''Allocation Report'' to the

[11] The Participants propose that for scenarios where the Industry Member responsible for reporting the Allocation has the FDID of the related new order(s) available, such FDID must be reported. This would include scenarios in which: (1) The FDID structure of the top account and subaccounts is known to the Industry Member responsible for reporting the Allocation(s); and (2) the FDID structure used by the IB/Correspondent when reporting new orders is known to the clearing firm reporting the related Allocations.

[12] FINRA Rule 4512(c) states the for purposes of the rule, the term ''institutional account'' means the account of: (1) A bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

[13] The Exchange proposes to renumber the definitions in Rule 16010 to accommodate the addition of this new definition of ''Allocation'' and the new definition of ''Client Account'' discussed below.

following phrases: ''the Firm Designated ID for any account(s), including subaccount(s), to which executed shares/contracts are allocated,'' ''the price per share/contract of shares/contracts allocated,'' ''the side of shares/contracts allocated,'' and ''the number of shares/contracts allocated to each account.''

(ii) Additional Elements

The Commission also conditioned the Allocation Exemption on the Participants amending their Compliance Rules to require the ten additional elements in Allocation Reports described above. Accordingly, the Exchange proposes to require these additional elements in Allocation Reports. Specifically, the Exchange proposes to amend the definition of ''Allocation Report'' in Rule 16010(c) (to be renumbered as Rule 16010(d)) to include the following elements, in addition to those elements currently required under the CAT NMS Plan:

(6) the time of the allocation; (7) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (8) trade date; (9) settlement date; (10) IB/correspondent CRD Number (if applicable); (11) FDID of new order(s) (if available in the booking system); (12) allocation instruction time (optional); (12) if account meets the definition of institution under FINRA Rule 4512(c); (13) type of allocation (allocation to a custody account, allocation to a DVP account, step-out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (14) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (15) if an allocation was cancelled, a cancel flag indicating that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(C) Allocation Reports

(i) Executing Brokers That Do Not Perform Allocations

The Commission granted the Participants an exemption from the requirement that the Participants, through their Compliance Rule, require executing brokers that do not perform Allocations to submit Allocation Reports. The Commission stated that it understands that executing brokers that are not self-clearing do not perform allocations themselves, and such allocations are handled by prime and/or clearing brokers, and these executing brokers therefore do not possess the requisite information to provide Allocation Reports. Accordingly, the Exchange proposes to eliminate Rule 16030(a)(2)(A)(i),[14] which requires an Industry Member to record and report to the Central Repository an Allocation Report if the order is executed, in whole or in part, and to replace this provision with proposed Rule 16030(a)(2)(F) as discussed below.

(ii) Industry Members That Perform Allocations

The Allocation Exemption requires the Participants to amend their Compliance Rules to require Industry Members to provide Allocation Reports to the Central Repository any time they perform Allocations to a client account, whether or not the Industry Member was the executing broker for the trades. Accordingly, the Commission conditioned the Allocation Exemption on the Participants adopting Compliance Rules that require prime and/or clearing brokers to submit Allocation Reports when such brokers perform allocations, in addition to requiring executing brokers that perform allocations to submit Allocation Reports. The Commission determined that such exemptive relief would improve efficiency and reduce the costs and burdens of reporting allocations for Industry Members because the reporting obligation would belong to the Industry Member with the requisite information, and executing brokers that do not have the information required on an Allocation Report would not have to develop the infrastructure and processes required to obtain, store and report the information. The Commission stated that this exemptive relief should not reduce the regulatory utility of the CAT because an Allocation Report would still be submitted for each executed trade allocated to a client account, which in certain circumstances could still result in multiple Allocation Reports,[15] just not necessarily by the executing broker.

In accordance with the Allocation Exemption, the Exchange proposes to add proposed Rule 16030(a)(2)(F) to the Compliance Rule. Proposed Rule 16030(a)(2)(F) would require Industry Members to record and report to the Central Repository ''an Allocation Report any time the Industry Member performs an Allocation to a Client Account, whether or not the Industry Member was the executing broker for the trade.''

(iii) Client Accounts

In the Allocation Exemption, the Commission also exempted the Participants from the requirement that they amend their Compliance Rules to require Industry Members to report Allocations for accounts other than client accounts. The Commission believes that allocations to client accounts, and not allocations to proprietary accounts or events such as step-outs and correspondent flips, provide regulators the necessary information to detect abuses in the allocation process because it would provide regulators with detailed information regarding the fulfillment of orders submitted by clients, while reducing reporting burdens on broker-dealers. For example, Allocation Reports would be required for allocations to registered investment advisor and money manager accounts. The Commission further believes that the proposed approach should facilitate regulators' ability to distinguish Allocation Reports relating to allocations to client accounts from other Allocation Reports because Allocations to accounts other than client accounts would have to be identified as such. This approach could reduce the time CAT Reporters expend to comply with CAT reporting requirements and lower costs by allowing broker-dealers to use existing business practices.

To clarify that an Industry Member must report an Allocation Report solely for Allocations to a client account, proposed Rule 16030(a)(2)(F) specifically references ''Client Accounts,'' as discussed above. In addition, the Exchange proposes to add a definition of ''Client Account'' as proposed Rule 16010(l). Proposed Rule 16010(l) would define a ''Client Account'' to mean ''for the purposes of an Allocation and Allocation Report, any account or subaccount that is not owned or controlled by the Industry Member.''

(D) Identity of Prime Broker

The Exchange also proposes to amend Rule 16030(a)(2)(A)(ii) to eliminate the requirement for executing brokers to record and report the SRO-Assigned Market Participant Identifier of the prime broker. Rule 16030(a)(2)(A)(ii) states that each Industry Member is required to record and report to the Central Repository, if the order is executed, in whole or in part, the ''SRO-Assigned Market Participant Identifier

[14] The Exchange proposes to renumber Rule 16030(a)(2)(A)(ii) and (iii) as Rule 16030(a)(2)(A)(i) and (ii) in light of the proposed deletion of Rule 16030(a)(2)(A)(i).

[15] As noted above, under the Allocation Alternative, for certain executions, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

of the clearing broker or prime broker, if applicable.'' The Exchange proposes to delete the phrase ''or prime broker'' from this provision. Accordingly, each Industry Member that is an executing broker would no longer be required to report the SRO-Assigned Market Participant Identifier of the prime broker.

As the Commission noted in the Allocation Exemption, exempting the Participants from the requirement that they, through their Compliance Rules, require executing brokers to provide the SRO-Assigned Market Participant Identifier of the prime broker is appropriate because, as stated by the Participants, allocations are done on a post-trade basis and the executing broker will not have the requisite information at the time of the trade. Because an executing broker, in certain circumstances, does not have this information at the time of the trade, this relief relieves executing brokers of the burdens and costs of developing infrastructure and processes to obtain this information in order to meet the contemporaneous reporting requirements of the CAT NMS Plan.

As the Commission noted in the Allocation Exemption, although executing brokers would no longer be required to provide the prime broker information, regulators will still be able to determine the prime broker(s) associated with orders through querying the customer and account information database. If an executing broker has only one prime broker, the identity of the prime broker can be obtained from the customer and account information associated with the executing broker. For customers with multiple prime brokers, the identity of the prime brokers can be obtained from the customer and account information which will list the prime broker, if there is one, that is associated with each account.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[16] in general, and Section 6(b)(5) of the Act,[17] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. In particular, the Exchange believes that this proposal is consistent with the Act because it is consistent with, and implements, the Allocation Exemption, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [18] To the extent that this proposal implements the Plan, and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule changes are consistent with the Allocation Exemption, and are designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. The Exchange also notes that the proposed rule changes will apply equally to all Industry Members. In addition, all national securities exchanges and FINRA are proposing this amendment to their Compliance Rules. Therefore, this is not a competitive rule filing and does not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20] Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of this 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) [21] 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–BOX–2020–40 *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–BOX–2020–40. 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

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696, 84697 (November 23, 2016).

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6).

[21] 15 U.S.C. 78s(b)(2)(B).

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–BOX–2020–40, and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28896 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90795; File No. SR–NYSE–2020–106]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Temporary Period for Specified Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and Temporary Rule Relief in Rule 36.30

December 23, 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 21, 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 and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the temporary period for specified Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and temporary rule relief in Rule 36.30, to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021. 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 extend the temporary period for specified Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and temporary rule relief to Rule 36.30, to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021. The current temporary period that these Rules are in effect ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on December 31, 2020.

Background

To slow the spread of COVID–19 through social-distancing measures, on March 18, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that, beginning March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City would close and the Exchange would move, on a temporary basis, to fully electronic trading.[4] On May 14, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to reopen the Trading Floor on a limited basis on May 26, 2020 to a subset of Floor brokers, subject to safety measures designed to prevent the spread of COVID–19.[5] On June 15, 2020, the CEO of the Exchange made a determination under Rule 7.1(c)(3) to begin the second phase of the Trading Floor reopening by allowing DMMs to return on June 17, 2020, subject to safety measures designed to prevent the spread of COVID–19.[6] Consistent with these safety measures, both DMMs and Floor broker firms continue to operate with reduced staff on the Trading Floor.

Proposed Rule Change

The Exchange has modified its rules to add Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and rule relief in Rule 36.30[7] that are in effect until the earlier of a full reopening of the Trading

[4] Pursuant to Rule 7.1(e), the CEO notified the Board of Directors of the Exchange of this determination. The Exchange's current rules establish how the Exchange will function fully-electronically. The CEO also closed the NYSE American Options Trading Floor, which is located at the same 11 Wall Street facilities, and the NYSE Arca Options Trading Floor, which is located in San Francisco, CA. *See* Press Release, dated March 18, 2020, available here: *https://ir.theice.com/press/press-releases/all-categories/2020/03-18-2020-204202110.*

[5] *See* Securities Exchange Act Release No. 88933 (May 22, 2020), 85 FR 32059 (May 28, 2020) (SR–NYSE–2020–47) (Notice of filing and immediate effectiveness of proposed rule change).

[6] *See* Securities Exchange Act Release No. 89086 (June 17, 2020) (SR–NYSE–2020–52) (Notice of filing and immediate effectiveness of proposed rule change).

[7] *See* Securities Exchange Act Release Nos. 88413 (March 18, 2020), 85 FR 16713 (March 24, 2020) (SR–NYSE–2020–19) (amending Rule 7.35C to add Commentary .01); 88444 (March 20, 2020), 85 FR 17141 (March 26, 2020) (SR–NYSE–2020–22) (amending Rules 7.35A to add Commentary .01, 7.35B to add Commentary .01, and 7.35C to add Commentary .02); 88488 (March 26, 2020), 85 FR 18286 (April 1, 2020) (SR–NYSE–2020–23) (amending Rule 7.35A to add Commentary .02); 88546 (April 2, 2020), 85 FR 19782 (April 8, 2020) (SR–NYSE–2020–28) (amending Rule 7.35A to add Commentary .03); 88562 (April 3, 2020), 85 FR 20002 (April 9, 2020) (SR–NYSE–2020–29) (amending Rule 7.35C to add Commentary .03); 88705 (April 21, 2020), 85 FR 23413 (April 27, 2020) (SR–NYSE–2020–35) (amending Rule 7.35A to add Commentary .04); 88725 (April 22, 2020), 85 FR 23583 (April 28, 2020) (SR–NYSE–2020–37) (amending Rule 7.35 to add Commentary .01); 88950 (May 26, 2020), 85 FR 33252 (June 1, 2020) (SR–NYSE–2020–48) (amending Rule 7.35A to add Commentary .05); 89059 (June 12, 2020), 85 FR 36911 (June 18, 2020) (SR–NYSE–2020–50) (amending Rule 7.35C to add Commentary .04); 89086 (June 17, 2020), 85 FR 37712 (SR–NYSE–2020–52) (amending Rules 7.35A to add Commentary .06, 7.35B to add Commentary .03, 76 to add Supplementary Material 20, and Supplementary Material .30 to Rule 36); and 89925 (September 18, 2020) (SR–NYSE–2020–75) (amending Rule 7.35 to add Commentary .02).

Floor facilities to DMMs or after the Exchange closes on December 31, 2020.[8]

The first and second phases of the reopening of the Trading Floor are subject to safety measures designed to prevent the spread of COVID–19. To meet these safety measures, Floor brokers and DMM units that have chosen to return to the Trading Floor are operating with reduced staff. The Exchange is therefore proposing to extend the following temporary rules until such time that there is a full reopening of the Trading Floor facilities to DMMs:

- Commentaries .01 and .02 to Rule 7.35;[9]
- Commentaries .01, .02, .03, .04, .05, and .06 to Rule 7.35A;
- Commentaries .01 and .03 to Rule 7.35B;
- Commentaries .01, .02, .03, and .04 to Rule 7.35C; and
- Amendments to Rule 36.30.

The Exchange is not proposing any substantive changes to these Rules.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(5) of the Act,[11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

To reduce the spread of COVID–19, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that beginning March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City would close and the Exchange would move, on a temporary basis, to fully electronic trading. On May 14, 2020, the CEO made a determination under Rule 7.1(c)(3) that, beginning May 26, 2020, the Trading Floor would be partially reopened to allow a subset of Floor brokers to return to the Trading Floor. On June 15, 2020, the CEO made a determination under Rule 7.1(c)(3) that, beginning June 17, 2020, DMM units may choose to return a subset of staff to the Trading Floor.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Trading Floor has not yet reopened in full to DMMs or Floor brokers. Accordingly, the Exchange believes that the temporary rule changes in effect pursuant to the Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and amendments to Rule 36.30, which are intended to be in effect during the temporary period while the Trading Floor has not yet opened in full to DMMs, should be extended until such time that there is a full reopening of the Trading Floor facilities to DMMs. The Exchange is not proposing any substantive changes to these Rules.

The Exchange believes that, by clearly stating that this relief will be in effect through the earlier of a full reopening of the Trading Floor facilities to DMMs or the close of the Exchange on April 30, 2021, market participants will have advance notice of the temporary period during which the Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and amendments to Rule 36.30 will be in effect.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather would extend the period during which Commentaries .01 and .02 to Rule 7.35; Commentaries .01, .02, .03, .04, 05, and .06 to Rule 7.35A; Commentaries .01 and .03 to Rule 7.35B; Commentaries .01, .02, .03, and .04 to Rule 7.35C; and amendments to Rule 36.30 will be in effect. These Commentaries are intended to be in effect during the temporary period while the Trading Floor has not yet been opened in full to DMMs and Floor brokers and currently expire on December 31, 2020. Because the Trading Floor has not been opened in full to DMMs, the Exchange proposes to extend the temporary period for these temporary rules to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13] Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[14] and Rule 19b–4(f)(6)(iii) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative prior to 30 days after the date of the filing. However, pursuant

[8] *See* Securities Exchange Act Release No. 90005 (September 25, 2020), 85 FR 61999 (October 1, 2020) (SR–NYSE–2020–78) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for specified Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and temporary rule relief in Rule 36.30). *See also* Securities Exchange Act Release Nos. 89425 (July 30, 2020), 85 FR 47446 (August 5, 2020) (SR–NYSE–2020–63) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on September 30, 2020); 89199 (June 30, 2020), 85 FR 40718 (July 7, 2020) (SR–NYSE–2020–56) (Notice of filing and immediate effectiveness of proposed rule change to extend the temporary period for Commentaries to Rules 7.35, 7.35A, 7.35B, and 7.35C; Supplementary Material .20 to Rule 76; and temporary rule relief in Rule 36.30 to end on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on July 31, 2020); and 89368 (July 21, 2020), 85 FR 45272 (July 27, 2020) (SR–NYSE–2020–61) (Notice of filing and immediate effectiveness of proposed rule change to lift the temporary suspension to Rule 76 and delete Supplementary Material .20 to Rule 76).

[9] Because DMMs are not obligated to return to a Floor, an IPO Auction may still be conducted by a DMM remotely as provided for in Commentary .04 to Rule 7.35A. If a DMM chooses to conduct an IPO Auction remotely, Floor brokers on the Trading Floor will not have access to IPO Auction imbalance information. The Exchange proposed a non-substantive change to Commentary .02 to Rule 7.35 to change the start date of that Commentary from September 20, 2020 to September 4, 2020, which is consistent with the date represented in the proposed rule change adopting that Commentary. *See* Securities Exchange Act Release No. 89925 (September 18, 2020) (SR–NYSE–2020–75) (amending Rule 7.35 to add Commentary .02).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(f)(6).

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[16] 17 CFR 240.19b–4(f)(6).

to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may take effect immediately. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it will allow the rules discussed above to remain in effect during the temporary period during which the Trading Floor has not yet been reopened in full to DMMs because of health precautions related to the Covid-19 pandemic. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[18]

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)[19] 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.shtm*l); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2020–106 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–2020–106. 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–2020–106 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28893 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 240.19b–4(f)(6)(iii).

[18] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90792; File No. SR–BOX–2020–38]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing of Proposed Rule Change To Amend BOX Rule 7620 (Accommodation Transactions)

December 23, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 10, 2020, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7620 (Accommodation Transactions) to allow Floor Brokers to enter opening cabinet orders on behalf of customers and Floor Market Makers, and codify that cabinet trades will follow open outcry rules pursuant to Exchange Rule 7600. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxoptions.com.*

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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

First, the proposed rule change is to amend Rule 7620 (Accommodation Transactions) to allow Floor Brokers to enter opening cabinet orders on behalf of customers[3] and Floor Market Makers. This is a competitive filing that is based on cabinet trading functionality at Cboe Exchange, Inc. (''Cboe'').[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Customers of the Floor Broker can include Public Customers, Broker Dealers and Market Makers.

[4] *See* Cboe Rule 5.85(h) (previously, Cboe Rule 6.54 Accommodation Liquidations (Cabinet Trades); *see also* Securities Exchange Release No. 34–73974 (December 31, 2014) (Order Approving SR–CBOE–2014–93)(explaining under the [cabinet trade] procedures, bids and offers (whether opening or closing a position) at a price of $1 per option contract may be represented in the trading crowd by a Floor Broker . . . but must yield priority to all resting orders in the [ ] cabinet book (which resting

As background, with respect to the proposed change, the Exchange adopted cabinet trading on the Exchange's Trading Floor.[5] Under the current BOX Rule 7620 (Accommodation Transactions), only closing cabinet transactions at a price of $1 per option contract for the account of a customer or Floor Market Maker are allowed. In addition, the rule specifies that opening orders are not cabinet orders, but opening orders in certain cases may be matched with a cabinet order.[6] The Exchange now wishes to allow opening cabinet orders to further accommodate additional cabinet transactions on the Exchange Trading Floor.

The Exchange first proposes to amend the definition of cabinet orders to include bids and offers (whether opening or closing) at a price of $1 per option contract for the account of a customer or Floor Market Maker.

The Exchange expects the majority of opening cabinet orders to be submitted by Market Makers (*e.g.,* Floor Market Makers or Away Market Makers), but intends to offer the potential benefits of these transactions to all participants.[7] As liquidity providers, Market Makers play a vital role in the financial markets and help to facilitate market efficiency and price discovery. Market Makers engage in a course of dealings for their own account to assist with the maintenance of a fair and orderly market. Market Makers must consistently manage portfolio risk and seek opportunities to hedge their exposures in order to maintain a risk-neutral position. Failure to rebalance portfolios and continuously hedge exposes Market Makers to undesirable risk. Therefore, permitting Market Makers to submit opening cabinet orders, while yielding priority to all closing cabinet orders, will enable Market Makers (or other market participants) to hedge away unwanted exposure and get back to a risk-neutral position.

As an example of the proposed rule change, consider the following:

Assume Market Maker (MM1) has the following positions:

(Position 1): Long 300 put contracts on XYZ with a May 2020 expiration date, and a $105 strike price

(Position 2): Short 300 put contracts on XYZ with a May 2020 expiration date, and a $100 strike price

XYZ stock is currently at $50 per share.

If MM1 then exercises Position 1 (Long 105 puts). MM1's positions are now:

(Position 2): Short 300 put contracts on XYZ with a May 2020 expiration date, and a $100 strike price

(Position 3): Short 30,000[8] Shares of XYZ stock (because MM1 exercised Position 1 and now has the right to sell 30,000 Shares of the underlying stock)

With this change MM1's current risk is XYZ's stock price rising past $100 per share, a risk exposure that is theoretically unlimited. In the industry having these types of positions is called being ''synthetically short''.[9] In order for MM1 to hedge the risk of the stock price going past $100 per share, MM1 would seek to offset the risk of his current Positions (2 and 3) by submitting an opening cabinet bid for 300 XYZ call contracts with a May 2020 expiration, at a $100 strike price (Position 4).[10]

MM1 would have the following positions:

(Position 2): Short 300 put contracts on XYZ with a May 2020 expiration date, and a $100 strike price

(Position 3): Short 30,000[11] Shares of XYZ stock

(Position 4): Long 300 call contracts of XYZ with a May 2020 expiration at a $100 strike price

After purchasing Position 4, MM1 will have effectively paired off Positions 2 and 3, and hedged against any previous risk of the XYZ stock price going over $100 per share.

Next, the Exchange proposes to make numerous changes to Rule 7620 to reduce confusion and clarify certain terms and conditions.

First, the Exchange proposes to add language to codify that Cabinet Orders may only be executed on the Exchange's Trading Floor in open outcry pursuant to Rule 7600 series. This language is intended to clarify that cabinet orders may execute in open outcry like all other orders execute in open outcry, in accordance with the order allocation, priority, and execution rules applicable to Qualified Open Outcry (''QOO'') Orders. The Exchange notes, the proposed changes do not substantively alter the manner in which cabinet orders may trade currently. The Exchange believes clarifying that cabinet orders follow the same trading floor rules as all other open outcry orders will simplify the rules of cabinet orders for Participants, making the rules for cabinet transactions easier to follow and understand. The Exchange notes this part of the proposal is similar to Cboe's cabinet order rule.[12] In addition, as described in further detail below, Participants will no longer be required to conduct cabinet trades through a manual process which includes filling out and submitting forms to the Exchange.

In addition, the Exchange believes the proposal, as discussed herein, would make clear that the split-price priority provisions within Rule 7600 series will apply to cabinet trades in open outcry.[13] The Exchange believes that expressly including that split-price priority provisions will apply to open outcry cabinet trading would clarify to Participants that this functionality is available on the Exchange. The Exchange believes not offering split-price functionality for cabinet orders unnecessarily limits the ability of market participants to manually trade cabinet orders on the floor. In addition, restricting split-pricing for cabinet trades would unreasonably restrict

cabinet book orders may be closing only); Securities Exchange Release No. 34–86994 (September 23, 2019) (SR–CBOE–2019–058) (noting inadvertent removal of rule language and current proposal to clarify and explicitly state market participants may continue to place opening cabinet orders, so long as they yield to all closing cabinet orders represented by the trading crowd).

[5] *See* Securities Exchange Release No. 34–85803 (May 8, 2019) (Notice of filing and immediate effectiveness SR–BOX–2019–16).

[6] *See* BOX Rule 7620(c), (d), and (e).

[7] Although the Exchange anticipates that Market Makers would be the primary market participant involved in submitting opening cabinet trades, the Exchange proposes to offer the order type to all participants for competitive reasons. The Exchange notes that its competitors offer all participants the ability to submit opening cabinet orders, and therefore, the Exchange wishes to offer the same opportunities. *See* Securities Exchange Release No. 34–86994 (September 17, 2019) (Notice of Filing and Immediate Effectiveness SR–CBOE–2019–058) (stating that ''market participants may continue . . . to place opening cabinet orders, which must continue to yield to all closing cabinet orders represented by the trading crowd.''); See also NYSEArca Rule 6.80–O(b)(3) (stating ''[Cabinet] [o]rders may be placed for customer, firm and Market Maker accounts . . .'').

[8] Example assumes each contract covers 100 shares of the underlying stock, therefore, 300 contracts multiplied by 100 shares of the underlying stock is 30,000 shares.

[9] Synthetic options are trading positions holding a number of securities that when taken together, emulate another position. *See Synthetic Options, www.corporatefinanceinstitute.com, https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/synthetic-options/.*

[10] The Exchange notes, although submitted as an ''opening'' trade, this order is in effect ''closing'' synthetically for the Market Maker and transferring risk from that Market Maker's books to another Market Maker more comfortable with that risk exposure. The Exchange also notes that this opening bid would be for a series that is not actively traded and therefore would be in line with the primary purposes of cabinet trading because the Market Maker could now trade in a series that is *not actively traded* in order to synthetically *close* their position and hedge unwanted portfolio risk.

[11] *See supra* note 8.

[12] *See* Cboe Rule 5.85(h). Cabinet orders on Cboe follow the order allocation and priority rules that are applicable to the execution of all orders in open outcry.

[13] See BOX Rule 7600(i) (Priority on Split-Price Transactions Occurring in Open Outcry).

business by not making available certain prices which are available on other competing exchanges. Split-price priority for open outcry cabinet trades provides an extra incentive for market participants to both price improve and facilitate the efficient trading of options contracts that are worthless or not actively traded. The Exchange notes that at least one other competing options exchange (NYSE American LLC ''NYSE American'' f/k/a NYSE MKT LLC) amended their rule text to explicitly allow for split-price priority provisions to apply to cabinet trading.[14] In the same manner, the Exchange now seeks to extend split-price priority to open outcry cabinet trades in order to have substantially similar rules to those of other exchanges with trading floors. The Exchange believes this will not only enable greater competition among competing exchanges that already offer this functionality, but also will align the Exchanges rules with competitors and thereby promotes efficiency and will help reduce any potential for investor confusion. The Exchange notes current Rule 7620 provides that cabinet trading shall be conducted in accordance with other Exchange rules except as otherwise provided within Rule 7620, which states, in part, that Exchange Rule 7050 (Minimum Trading Increments) shall not apply to orders placed in the cabinet. Accordingly, the Exchange believes there is no conflict between the Exchange's current rules and the proposed rule change.

The Exchange then proposes to specify that option classes participating in the Penny Interval Program, pursuant to Rule 7260, are not allowed as cabinet orders. Penny Interval classes may already trade in minimum increments of $0.01, therefore, the proposed change adds clarity to the rule text, and ensures that the cabinet order rule accounts for other Exchange Rules that provide for trading in penny classes. The Exchange notes the exclusion of penny classes is consistent with cabinet order rules on at least one other exchange.[15]

The Exchange then proposes to add language that Floor Brokers representing bids and offers for cabinet trades must first yield priority to all existing closing cabinet orders represented on the Trading Floor. The Exchange believes including this language makes clear that cabinet orders (whether opening or closing) must yield priority to any existing closing cabinet orders. For example, if a pre-existing closing cabinet order is being represented in the trading crowd, and another closing cabinet order is submitted, the pre-existing closing cabinet order will take priority over the new closing cabinet order. The Exchange notes this priority process is followed on at least one other options exchange.[16]

Next, as noted above, the Exchange proposes to remove language in current subsection (b) which requires Floor Brokers to use designated transaction forms to record cabinet transactions and remove the language that states Rule 7580(e)(1) does not apply to cabinet orders. The Exchange proposes to have cabinet orders systematized by Floor Brokers when they record the cabinet orders in their order entry mechanisms prior to representation on the Exchange's Trading Floor for execution in open outcry. Specifically, cabinet orders, like all other QOO Orders, will be subject to the order recordation rule under BOX rule 7580(e)(1).[17] The Exchange believes this will aid Floor Brokers in executing cabinet transactions more efficiently and help create an electronic audit trail for cabinet orders represented and executed by Floor Brokers on the Exchange's Trading Floor.

The Exchange then proposes to remove the specific scenarios laid out in current subsections (c) through (e). The Exchange believes not removing these examples, which describe the limited circumstances in which opening orders may be matched with a cabinet order[18] would create investor confusion as to the types of cabinet orders allowed on the BOX Trading Floor. As previously discussed, the Exchange's current proposal would allow *all* cabinet trades (opening or closing) to occur via open outcry pursuant to Exchange Rule 7600 series, therefore current subsections (c) through (e) would be unnecessary and potentially confusing. The Exchange is also proposing to remove the definition of ''opening order'' in the current rule because the Exchange no longer intends to limit the meaning of the term to contra-side opening orders as a response to customers. The Exchange's proposal allows for initiating and contra-side opening orders.

Finally, the Exchange proposes to remove the requirement for Participants to submit a cabinet transaction form under Rule 7620(f). As previously noted, the Exchange is proposing to remove cabinet transaction forms in order to have cabinet orders be recorded and executed like all other QOO Orders on the Exchange's Trading Floor. Therefore, Floor Brokers manually submitting cabinet transaction forms to the Exchange will no longer be necessary. The Exchange believes that harmonizing cabinet orders and QOO Orders will avoid any potential investor confusion by providing consistency in order and trade recordation on the Trading Floor.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act,[19] in general, and Section 6(b)(5) of the Act,[20] in particular the Exchange believes the proposed rule change promotes just and equitable principles of trade, and by supplying market participants with an additional risk management tool will remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, protects investors and the

[14] *See* Securities and Exchange Act Release No. 34–68128 (November 1, 2012), 77 FR 66888 (November 7, 2012) (SR–NYSEMKT–2012–55) (noticed by the Commission for immediate effectiveness). NYSEMKT noted that ''neither CBOE nor PHLX have a similar restriction [for split-price priority] on cabinet trades, and allow for split-price priority for cabinet trades on the trading floor.'' NYSEMKT cited to the prevailing Cboe and Phlx rules at the time, (specifically CBOE Rules 6.54 and 6.47 and PHLX Rule 1059) and emphasized that ''[s]plit-price priority [was] available for open outcry trading on both CBOE and PHLX, with no restriction for cabinet trades.'' Cboe Rule 6.54 was modified to the current rule text and moved to Cboe Rule 5.12. *See* Securities and Exchange Act Release No. 86994 (September 17, 2019), 84 FR 49774 (September 23, 2019) (SR–CBOE–2019–058). In Cboe's SR–CBOE–2019–058 rule filing, Cboe noted the rule change would not ''substantively alter the manner in which cabinet orders may trade,'' and stated that cabinet orders would execute ''in accordance with the order allocation, priority and execution rules . . . which is substantially similar to how cabinet trades currently function.'' Cboe's Cabinet Orders rule was subsequently relocated from Rule 5.12 to Rule 5.85(h), where it is currently located. *See* Securities and Exchange Act Release No. 87224 (October 4, 2019), 84 FR 54652 (October 10, 2019) (SR–CBOE–2019–081). The Exchange believes split-price priority continues to be available for cabinet trading on Cboe's trading floor. *See also* Phlx Options 8 Section 33. Accommodation Transactions and Options 8 Section 25(a)(2) (split-price priority). Per Phlx rulebook, split-price priority ''applies to the allocation of orders on the Trading Floor'' and cabinet trading (accommodation transactions) are conducted only by Floor Brokers on Phlx's trading floor. While the above exchanges do not explicitly state in their rule text that split-price functionality is available for cabinet orders, as detailed above, NYSE American/NYSEMKT amended its cabinet trading rule text to specifically allow for split-price priority for open outcry cabinet trades because other exchanges provide for this capability.

[15] *See supra* note 4.

[16] *See* Cboe Rule 5.85(h) (stating that ''[c]abinet orders may only execute after yielding priority to all closing cabinet orders represented by the trading crowd).

[17] BOX Rule 7580(e)(1) requires Floor Brokers to contemporaneously upon receipt of a single or double-sided orders, and prior to the announcement of such order in the trading crowd, record specific information of the order onto the Floor Broker's order entry mechanism.

[18] *See supra* note 6.

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

public interest. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between market participants because opening cabinet trades are available to all market participants and must respect the priority of closing cabinet orders. The Exchange believes opening cabinet trades would essentially function as an alternative means by which Participants could avoid unwanted position exposure. In addition, the Exchange notes that opening cabinet trades are not profitable for Participants, but can be used to change a Participant's risk profile. The Exchange believes that the proposed change is in line with the primary purpose of cabinet trading because closing cabinet orders allow market participants to close worthless positions—*that carry some form of diminutive risk*—and opening cabinet trades will similarly enable Participants to submit orders in not actively traded series to effectively close out (synthetically) the risk of current positions. As such, the Exchange believes allowing market participants to execute both opening and closing cabinet positions is consistent with the Act.

As stated above, the Exchange believes offering opening cabinet orders will allow Market Makers (and other market participants) to more effectively manage portfolio risk. The Exchange believes enhancing the abilities of market participants to reduce risk exposure will remove impediments to, and perfect the mechanisms of, a free and open market and a national market system by enabling market participants to better manage risk and continue to further participate in the market.

The Exchange believes the proposed rule promotes just and equitable principles of trade by accepting opening cabinet orders, only if they yield priority to existing closing cabinet orders represented in the trading crowd. This order of precedence will ensure that cabinet orders remain available for all market participants wishing to effect closing transactions, but if no such orders exist, the Exchange will then allow for opening cabinet trades to execute. Additionally, the Exchange believes the proposed rule change is consistent with the requirement that the rules of an exchange not be designed to permit unfair discrimination between Participants. Specifically, the proposed rule change is not unfairly discriminatory because the priority process respects the primacy of closing cabinet orders which the Exchange anticipates would be executed by a broader range of market participants.

The Exchange believes amending the rule text to remove the trading scenarios [21] in the current rule text that will no longer apply and stating that all cabinet orders will execute in open outcry pursuant to Rule 7600 fosters cooperation and coordination with persons engaged in facilitating transactions in securities. The Exchange believes clarifying that cabinet trades will follow the pre-existing rules of QOO Orders adds greater transparency and consistency to the Exchange's Trading Floor rules. The Exchange believes that the proposed changes, overall, will make the cabinet trading rules easier to follow and understand. The Exchange believes removing the requirement for Participants to submit manual cabinet transaction forms, and instead have Floor Brokers follow the electronic order recordation rule of the Exchange will reduce the administrative burden on Floor Brokers and therefore removes impediments to and perfects the mechanisms of a free and open market. Also, because cabinet trades will be reported and processed like all other open outcry trades, market participants will not be impacted nor have to take on any additional reporting or processing burden. In addition, the Exchange believes that the proposal is designed to prevent fraudulent and manipulative acts and practices because having an electronic audit trail of all cabinet orders will provide a complete and accurate record of cabinet transactions and better facilitate regulatory oversight. The Exchange notes at least one other options exchange systematizes cabinet orders and allows cabinet orders to execute pursuant to open outcry rules.[22]

The Exchange believes allowing for split-pricing priority provisions (pursuant to Rule 7600) to apply to cabinet trades promotes just and equitable principles of trade, and removes impediments to and perfects the mechanisms of a free and open market and national market system because it will align the Exchange's Rules with the rules and trading practices of other options exchanges that currently conduct cabinet trading on their respective trading floors.[23] The Exchange believes providing market participants the ability to have split-price priority when trading cabinet orders will help facilitate the trading of options positions that are worthless or not actively traded. The Exchange believes the proposal is consistent with the protection of investors and the public interest because allowing for split-price priority for cabinet trading should lead to more aggressive quoting by Floor Participants, which in turn may lead to better executions for all market participants. Specifically, a Floor Participant might be willing to trade at a better price for a portion of an order if they were assured of trading with the balance of the order at the next best price increment. As a result, Floor Brokers representing orders in the trading crowd might receive better-priced executions.

Lastly, the Exchange believes permitting opening cabinet transactions that yield priority to existing closing cabinet orders aligns the Exchange's rule with at least two other exchanges with trading floors.[24] Therefore, the Exchange believes this proposal offers more consistency with floor trading across market centers which helps avoid potential investor confusion, thereby removing impediments to and perfecting the mechanisms of a free and open national market system and protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As indicated above, the Exchange notes that the rule is being proposed as a competitive response to the rules of another exchange.[25] The Exchange believes that allowing for additional liquidations at $1 per option contract would allow market participants to better manage risk and hedge unwanted exposure. The Exchange believes this promotes competition amongst exchanges because market participants will have an additional venue in which they can execute opening cabinet order transactions. In addition, the Exchange believes allowing opening cabinet executions from Market Makers will provide Market Makers with an additional risk management tool while trading on BOX, and encourage them to direct more general order flow to the Exchange, which may ultimately benefit all Participants. Furthermore, the Exchange does not believe that the proposed rule change will impose any

[21] *See supra* note 6.

[22] *See supra* note 4.

[23] *See supra* note 14.

[24] *See supra* note 4 and NYSEArca Rule 6.80–O(b)(5) (noting bids or offers on orders to open or close for the accounts of Market Makers, customers or firms may be made at $1 per option contract, but such orders must yield to all orders in the cabinet).

[25] *See supra* note 4.

burden on intramarket competition because the proposal simply offers an additional way for all market participants to synthetically liquidate unwanted risk exposure, and respects the priority of closing cabinet orders. In addition, the Exchange does not believe the proposed rule change will impose any burden on intramarket competition because the proposed cabinet orders will be available to all market participants to execute in open outcry in the same manner as they are able to execute any other QOO Orders. Furthermore, the Exchange believes that allowing for split-pricing priority to apply to cabinet trades is pro-competitive as it will allow the Exchange to offer its Participants pricing abilities which are currently available on competing exchanges [26] As such, 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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–BOX–2020–38 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–BOX–2020–38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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–BOX–2020–38 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28890 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[26] See supra note 14.

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90774; File No. SR–NASDAQ–2020–092]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Expiration Date of the Temporary Amendments Set Forth in SR–NASDAQ–2020–076 Concerning Video Conference Hearings

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 17, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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 extend the expiration date of the temporary amendments in SR–NASDAQ–2020–076 from December 31, 2020 to April 30, 2021. The proposed rule change would not make any changes to the text of the Exchange rules.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

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

In response to the COVID–19 global health crisis and the corresponding need to restrict in-person activities, the Exchange filed proposed rule change SR–NASDAQ–2020–076, which allows the Exchange's Office of Hearing Officers (''OHO'') and the Exchange Review Council (''ERC'') to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing. The COVID–19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID–19 conditions, and the lack of certainty as to when COVID–19-related health concerns will subside, the Exchange has determined that there is a continued need for this temporary relief for several months beyond December 31, 2020. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments in SR–NASDAQ–2020–076 from December 31, 2020, to April 30, 2021.

On November 5, 2020, the Exchange filed with the Commission a proposed rule change for immediate effectiveness, SR–NASDAQ–2020–076, to temporarily amend Exchange Rules 1015, 9261, 9524 and 9830 to grant OHO and the ERC authority [4] to conduct hearings in connection with appeals of Membership Application Program decisions, disciplinary actions, eligibility proceedings and temporary and permanent cease and desist orders by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing (the ''November 5 Filing'').[5] The Commission published its notice of filing and immediate effectiveness for the November 5 Filing on November 10, 2020.[6] The temporary amendments, as originally proposed in the November 5 Filing, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The Exchange proposed the temporary amendments allowing for specified OHO and ERC hearings to be conducted by video conference in response to the COVID–19-related public health risks posed in connection with conducting traditional, in-person hearings. As set forth in the November 5 Filing, the Exchange relies on COVID–19 data and the guidance issued by public health authorities to determine whether the current public health risks presented by an in-person hearing may warrant a hearing by video conference.[7] As noted above, the COVID–19-related public health risks necessitating this temporary relief have not yet abated, with COVID–19 cases surging nationwide.

Based on its assessment of current COVID–19 conditions, including the recent escalation in COVID–19 cases nationwide, the Exchange does not believe the COVID–19-related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020. Accordingly, the Exchange proposes to extend the expiration date of the temporary rule amendments in the November 5 Filing from December 31, 2020, to April 30, 2021. The extension of these temporary amendments allowing for specified OHO and ERC hearings to proceed by video conference will allow the Exchange's critical adjudicatory functions to continue to operate effectively in these extraordinary circumstances—enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets—while also protecting the health and safety of hearing participants.

The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, by continuing to provide greater harmonization between the Exchange rules and FINRA rules of similar purpose,[10] resulting in less burdensome and more efficient regulatory compliance.

The proposed rule change, which extends the expiration date of the temporary amendments to the Exchange rules set forth in the November 5 Filing, will continue to aid the Exchange's efforts to timely conduct hearings in connection with its core adjudicatory functions. Given current COVID–19 conditions and the uncertainty around when those conditions will improve, without this relief allowing OHO and ERC hearings to continue to proceed by video conference, such hearings may need to be postponed indefinitely. The Exchange must be able to perform its critical adjudicatory functions in order to fulfill its statutory obligations to protect investors and maintain fair and orderly markets. As such, this relief is essential to the Exchange's ability to fulfill its statutory obligations and allows hearing participants to avoid the serious COVID–19-related health and safety risks associated with in-person hearings.

Among other things, this relief will allow OHO to conduct temporary cease and desist proceedings by video conference so that the Exchange can take immediate action to stop ongoing customer harm and will allow the ERC to timely provide members, disqualified individuals and other applicants an

[4] For OHO hearings under Exchange Rules 9261 and 9830, the proposed rule change temporarily grants authority to the Chief or Deputy Chief Hearing Officer to order that a hearing be conducted by video conference. For ERC hearings under Exchange Rules 1015 and 9524, this temporary authority is granted to the ERC or relevant Subcommittee.

[5] The temporary amendments set forth in the November 5 Filing were subject to a 30-day operative delay and, accordingly, became operative on December 6, 2020. *See infra* note 6 and accompanying text.

[6] *See* Exchange Act Release No. 90390 (November 10, 2020), 85 FR 73302 (November 17, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–NASDAQ–2020–076).

[7] As noted in the November 5 Filing, the temporary proposed rule change grants discretion to OHO and the ERC to order a video conference hearing. In deciding whether to schedule a hearing by video conference, OHO and the ERC may consider a variety of other factors in addition to COVID–19 trends.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *See* Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042). In SR–FINRA–2020–042, FINRA proposed rule changes to extend the expiration date of the temporary rule amendments set forth in SR–FINRA–2020–015 and SR–FINRA–2020–027 from December 31, 2020, to April 30, 2021. SR–FINRA–2020–015 provided temporary relief from some timing, method of service and other procedural requirements in FINRA's rules. SR–FINRA–2020–027 allowed FINRA's OHO and the NAC to conduct hearings, on a temporary basis, by video conference, if warranted by the current COVID–19-related public health risks posed by an in-person hearing.

approval or denial of their applications. As set forth in detail in the November 5 Filing, this temporary relief allowing OHO and ERC hearings to proceed by video conference accounts for fair process considerations and will continue to provide fair process while avoiding the COVID–19-related public health risks for hearing participants. Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the temporary proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As set forth in the November 5 Filing, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID–19 outbreak and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary impediments to its operations, including its critical adjudicatory processes, and its ability to fulfill its statutory obligations to protect investors and maintain fair and orderly markets that would otherwise result if the temporary amendments were to expire on December 31, 2020.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [11] of the Act and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are rapidly escalating nationwide. Based on the Exchange's assessment of the current COVID–19 conditions, including the lack of certainty as to when COVID–19-related health concerns will subside, the Exchange has determined that that there is a continued need for this temporary relief for several months beyond December 31, 2020. Accordingly, the Exchange states that waiver of the operative delay would allow the proposed changes, which are designed to minimize disruptions to the Exchange's operations in order to maintain fair processes and fulfill its obligations to protect investors and maintain fair and orderly markets, to be operative on the date of filing so the Exchange can implement the extension of these temporary amendments immediately.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in the November 5 Filing, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.[13] The Exchange also states that this temporary relief is necessary in order to continue performing critical adjudicatory functions necessary to meet its statutory obligations in light of COVID–19 related health and safety risks associated with in-person hearings.

The Commission observes that this proposal, like the Exchange's November 5 Filing and FINRA's comparable filing,[14] provides only temporary relief during the period in which the Exchange's operations are impacted by COVID–19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

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–NASDAQ–2020–092 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–2020–092. 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/*

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] *See supra* note 10 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID–19 related health risks). *See also* November 5 Filing, 85 FR at 73303 (stating that with certain exceptions, the text of Exchange Rules 1015, 9261, 9524 and 9830 are substantially the same as FINRA's rules).

[14] *See supra* note 10 and accompanying text.

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such 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–2020–092 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28803 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90786; File No. SR–IEX–2020–19]

Self-Regulatory Organizations: Investors Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Transaction Fees Pursuant to IEX Rule 15.110

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 11, 2020, the Investors Exchange LLC (''IEX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[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

Pursuant to the provisions of Section 19(b)(1) under the Act,[3] and Rule 19b-4 thereunder,[4] IEX is filing with the Commission a proposed rule change to amend its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c) (the ''Fee Schedule'') to modify certain promotional pricing incentives for the execution of Discretionary Limit (''D-Limit'') orders. Changes to the Fee Schedule pursuant to this proposal are effective upon filing,[5] and the Exchange plans to implement the changes on January 1, 2021.

The text of the proposed rule change is available at the Exchange's website at *www.iextrading.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule, pursuant to IEX Rule 15.110(a) and (c), to modify certain pricing incentives currently applicable to executions of Discretionary Limit (''D-Limit''), Discretionary Peg (''D-Peg''), and Midpoint Peg (''M-Peg'') order executions that were implemented with the launch of the D-limit order type on October 1 2020.[6] Specifically, the Exchange proposes to eliminate the fee discount of $0.0002 per executed share available to IEX Members[7] for liquidity-providing D-Peg and M-Peg orders.

The D-Limit order type was approved by the Commission on August 26, 2020,[8] and is designed to protect liquidity providers from potential adverse selection by latency arbitrage trading strategies in a fair and nondiscriminatory manner. A D-Limit order may be a displayed or non-displayed limit order that upon entry and when posting to the Order Book[9] is priced to be equal to and ranked at the order's limit price, but will be adjusted to a less-aggressive price during periods of quote instability, as defined in IEX Rule 11.190(g).[10] Otherwise, a D-Limit order operates in the same manner as either a displayed or non-displayed limit order, as applicable,[11] and accordingly, the Exchange determined that liquidity-taking D-Limit orders would be subject to the same transaction fees as other displayed or non-displayed orders.[12]

Currently, a D-Limit order that provides liquidity and is executed at a price at or above $1.00 results in a free execution.[13] In addition, D-Peg and M-Peg orders that provide liquidity and execute at a price at or above $1.00 per share are currently subject to a discount of $0.0002 per share from the fee that would otherwise be charged for the number of shares of such orders executed up to the number of shares of D-Limit orders that provided liquidity and executed at a price at or above $1.00 per share during such time period by the same Member, measured on a monthly basis.[14]

The fee discounts were designed to provide a narrowly tailored incentive for Members to utilize D-limit orders, a new and innovative order type, taking

[3] 15 U.S.C. 78s(b)(1).

[4] 17 CFR 240.19b–4.

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] *See* Securities Exchange Act Release No. 89967 (September 23, 2020), 85 FR 63616 (October 8, 2020) (SR–IEX–2020–14).

[7] *See* IEX Rule 1.160(s).

[8] *See* Securities Exchange Act Release No. 89686 (August 26, 2020), 85 FR 54438 (September 1, 2020) (SR–IEX–2019–15).

[9] *See* IEX Rule 1.160(p).

[10] *See* IEX Rules 11.190(b)(7) and 11.190(g).

[11] *See* IEX Rule 11.190(b)(7).

[12] Generally, IEX currently charges $.0003 per share for any displayed orders that execute (whether they add or remove liquidity) and $.0009 per share for any non-displayed orders that execute (whether they add or remove liquidity). If the shares execute for less than $1.00 per share, the Exchange charges 0.30% of the total dollar value of the transaction. *See* IEX Fee Schedule, *https://iextrading.com/trading/fees/.*

[13] *See* IEX Fee Schedule, *https://iextrading.com/trading/fees/.*

[14] For purposes of the discount, IEX aggregates all of a Member's MPIDs to calculate each Member's D-Peg, M-Peg, and D-Limit liquidity providing orders on a monthly basis. Upon a Member's request and subject to IEX's review and verification of the affiliate's relationship to the requesting Member, IEX will aggregate the Member's activity with activity of the Member's affiliated Member(s).

into account that Members seeking to utilize the new D-Limit order type may have needed to modify and test new trading strategies and order entry systems in order to do so. Accordingly, the pricing incentives implemented by the Exchange were designed to provide a meaningful economic incentive for such efforts and to encourage use of this new order type.

However, IEX has concluded that, while free executions for liquidity providing D-Limit orders priced at or above $1.00 continues to be an appropriate incentive, elimination of the related fee discount of $0.0002 per share for the execution of liquidity providing D-Peg and M-Peg orders is appropriate in order to simplify the fee structure. Specifically, based on informal discussions with Members, the Exchange understands that the fee discounts for non-D-Limit related order flow has created complexities in tracking applicable fees and corresponding billing for some Members and therefore do not provide a meaningful incentive for the use of D-Limit orders. As a result, the Exchange proposes to eliminate the fee discount of $0.0002 per share for the execution of liquidity providing D-Peg and M-Peg orders.

The Fee Schedule will continue to provide that execution of a D-Limit order that adds liquidity will result in a free execution, with the exception of executions below $1.00, which will continue to be assessed a fee of 0.30% of TDV (unless otherwise eligible for a free execution in accordance with the IEX Fee Schedule).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[15] in general, and furthers the objectives of Section 6(b)(4) [16] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable fees among IEX Members and persons using its facilities. Additionally, IEX believes that the proposed changes to the Fee Schedule are consistent with the investor protection objectives of Section 6(b)(5) [17] of the Act, in particular, in that they 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 investors and the public interest; and are not designed to permit unfair discrimination between customers, brokers, or dealers.

The Exchange believes that the proposed changes are consistent with the Act because they will be applicable to all Members on a fair, equal and nondiscriminatory basis. The transaction fee discount was part of a narrowly tailored approach, designed to maximize participation for the launch of D-Limit, while free executions for liquidity providing D-Limit orders priced at or above $1.00 per share is designed to provide the primary pricing incentive. As with any new order type, the implementation of D-Limit required a period during which Members needed to become familiar with its operation and potentially adjust order entry systems and trading strategies to effectively use D-Limit orders. However, based on informal Member feedback regarding the complexity such discounts have created, IEX believes that the transaction fee discounts are no longer necessary to incentivize Members to use D-Limit orders.

The Exchange further believes that the proposed amendment is consistent with the Act's requirement that the Exchange provide for an equitable allocation of fees. The Exchange's proposal involves the elimination of transaction fee incentives that were available to all Members based on executions of liquidity adding D-Peg and M-Peg orders. Similarly, eliminating the transaction fee incentive will apply in an equal and nondiscriminatory manner to all Members. All Members will continue to be subject to the same fees for the use of D-Limit orders. Moreover, eliminating the fee discount will operate to simplify the Exchange's fee structure and reduce any corresponding order tracking and billing complexities on the part of Members.

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 does not believe that the proposed fees will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues, if its fees are viewed as non-competitive. Moreover, IEX believes that the proposed fees, as amended, continue to be designed to enhance competition by increasing the Exchange's pool of both displayed and non-displayed liquidity, and to the extent that displayed liquidity increases, would contribute to the public price discovery process. Further, subject to the SEC rule filing process, other exchanges could adopt a similar order type and fee incentive.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. While Members that add liquidity using certain D-Limit orders will be subject to different fees based on this usage, those differences are not based on the type of Member entering orders but on whether the Member chose to submit certain liquidity providing D-Limit orders. As noted above, not only can any Member submit certain liquidity adding D-Limit orders, but every Member would benefit from the availability of more liquidity on the Exchange that the proposed fees are designed to incentivize. The Exchange is proposing to eliminate discounted transaction fees for certain D-Peg and M-peg orders that were part of a narrowly tailored incentive for Members to begin using the D-Limit order type. As discussed in the Purpose and Statutory Basis sections, the Exchange has concluded that the fee transaction discounts are no longer necessary to incentivize Members to use D-Limit orders and can operate to introduce certain complexities in order tracking and billing. Accordingly, the Exchange does not believe that eliminating the transaction fee discounts will have any impact 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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) [18] of the Act.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if

[15] 15 U.S.C. 78f(b).

[16] 15 U.S.C. 78f(b)(4).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78s(b)(3)(A)(ii).

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) [19] 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–IEX–2020–19 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–IEX–2020–19. 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 offices 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–IEX–2020–19, and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28811 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[19] 15 U.S.C. 78s(b)(2)(B).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90778; File No. SR–FINRA–2020–045]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 16, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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

FINRA is proposing to amend to amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure). The proposed rule change would (1) make information about formerly registered individuals subject to a final regulatory action available through BrokerCheck® on a permanent basis only for those individuals who have been registered on or after August 16, 1999; and (2) exclude information from BrokerCheck about deceased individuals. The proposed rule change also would make non-substantive, technical changes to FINRA Rule 8312.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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

BrokerCheck Program

FINRA established the BrokerCheck program (then known as the Public Disclosure Program) in 1988 to provide investors and the general public with information on the professional background, business practices, and conduct of member firms and their associated persons. Since establishing BrokerCheck, FINRA has regularly assessed the scope and utility of the information it provides to the public and, as a result, has made numerous changes to improve the program. These changes have made BrokerCheck easier to access by expanding the available methods of requesting information through the program. For instance, initially the public could request information only via U.S. mail or facsimile. FINRA subsequently added the ability to submit requests via a toll-free telephone number in 1991 and then through email in 1997.[3] Now BrokerCheck reports are available instantly online at *https://brokercheck.finra.org/.*[4] FINRA also has increased the amount of information available through the program. At first,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Congress in 1990 amended Exchange Act Section 15A to require FINRA to establish and maintain a toll-free telephone listing to receive inquiries regarding disciplinary actions involving its member firms and their associated persons, and promptly respond to such inquiries in writing. *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Public Law 101–429, 104 Stat. 931 (1990). *See also Notice to Members* 00–16 (March 2000).

[4] In 2006, Congress again amended Exchange Act Section 15A to, among other things, expand the methods by which BrokerCheck information is made available. *See* Military Personnel Financial Services Protection Act, Public Law 109–290, 120 Stat. 1317 (2006).

limited employment history, final disciplinary actions and criminal convictions were available through BrokerCheck. The information currently available to investors through BrokerCheck includes registrations brokers hold and the examinations they have passed, and disclosure information regarding various criminal, regulatory, customer dispute, termination and financial matters on current and former FINRA-registered brokerage firms and brokers.

The information displayed through BrokerCheck generally is derived from the Central Registration Depository (''CRD®'').[5] The CRD system is the central licensing and registration system used by the U.S. securities industry and its regulators. In general, information in the CRD system is obtained through the uniform registration forms that firms and regulatory authorities complete as part of the securities industry registration and licensing process.[6] These forms, particularly Forms U4 and U5, collect administrative, regulatory, criminal history, financial and other information about brokers, while Form BD collects similar information about broker-dealer firms.[7] FINRA, state and other regulatory authorities use this information in connection with their licensing and regulatory activities, and member firms use this information to help them make informed employment decisions. As of November 30, 2020, FINRA had processed over 57 million registration approvals for brokers and investment adviser representatives in the CRD system over a period spanning more than 20 years.

Pursuant to rules approved by the SEC, FINRA makes specific information in the CRD system publicly available through BrokerCheck.[8] BrokerCheck is part of FINRA's ongoing effort to help investors make informed choices about the brokers and broker-dealer firms with which they may conduct business. BrokerCheck maintains information on the approximately 3,550 registered broker-dealer firms and 624,600 registered brokers. BrokerCheck also provides the public with access to information about formerly registered broker-dealer firms and brokers.[9] In the first 11 months of 2020, BrokerCheck helped users conduct more than 35 million searches of firms and brokers.

FINRA believes that there are changes it can make to BrokerCheck to make the information more useful and relevant for investors and other users of the system. Accordingly, FINRA is proposing to amend FINRA Rule 8312 to (1) make information about final regulatory actions available through BrokerCheck on a permanent basis only for those individuals who have been registered on or after August 16, 1999; and (2) exclude information from BrokerCheck about deceased individuals.[10]

Proposed Rule Change

(A) Permanent Inclusion of Individuals Subject to Aged Final Regulatory Actions

Under FINRA Rule 8312(c)(1), information is made available through BrokerCheck on a permanent basis for those formerly registered individuals who:

- Are the subject of a final regulatory action;
- have been convicted of or pled guilty or nolo contendere to a crime;
- were the subject of a civil injunction in connection with investment-related activity, a civil court finding of involvement in the violation of any investment-related statute or regulation, or an investment-related civil action brought by a state or foreign financial regulatory authority that was dismissed pursuant to a settlement agreement; or
- were named as a respondent or defendant in an investment-related, consumer-initiated arbitration or civil litigation that alleged the person was involved in a sales practice violation and which resulted in an arbitration award or civil judgment against the individual.

Information about individuals formerly registered with FINRA (or a registered national securities exchange that uses the CRD system for registration purposes) who have been involved in the above disclosure events (''Permanent Disclosure Events''), except final regulatory actions, is made available on a permanent basis through BrokerCheck only if the individual has been registered on or after August 16, 1999.[11] There is no such registration date limitation with respect to formerly registered individuals subject to a final regulatory action, so information about these individuals is made available on a permanent basis through BrokerCheck even if their most recent registration terminated prior to August 16, 1999. This discrepancy between the availability of information for individuals subject to final regulatory actions and for individuals involved in the other Permanent Disclosure Events developed because FINRA expanded the scope of information made permanently available through BrokerCheck in two phases.

Information about formerly registered individuals subject to a final regulatory action was first made available through BrokerCheck on a permanent basis in 2009.[12] As mentioned above, this increase in the time frame that information about formerly registered individuals subject to a final regulatory action is provided through BrokerCheck applies regardless of when the individual was registered. Data limitations, however, affect the BrokerCheck reports of a number of the individuals subject to final regulatory actions who were no longer registered at the time the Web CRD system was implemented on August 16, 1999. The BrokerCheck reports of many such individuals contain minimal

[5] The concept for the CRD system was developed by FINRA jointly with the North American Securities Administrators Association (''NASAA''). The CRD system fulfills FINRA's statutory obligation to establish and maintain a system to collect and retain registration information. NASAA and state regulators play a critical role in the ongoing development and implementation of the CRD system.

[6] The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form BR (Uniform Branch Office Registration Form), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form).

[7] FINRA and NASAA jointly drafted the Forms U4 and U5, and both organizations collaborate in the development of any proposed amendments to these Forms. Form BD is the SEC's registration form for broker-dealer firms.

[8] Section 15A of the Exchange Act requires FINRA to provide registration information to the public. BrokerCheck is one of the tools through which FINRA disseminates this information to the public. There is a limited amount of information in the CRD system that FINRA does not display through BrokerCheck, including personal or confidential information. A detailed description of the information made available through BrokerCheck is available at *https://www.finra.org/investors/learn-to-invest/choosing-investment-professional/about-brokercheck.*

[9] Formerly registered brokers, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or may seek to attain other positions of trust with potential investors. BrokerCheck provides information on more than 17,120 formerly registered broker-dealer firms and 554,170 formerly registered brokers. Reports are available through BrokerCheck for 10 years after a broker leaves the industry, and brokers who are the subject of disciplinary actions and certain other events remain on BrokerCheck permanently.

[10] FINRA notes that the proposed rule change would impact members that have elected to be treated as capital acquisition brokers (''CABs''), given that the CAB rule set incorporates the impacted FINRA rule by reference.

[11] On this date, FINRA moved from the paper-based Legacy CRD system to the internet-based Web CRD system.

[12] *See* Securities Exchange Act Release No. 61002 (November 13, 2009), 74 FR 61193 (November 23, 2009) (Order Approving File No. SR–FINRA–2009–050).

information about the final regulatory action and no administrative or qualification information.[13] In addition to the data limitations, FINRA staff also must manually create BrokerCheck reports for these individuals due to the fact that their information is not available in the Web CRD system.[14]

In 2010, FINRA again expanded BrokerCheck to permanently make publicly available information about formerly registered individuals who had been involved in any of the Permanent Disclosure Events, other than final regulatory actions.[15] At that time, FINRA proposed applying the expansion only to those individuals who have been registered on or after August 16, 1999, due to the limitations applicable to the information available for some individuals who were no longer registered prior to that date.[16] FINRA also noted that the registration date limitation was warranted because, since the implementation of the Web CRD system, FINRA had used the information in that database to generate BrokerCheck reports.[17]

Therefore, FINRA proposes an amendment to FINRA Rule 8312(c)(1) to harmonize the Permanent Disclosure Events categories to make information about formerly registered individuals subject to a final regulatory action available in BrokerCheck on a permanent basis only for those individuals who have been registered on or after August 16, 1999.[18] While the proposal would affect the availability of information displayed through BrokerCheck for certain formerly registered individuals, these individuals will not have been registered (and therefore not engaged in the securities business) for more than 21 years.[19] In addition, the limited information available about the final regulatory actions for a number of these individuals, as well as the lack of administrative and qualification information,[20] may make the information of minimal use or relevance to BrokerCheck users.[21]

(B) Exclusion of Information Pertaining to Deceased Individuals

Information is available through BrokerCheck for individuals who are currently registered, whose registration was terminated within the preceding 10 years, and on a permanent basis as described in the preceding section. In most circumstances, these time frames for inclusion in BrokerCheck are applied to all individuals and result in information about deceased individuals being displayed in BrokerCheck.

There is very little investor protection value to the inclusion of information about deceased individuals in BrokerCheck. In addition, maintaining information about a deceased individual in BrokerCheck may result in unnecessary distress for the individual's family and possibly make it easier for someone to steal the deceased person's identity in an attempt to defraud investors.[22] Therefore, FINRA proposes to amend FINRA Rule 8312(g) to specify that information about a deceased individual would be removed from BrokerCheck 180 days after the individual's last registration date.[23] FINRA further proposes that, after the 180 days, FINRA would provide BrokerCheck information on a deceased individual in response to a written request where the information is requested for a legal, regulatory or compliance purpose.[24]

(C) Technical Changes

FINRA is also proposing non-substantive, technical changes to FINRA Rule 8312 that would (1) delete, with respect to BrokerCheck Firms, the phrase ''current or former'' from FINRA Rules 8312(b)(1) and (b)(2)(H) as this phrase is redundant; (2) delete the unnecessary numeral 2 pertaining to the age of customer complaints from FINRA Rule 8312(b)(2)(G); and (3) clarify in FINRA Rule 8312(c) that the term ''final regulatory action'' is used (rather than defined) in Form U4.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 90 days following publication of the *Regulatory Notice* announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[25] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The proposed rule change will harmonize the information available through BrokerCheck, that is available to investors and other users of the system, about formerly registered individuals who have been involved in Permanent Disclosure Events, including final regulatory actions. Moreover, making information about final regulatory actions available in BrokerCheck on a permanent basis only for those individuals who are registered on or after August 16, 1999, will remove information that is limited with respect to the regulatory action, lacks administrative and qualification information, and involves individuals who have not been in the securities industry for decades. Thus, the proposed rule change will make information presented in BrokerCheck

[13] Some of the unavailable information for individuals subject to a final regulatory action whose most recent registration terminated before August 16, 1999, includes registration history, industry examinations the individual has passed, employment history, and other business activities. The lack of information is due in part to the changes in the uniform registration forms. Specifically, Forms U4 and U5 have been revised on a number of occasions since 1999 and now elicit information that previously was not elicited by those Forms.

[14] BrokerCheck is able to automatically generate reports for those individuals whose information is in the Web CRD system because the information in the system is in a web-based format. The automatic generation of BrokerCheck reports is not possible for individuals whose information is in the paper-based Legacy CRD system.

[15] *See* Securities Exchange Act Release No. 62476 (July 8, 2010), 75 FR 41254 (July 15, 2010) (Order Approving File No. SR–FINRA–2010–012).

[16] *See supra* note 15.

[17] *See supra* note 15.

[18] The proposal would affect the availability of information in BrokerCheck for approximately 14,750 formerly registered individuals whose last registration ended before August 16, 1999, and whose report is available through BrokerCheck solely because they are the subject of a final regulatory action.

[19] Although no BrokerCheck report will be available for those formerly registered individuals who subsequently register only as an investment adviser representative after August 16, 1999, BrokerCheck will note that information about the individual is available on IAPD. Such an individual's IAPD report will include information about the final regulatory action.

[20] *See supra* note 13.

[21] Although information about these aged final regulatory actions would be removed from BrokerCheck, the information would remain in the CRD system and available to securities regulators and member firms.

[22] Last year, FINRA issued an Investor Alert about an unregistered individual using an altered BrokerCheck report to impersonate a registered investment professional.

[23] Information about an individual would be removed from BrokerCheck only upon documentary evidence that the individual is deceased, such as a Form U5 with a reason for termination of ''deceased'' or a newspaper obituary or death certificate provided by an executor, family member or other party.

[24] FINRA would provide information on a deceased individual in response to a written request for up to 10 years after the individual's last registration date unless any of the events set forth in proposed FINRA Rules 8312(c)(1)(A)–(D) applies to the individual, in which case the 10-year limitation would not apply.

[25] 15 U.S.C. 78*o*–3(b)(6).

more useful and relevant for investors and other users of the system.

In addition, excluding information from BrokerCheck about deceased individuals will reduce potential distress for a deceased individual's family and possibly make it more difficult for someone to steal the deceased person's identity in an attempt to defraud investors. Although the information on deceased individuals will no longer be in BrokerCheck, the information will continue to be available for legal, regulatory or compliance purposes upon written request.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Economic Impact Assessment

FINRA has undertaken an economic impact assessment, as set forth below, to further analyze the regulatory need for the proposed rule change, its potential economic impacts, including anticipated costs, benefits, and distributional and competitive effects, relative to the current baseline, and the alternatives FINRA considered in assessing how best to meet its regulatory objective.

Regulatory Need

BrokerCheck provides the public with information on the professional background, business practices, and conduct of FINRA member firms and their associated persons. FINRA believes, however, that some information presented in BrokerCheck is of minimal use or relevance for investors and other users of the system. Accordingly, FINRA is proposing to remove some information that is displayed or can be accessed through BrokerCheck.

Economic Baseline

The economic baseline for the proposed rule change is the current rule that addresses the types of information displayed in BrokerCheck. In general, the proposed rule change may affect those users of BrokerCheck for whom the removed information may have been relevant. The proposed rule change also may affect individuals who may be adversely impacted by the maintenance of information about a deceased individual in BrokerCheck.

The information displayed in BrokerCheck is derived from the CRD system. In general, the information enables users to make informed decisions regarding the firms currently registered as broker-dealers and the individuals currently registered as brokers. BrokerCheck maintains information on approximately 3,550 firms currently registered as broker-dealers and 624,600 individuals currently registered as brokers. As noted above, BrokerCheck also maintains information on more than 17,120 formerly registered broker-dealer firms and 554,170 formerly registered brokers.[26]

Decisions include the choice of firms or individuals with whom to do business or employ, and the choice of firms with which to seek employment. The review and consideration of this information before the selection of an individual or firm with which to do business or to employ may improve investor protections by increasing the ability of users to understand the potential risk of misconduct. Disclosure events reported to the CRD system have been found to be predictive of future misconduct.[27]

Economic Impacts

The proposed rule change would remove some information currently available through BrokerCheck. This information relates to the final regulatory actions of individuals who have not been registered since August 16, 1999, and deceased individuals.[28] We discuss the costs and benefits of the proposed rule change below. To the extent that the information remains available online (*i.e.,* discoverable through routine internet searches), however, then the potential benefits and costs of the proposed rule change may be mitigated.

The proposed amendments relating to deceased individuals would reduce the ability for someone to steal the deceased individual's identity in an attempt to defraud investors. This may increase investor protections to the extent someone would use the information to defraud investors, and decrease the potential costs to the families of the deceased individuals (*e.g.,* time and distress) to resolve matters relating to identity theft.

Although the information may be of minimal use or relevance to investors and other users of BrokerCheck, the proposed rule change may impose costs on certain users of BrokerCheck who would otherwise utilize the information that would be removed. For example, the former customers of a deceased broker may use BrokerCheck as a resource to evaluate the potential for previous misconduct in their own account. Instead of obtaining the information through BrokerCheck, these investors would incur the costs associated with submitting a written request to obtain the information.

The information available through BrokerCheck may change over time as a result of the exclusion of information relating to the final regulatory actions of individuals who have not been registered since August 16, 1999, and deceased individuals, which may result in different collections of BrokerCheck data.[29] The changes to data collections is dependent, in part, on the number of deceased individuals who would have their information excluded. As the number of deceased individuals for whom information is available through BrokerCheck is uncertain, so is the effect of the proposed rule change on future data collections.

Alternatives Considered

An alternative to the proposed rule change would be to propose a different number of days for removing a deceased individual's information from BrokerCheck. A period longer (shorter) than the proposed 180 days after the individual's last registration may increase (decrease) the ability of investors to readily obtain information about a deceased broker with which they did business prior to the broker's death or examine the misconduct of individual brokers at the firm level. A period longer (shorter) than the proposed 180 days, however, may increase (decrease) the potential for identity theft.

[26] *See supra* note 8 for a further discussion of the information that is available through BrokerCheck.

[27] *See* Hammad Qureshi & Jonathan Sokobin, *Do Investors Have Valuable Information About Brokers?* (2015), *https://www.finra.org/sites/default/files/OCE-Working-Paper.pdf. See also* Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy 233–295 (2019); and Stephen G. Dimmock, & William C. Gerken, *Predicting Fraud by Investment Managers,* 105(1) Journal of Financial Economics 153–173 (2012).

[28] As noted above, approximately 14,750 individuals whose last registration ended before August 16, 1999 have a record in BrokerCheck solely because they are the subject of a final regulatory action that occurred before that date. *See supra* note 18. In general, FINRA is not able to identify those individuals in BrokerCheck who are deceased, unless it receives documentary evidence that the individual is deceased.

[29] In July 2017, FINRA revised the BrokerCheck Terms of Use to allow ''scraping'' for academic use. Academic and other users are obligated to comply with the other applicable provisions of the Terms of Use. Academics have collected, in bulk, data from the BrokerCheck website. *See, e.g.,* Mark Egan, Gregor Matvos & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy 233–295 (2019).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2020–045 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–FINRA–2020–045. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2020–045 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28807 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90777; File No. SR–LTSE–2020–23]

Self-Regulatory Organizations; Long-Term Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.380 To Expand the Exchange's Optional Risk Controls Mechanism To Include a Net Notional Exposure Risk Check in Addition to the Gross Notional Exposure Risk Check

December 22, 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 17, 2020, Long-Term Stock Exchange, Inc. (''LTSE'' or the ''Exchange'') 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 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

LTSE proposes a rule change to amend LTSE Rule 11.380 to offer an optional net notional exposure risk check to Members and their clearing firms as part of the Exchange's Risk Controls mechanism.

The text of the proposed rule change is available at the Exchange's website at *https://longtermstockexchange.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 amend LTSE Rule 11.380 to offer an optional net notional exposure risk check to Members and their clearing firms as part of the Exchange's Risk Controls mechanism.

Existing LTSE Rule 11.380 describes the Exchange's current optional Risk Controls mechanism that is designed to assist LTSE Members and their clearing firms in their risk management efforts. LTSE does not charge a fee for use of the Risk Controls mechanism. As described in the rule, the Risk Controls mechanism currently can be configured to provide trading limits based on the gross notional exposure for matched trades for a Member or clearing firm's broker correspondent across market participant identifiers (''MPIDs''), by MPID, by session or in combination, per clearing firm relationship or Member, as applicable (''Gross Notional Exposure''). Once the Gross Notional Exposure, as elected and configured by a Member or its clearing firm, has exceeded the pre-determined limit, LTSE will automatically reject new orders and cancel all open orders for the applicable

[30] 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.

MPID(s) and/or FIX session [4] as specified. Further, the Gross Notional Exposure risk control may be increased or decreased on an intra-day basis by a Member or the clearing firm of a Member, as applicable. As specified in paragraph (a)(2)(A) of Rule 11.380, Gross Notional Exposure is calculated as the absolute sum of the notional value of all buy and sell trades (*i.e.,* equal to the value of executed buys plus the absolute value of executed long sells plus the absolute value of executed short sells). There is no netting of buys and sales in the same symbol or across symbols. The Gross Notional Exposure resets for each new trading day.

LTSE proposes to revise Rule 11.380 to provide Members or the clearing firms of Members with an additional option of configuring a Risk Controls trading limit on the net notional exposure for matched trades for a Member or clearing firm's broker correspondent across MPIDs, by MPID, by FIX session or in combination, per clearing firm relationship or Member as applicable (''Net Notional Exposure''). LTSE notes that other exchanges offer their members the option of a risk control based upon the member's net notional exposure.[5] As proposed, once the Net Notional Exposure, as elected and configured by a Member or its clearing firm, has exceeded the predetermined limit, LTSE will automatically reject new orders and cancel all open orders for the applicable MPID(s) and/or FIX session specified. However, just as with the existing Gross Notional Exposure risk control, the proposed new Net Notional Exposure risk control may be increased or decreased on an intra-day basis by a Member or the clearing firm of a Member, as applicable. As specified in the proposed new paragraph (a)(2)(B) of Rule 11.380, Net Notional Exposure will be calculated as the absolute net sum of the notional value of all buy and sell trades (*i.e.,* equal to the value of executed buys minus the absolute value of executed long sells minus the absolute value of executed short sells). Netting will be calculated across all symbols. As with Gross Notional Exposure risk controls, the proposed Net Notional Exposure risk control would reset for each new trading day. Under the proposed rule change, Members or their clearing firms, if they choose to avail themselves of LTSE's Risk Controls mechanism, may elect to configure the Risk Controls mechanism to accumulate and specify a limit or limits on either the Gross Notional Exposure, the newly-offered Net Notional Exposure, or both (collectively defined in the proposed new rule as the ''Risk Controls Limit'').[6] LTSE believes that adding a Net Notional Exposure risk control to its existing Risk Controls mechanism will enhance the risk management tools available to LTSE Members. The Exchange notes, however, that use of a Risk Controls Limit by a Member or the clearing firm of a Member does not automatically constitute compliance with LTSE rules or SEC rules, nor does it replace Member-managed and clearing firm-managed risk management solutions. The Exchange does not propose to require Members or their clearing firms to use the Risk Controls mechanism, and Members and their clearing firms may use any other appropriate risk-management tool or service instead of, or in combination with, LTSE's Risk Controls mechanism. The Exchange will not provide preferential treatment to Members or clearing firms using LTSE's Risk Controls mechanism, nor will the use of the Risk Controls mechanism impact a Member or clearing firm's use of LTSE other than when it results in orders being rejected or cancelled pursuant to the Risk Controls Limits. In addition, LTSE will continue to provide the Risk Controls mechanism to Members and clearing firms without charge.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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.

Specifically, the Exchange believes that the proposed rule change 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 by enhancing the risk management protections available to Exchange Members and their clearing firms. The Exchange believes that the proposed rule change supports these objectives because it is designed to enable all LTSE Members an additional option for how to manage and limit their own trading exposure (whether on the basis of the Member's Gross Notional Exposure, Net Notional Exposure, or both) on the Exchange, in addition to providing clearing firms an additional option to monitor their correspondent Members' trading exposure as well as their own trading exposure (whether on the basis of the clearing firm's Gross Notional Exposure, Net Notional Exposure, or both), including by intra-day increases or decreases in the limits.

Further, the Exchange believes that the proposed rule change is consistent with the protection of investors and the public interest because it provides an additional mechanism to enable LTSE Members and clearing firms of LTSE Members to manage their risk by preventing trading that exceeds a Member or a Member's clearing firm's financial resources on a net notional basis (as well as the currently available gross notional basis risk control), and, thereby, contributes to the stability of the equities markets. Thus, the Exchange believes the addition of a Net Notional Exposure risk control offers Members and their clearing firms an important compliance tool that Members and their clearing firms may use to help maintain the regulatory integrity of the markets. The Exchange notes that other exchanges' rules provide for similar functionality,[9] and, accordingly, LTSE does not believe that

[4] The proposed rule change is substantively identical to the corresponding provisions in Investors Exchange (''IEX'') Rule 11.380 with certain exceptions. The Exchange's existing Rule 11.380 uses the term ''session'' but the proposed rule change would use the term ''FIX session'' to clarify its meaning. *See* IEX Rule 11.380. The Exchange also is not adopting the provisions in paragraph (a)(3) of IEX Rule 11.380, which pertain to the application of the Risk Controls in the context of an opening or closing auction. Because the Exchange does not have an opening or closing auction, these provisions are inapposite. If the Exchange introduces an opening or closing auction, it will address the implications for its Risk Controls at that time.

[5] *See, e.g.,* IEX Rule 11.380; Nasdaq Stock Market (''Nasdaq'') Rule 6130; Cboe BZX Exchange, Inc. (''Cboe'') Rule 11.13 Interpretations and Policies .01(h). The proposed rule change is substantively identical to the corresponding provisions in IEX Rule 11.380 with the exception of references to ''routed'' trades because LTSE does not have a routing broker.

[6] In the case of a Member that is subject to Risk Controls Limits set by its clearing firm, the Member will be advised of such limits by LTSE. In the event a Member that is subject to Risk Controls Limits set by its clearing firm also elects to set Risk Controls Limits for its own trading, the Exchange will apply both such limits with the lower of the Risk Controls Limits being applicable since it will trigger first.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] *See supra* note 5.

the proposed rule change raises any new or novel issues not already considered by the Commission.

In addition, the Exchange believes that the proposal is consistent with just and equitable principles of trade and not unfairly discriminatory because the Risk Controls mechanism is available to all Members and their clearing firms without charge.

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 proposal is designed to expand the Exchange's existing, optional Risk Controls mechanism by adding a new Net Notional Exposure risk control. The Exchange is not proposing to charge any fee for use of any aspect of its Risk Controls mechanism. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition because other exchanges offer similar functionality.[10] The Exchange also does not believe that the proposal will impose a burden on intramarket competition because its Risk Controls mechanism is available to all Members, and clearing firms of Members, and provides a way for LTSE Members and clearing firms to manage their risk by preventing trading that is erroneous or exceeds a Member or clearing firm's financial resources, thereby contributing to the stability of the equities markets. Accordingly, the Exchange does not believe that this proposal will have any impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; or (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[13] and Rule 19b–4(f)(6)(iii) thereunder.[14]

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)[15] 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–LTSE–2020–23 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–LTSE–2020–23. 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–LTSE–2020–23 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28806 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[10] *Id.*

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 15 U.S.C. 78s(b)(3)(A)(iii).

[14] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90776; File No. SR–NYSE–2020–105]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Revising Rules 46 and 46A To Permit the Appointment of Trading Officials

December 22, 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 15, 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 and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 revisions to Rules 46 and 46A to permit the appointment of Trading Officials and to make conforming changes to certain Exchange rules related to Floor Official duties and responsibilities. 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 revisions to Rules 46 and 46A to permit the appointment of Trading Officials and to make conforming changes to certain Exchange rules related to Floor Official duties and responsibilities.

Background

Rule 46 (Floor Officials—Appointment) and Rule 46A (Executive Floor Governors) currently set forth the process for the Exchange to appoint active NYSE members [4] as Floor Officials. In addition, Rule 46 permits the Exchange to appoint qualified ICE employees to as act as Floor Governors, a more senior type of Floor Official.[5]

The role of the Floor Official evolved out of the self-regulatory scheme of the Securities Exchange Act of 1934, as amended (the ''Act'').[6] Floor Officials are delegated authority from the Exchange's Board of Directors (the ''Board'') to supervise and regulate active openings and unusual situations that arise in connection with the making of bids, offers or transactions on the Trading Floor,[7] and to review and approve certain trading actions. A number of Exchange Rules specify involvement in the marketplace by Floor Officials, senior-level Floor Officials (*i.e.,* Floor Governors, Executive Floor Officials, Senior Floor Officials and Executive Floor Governors), or both.

Exchange members appointed as Floor Officials serve in a volunteer capacity in addition to their regular obligations as either brokers or Designated Market Makers (''DMM''). In 2008, the Exchange amended Rule 46 to permit qualified ICE employees to be appointed as Floor Governors (''Staff Governors'').[8] At the same time, as a result of the evolution of the equities markets away from manual executions and manual enforcement of rules toward an electronic market that automates executions and in many cases hard codes the rule requirements into the execution logic, many of the trading procedures and situations originally requiring Floor Official involvement have been automated; in other cases, Floor Official approval has become *pro forma* rather than substantive.[9] More recently, the Exchange introduced Regulatory Trading Officials (''RTOs'') to perform the functions performed by Floor Officials regarding whether a bid or offer is eligible for inclusion in the Closing Auction by the DMM.[10] As described below, the Exchange has now determined to delegate the remaining duties and responsibilities of Floor Officials to the proposed Trading Officials.

Proposed Rule Change

The Exchange proposes to transition the duties and responsibilities of Floor Officials to Trading Officials, who would be Exchange staff appointed by the NYSE CEO or his or her designee. As proposed, Trading Officials would be the only persons authorized to perform the delegated functions under the Exchange rules on the Floor that member Floor Officials and Staff Governors currently perform. The various seniority-based gradations of Floor Official (Floor Officials, Senior Floor Officials, Executive Floor Officials, Floor Governors and Executive Floor Governors) also would be eliminated. As a practical matter, the current Staff Governors would become the new Trading Officials. Active Exchange members would not be eligible for appointment as Trading Officials.

Under current Rules 46 and 46A, Floor Officials are appointed by the Board and re-appointed annually. Floor Officials must also complete a mandatory education program and pass a qualifications exam. These requirements were developed for member Floor Officials, and the Exchange does not propose to retain them for Trading Officials. Like the current Staff Governors, Exchange staff would be appointed as Trading Officials based on experience and necessary business and rule knowledge that would enable them to participate in and supervise various trading situations on the Floor. Once appointed, Trading Officials would be trained and supervised by the Exchange in the same manner as the current Staff Governors.

In order to effectuate the proposed changes, the Exchange proposes to delete current Rules 46 and 46A in their entirety and define a Trading Official in new Rule 46 as an Exchange staff person designated by the CEO of the Exchange or his or her designee to perform those functions specified in Exchange rules.

In addition, the Exchange proposes certain technical and conforming changes to replace references to Floor Officials, Senior Floor Officials, Executive Floor Officials, Floor Governors and/or Executive Floor Governors with Trading Official in the following rules:

[4] Rule 2(a) states that the term ''member,'' when referring to a natural person, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Exchange Trading Floor or any facility thereof. *See also* note 6, *infra.*

[5] The title ''Floor Official'' includes a broad category of titles that include, in order of increasing seniority, Floor Officials, Senior Floor Officials, Executive Floor Officials, Floor Governors and Executive Floor Governors. *See* Rules 46 and 46A (defining Floor Official, Floor Governor, Executive Floor Official, Senior Floor Official and Executive Floor Governors).

[6] *See* 15 U.S.C. 78f.

[7] The term ''Trading Floor'' is defined in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the ''Main Room'' and the ''Buttonwood Room.''

[8] *See* Securities Exchange Act Release No. 57627 (April 4, 2008), 73 FR 19919 (April 11, 2008) (SR–NYSE–2008–19) (''Release No. 57627'').

[9] *See, e.g.,* Securities Exchange Act Release No. 75695 (August 13, 2015), 80 FR 50365 (August 19, 2015) (SR–NYSE–2015–33) (deletion of Rule 79A.20 requiring prior Floor Official approval for certain DMM dealer trades more than one or two dollars away from the last sale as moot).

[10] *See* Securities Exchange Act Release No. 88765 (April 29, 2020), 85 FR 26771 (May 5, 2020) (SR–NYSE–2020–03). The Exchange has filed a separate proposed rule change to make permanent that Floor Broker Interest would not be eligible to participate in the Closing Auction and in that filing, has also proposed to delete Rule 46B because RTOs would no longer have a role under Exchange rules. *See* Securities Exchange Act Release No. 90495 (November 24, 2020), 85 FR 77304 (December 1, 2020) (SR–NYSE–2020–95) (Notice) (''NYSE Close Proposal'').

• Rule 7.35A (DMM-Facilitated Core Open and Trading Halt Auctions) sets forth the responsibility of DMMs to ensure that registered securities open as close to the beginning of Core Trading Hours as possible or reopen at the end of the halt or pause.

○ Subsection (a)(4) provides for Floor Official participation in the opening and reopening process to provide an impartial professional assessment of unusual situations, as well as to provide guidance with respect to pricing when a significant disparity in supply and demand exists. The rule also contemplates DMMs consultations with Floor Officials under certain specific circumstances. References to Floor Official in Rule 7.35A(a)(4) and (a)(5) would be replaced with Trading Official.

○ Rule 7.35A(d) governs pre-opening indications. Subsection (d)(4) describes the procedures for publishing pre-opening indications and specifies when publication of a pre-opening indication requires supervision and approval of a Floor Governor. References to Floor Governor in Rule 7.35A(d)(4)(A) and (F)(i) would be replaced with Trading Official.

• Rule 7.35B (DMM-Facilitated Closing Auctions) describes the responsibility of each DMM to ensure that registered securities close as soon after the end of Core Trading Hours as possible.

○ Rule 7.35B(a)(1)(C) provides that electronically-entered Floor Broker Interest cannot be reduced in size or replaced except that DMMs can accept a full cancellation of electronically-entered Floor Broker Interest to correct a Legitimate Error subject to Floor Official approval. Floor Official would be replaced with Trading Official in Rule 7.35B(a)(1).[11]

○ Rule 7.35B(d) governs closing imbalances. Subsection (d)(1)(A) describes the circumstances when a DMM may disseminate a Regulatory Closing Imbalance with prior Floor Official approval. Subsection (d)(2) provides that DMMs may disseminate a Manual Closing Imbalance only with prior Floor Official approval beginning one hour before the scheduled end of Core Trading Hours up to the Closing Auction Imbalance Freeze Time. In both subsections, references to Floor Official would be replaced with Trading Official.

○ Rule 7.35B(j) governs temporary rule suspensions. Subsection (j)(3) provides that a determination to declare a temporary suspension as well as any entry or cancellation of orders or closing of a security under subsection (j)(2) must be supervised and approved by an Executive Floor Governor and supervised by an Exchange Officer. The Exchange proposes that supervision and approval of these determinations must be supervised and approved by a Trading Official.

• Rule 18(d) (Compensation in Relation to Exchange System Failure) sets forth the process for member organizations to seek reimbursement for losses resulting from system failures. Subsection (d) establishes a Compensation Review Panel consisting of three Floor Governors and three Exchange employees to determine the eligibility of a claim for payment. The Exchange proposes to eliminate the Compensation Review Panel and provide that the Exchange will perform will review claims submitted pursuant to the rule and determine eligibility of a claim for payment.

• Rule 37 (Visitors) provides that visitors shall not be admitted to the Floor except by permission of Exchange officer, a Senior Floor Official, Executive Floor Official, a Floor Governor, or an Executive Floor Governor. The Exchange proposes that admission of visitors to the Floor be by permission of the Exchange.

• As noted, the text of Rules 46 and 46A would be deleted. The heading of Rule 46 would be changed to ''Trading Officials''.

• Under current Rule 47 (Floor Officials—Unusual Situations), Floor Officials have the power to supervise and regulate active openings and unusual situations that may arise in connection with the making of bids, offers or transactions on the Floor. References to Floor Official would be changed to Trading Officials and the heading would be changed to ''Unusual Situations on the Floor.'' Current Rule 47 would become new Rule 48.

• Rule 75 (Disputes as to Bids and Offers) mandates that disputes arising on bids or offers that are not settled by agreement between the interested members shall be settled by a Floor Official. The Exchange proposes that disputes be settled by a Trading Official and would amend the rule text and Supplementary Material .10 accordingly. The rule currently provides that, if both parties to a dispute involving either a monetary difference of $10,000 or more or a questioned trade, the matter may be referred for resolution to a panel of three Floor Governors, Senior Floor Officials, or Executive Floor Officials, or any combination thereof (''3 Floor Official Panel''), whose decision shall be binding on the parties. As an alternative to the 3 Floor Official Panel, members may proceed to resolve a dispute through long-standing arbitration procedures established under the Exchange's rules. The Exchange proposes to eliminate the 3 Floor Official Panel. Disputes involving either a monetary difference of $10,000 or more or a questioned trade would thus be resolved exclusively through arbitration.

• Rule 91.50 (Taking or Supplying Securities Named in Order) provides that if there is a continued pattern of rejection of a DMM's principal transactions, a Floor Official may be called upon and require the broker to review his actions. Floor Official would be changed to Trading Official in Rule 91.50.

• Rule 93(b) (Trading for Joint Account) provides that no member while on the Floor shall initiate the purchase or sale on the Exchange of a stock for any account in which the member, the member's member organization or any other member or allied member therein is directly or indirectly interested with any person other than such member organization or any other member or allied member therein, without the prior approval of a Floor Official. The reference to Floor Official would be changed to Trading Official.

• Rule 103.10 (Registration and Capital Requirements of DMMs and DMM Units) governs the temporary reallocation of securities and provides that the CRO or his or her designee and two non-DMM Executive Floor Governors or if only one or no non-DMM Executive Floor Governors is present on the Floor, the most senior non-DMM Floor Governor or Governors based on length of consecutive service as a Floor Governor at the time of any action covered by this rule, acting by a majority, shall have the power to reallocate temporarily any security on an emergency basis whenever such reallocation would be in the public interest. The Exchange proposes that only the CRO or his or her designee would have the power to reallocate temporarily any security on an emergency basis.

• Rule 103A (Member Education) provides for the Exchange to develop procedures and standards for qualification and performance of members active on the Floor of the Exchange. The rule currently exempts Executive Floor Governors from the requirement to complete educational modules, which the Exchange proposes to eliminate. The Exchange also proposes the non-substantive change of

[11] The Exchange has separately proposed to delete Rule 7.35B(a)(1)(C). *See id.*

deleting the superfluous ''(I)'' at the beginning of the rule.

• Rule 103B(G) (Security Allocation and Reallocation) describes the allocation freeze policy and provides that, following allocation probation, a second six month period will begin during which a DMM unit may apply for new listings, provided that the unit demonstrates relevant efforts taken to resolve the circumstances that triggered the allocation prohibition. Currently, the determination as to whether a unit may apply for new listings is made by Exchange regulatory staff in consultation with the Executive Floor Governors. The Exchange proposes that this determination will be made solely by regulatory staff.

• Rule 104 (Dealings and Responsibilities of DMMs) governs dealings and responsibilities of DMMs. Subsection (i) provides for temporary DMMs and permits a Floor Governor to authorize a member of the Exchange who is not registered as a DMM in such stock or stocks, to act as a temporary DMM under specific circumstances. The Exchange proposes that Trading Officials would perform this function under the rule.

• Rule 112(a)(i) (Orders initiated ''Off the Floor'') provides that all orders in stocks for the account of a member organization or any member, principal executive, approved person, officer, or employee of such organization or a discretionary account serviced by the member or member organization must be sent to the Floor through a clearing firm's order room or other facilities regularly used for transmission of public customers' orders to the Floor, except for orders, among others, when a Floor Official expressly invites a member or members to participate in a difficult market situation. The Exchange would replace Trading Official for Floor Official in Rule 112(a)(i).

• Rule 124(e) (Midday Auction) provides that, when there is a significant imbalance in a Midday Auction Stock at the end of the Midday Auction Pause, the Midday Auction Pause may be converted to an order imbalance halt with the approval of a Floor Governor or two Floor Officials. The Exchange proposes that the approval would be given by a Trading Official.

• Rule 128B (Publication of Changes, Corrections, Cancellations or Omissions and Verification of Transactions) governs changes and corrections to the Consolidated Tape.

○ Rule 128B.10 (Publication on the tape or in the ''sales sheet'') provides that publication of a change or a correction in a transaction which previously appeared on the tape may be made on the tape on the day of the transaction provided that both buying and selling members or member organizations agree to the change in the transaction(s) and receive approval from a Floor Governor, Executive Floor Official, Senior Floor Official or Executive Floor Governor. In the event such publication is not made on the tape on the day of the transaction, it may be published on the tape at least ten minutes prior to the opening of business on the following business day or in the sales sheet within three business days of the transaction with the approval of both the buying and selling members and a Floor Official, provided the price of the transaction does not affect the high, low, opening or closing price of the security on the day of the transaction. The Exchange proposes that Trading Officials provide the approvals required under Rule 128B.10.

○ Rule 128B.13 (Other errors) provides that a correction in the amount of a transaction reported erroneously to the tape by a party to the transaction, may be published on the tape on the day of the transaction, on the tape at least ten minutes prior to the opening on the following business day, or on the ''sales sheet'' within three business days of the transaction with the approval of a Floor Governor, Executive Floor Official, Senior Floor Official or Executive Floor Governor. The Exchange proposes that Trading Officials provide the approvals required under Rule 128B.13.

• Rule 308(g) (Acceptability Proceedings) provides that any person whose application has been disapproved by an Acceptability Committee, or any member of the Board, any member of the Committee for Review, any Executive Floor Governor, and the Division of the Exchange initiating the proceedings may require a review by the Board of any determination of an Acceptability Committee. The Exchange proposes to delete Executive Floor Governors from the rule.

• Rule 903(d)(ii) (Off-Hours Transactions) provides that a closing price order to buy (sell) a security for the account of the DMM registered in such security and approved by a Floor Official, coupled with a closing price order to sell (buy) to offset all or part of a market-on-close imbalance in the stock prior to the close, shall be executed upon entry. The Exchange proposes that a Trading Official would provide the required approval under the rule.

• Rule 906 (Impact of Trading Halts on Off-Hours Trading) provides that a closing price order to buy (sell) a security for the account of the DMM registered in such security and approved by a Floor Official coupled with a closing price order to sell (buy) to offset all or part of any market-on-close imbalance in the stock prior to the close, shall not be so canceled or precluded from entry as result of corporate developments during the Off-Hours Trading Session. The Exchange proposes that a Trading Official would provide the required approval under the rule.

• Finally, NYSE Listed Company Manual Section 202.04 (Exchange Market Surveillance) provides that a listed issue may be placed under special initial margin and capital requirements, which indicates a determination by the Exchange's Floor Officials that the market in the issue has assumed a speculative tenor and has become volatile due to the influence of credit, which, if ignored, may lead to unfair and disorderly trading. The reference to Floor Officials would be updated to Trading Officials.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5),[13] 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.

In particular, the Exchange believes that creating a new category of Trading Official to replace member Floor Officials would promote just and equitable principles of trade and remove impediments to a free and open market by streamlining and modernizing the role of a Trading Official on the Floor. The volunteer member Floor Official is a self-regulatory vestige developed for manual trading. As noted, the Exchange introduced Staff Governors several years ago to address the shortfall in experienced members following the consolidation of trading space on the Exchange.[14] More recently, RTOs were introduced to perform certain functions performed by Floor Officials in

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* Release No. 57627, 73 FR at 19920.

connection with the Closing Auction.[15] The proposed rule change would complete the evolution of member Floor Officials to Trading Officials that are Exchange-trained and supervised staff, which is similar to how trading officials function on the options markets run by the Exchange's affiliates.[16] By replacing the variety and hierarchy of Floor Officials based on seniority with a single Trading Official appointed by the NYSE CEO, the Exchange would significantly simplify the appointment and retention of individuals with responsibility under the Exchange's rules to supervise and review trading on the Floor. Further, the proposal would contribute to the protection of investors and the public interest by ensuring that qualified Exchange staff continue to perform the formal roles prescribed by Exchange rules and provide a level of oversight to the marketplace on a day-to-day basis, thereby contributing to the maintenance of a fair and orderly marketplace on the Exchange.

Finally, the Exchange believes that the conforming and technical changes 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 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 transferring Floor Official duties and responsibilities under Exchange rules to staff Trading Officials. The Exchange believes the proposed rule changes would streamline and modernize the role of the trading official on the Floor, thereby contributing to the maintenance of a fair and orderly marketplace on the Exchange to the benefit of all members and member organizations and the investing public. Moreover, since the proposal does not substantively modify system functionality or processes on the Exchange, the proposed changes will not impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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–2020–105 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–2020–105. 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–2020–105 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28805 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[15] As noted above, the Exchange has separately proposed to delete Rule 46B because RTOs would no longer have a role under Exchange rules. *See* NYSE Close Proposal, *supra* note 10.

[16] *See* NYSE American LLC (''NYSE American'') Rule 900.2NY(82) and NYSE Arca, Inc. (''NYSE Arca'') Rule 6.1–O(b)(34).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90771; File No. SR–NYSENAT–2020–38]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Effective Date in Commentary .10 Under NYSE National Rule 2.1210

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 15, 2020, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 a rule change to extend the effective date in Commentary .10 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under NYSE National Rule 2.1210 (Registration Requirements) applicable to ETP Holders, from December 31, 2020 to April 30, 2021. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to extend the effective date in Commentary .10 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under NYSE National Rule 2.1210 (Registration Requirements) applicable to ETP Holders,[3] from December 31, 2020 to April 30, 2021. The proposed rule change would extend the 120-day period that certain individuals can function as a principal without having successfully passed an appropriate qualification examination through April 30, 2021,[4] and would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. This proposed rule change is based on a filing recently submitted by the Financial Regulatory Authority, Inc. (''FINRA'')[5] and is intended to harmonize the Exchange's registration rules with those of FINRA so as to promote uniform standards across the securities industry.

The COVID–19 pandemic is an unpredictable, exogenous event that has resulted in unavoidable disruptions to the securities industry and impacted member firms, regulators, investors and other stakeholders. In response to COVID–19, earlier this year FINRA began providing temporary relief by way of frequently asked questions (''FAQs'')[6] to address disruptions to the administration of FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.[7]

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04[8] prior to February 2, 2020, would be given until May 31, 2020, to pass the appropriate principal qualification examination.[9] On May 19, 2020, FINRA extended the relief to pass the appropriate examination until June 30, 2020. On June 29, 2020, FINRA again extended the temporary relief providing that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to May 4, 2020, would be given until August 31, 2020, to pass the appropriate principal qualification examination.

On September 25, 2020, NYSE National filed with the Commission a proposed rule change for immediate effectiveness to extend the temporary relief provided via the FAQ by adopting temporary Commentary .10 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under NYSE National Rule 2.1210 (Registration Requirements).[10] Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under NYSE National Rule 2.1210.10 have until December 31, 2020, to pass the appropriate qualification examination.

The COVID–19 conditions necessitating the extension of relief provided in the FAQ and SR–NYSENAT–2020–30 persist and in fact appear to be worsening.[11] One of the impacts of COVID–19 continues to be serious interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations.[12] Although Prometric has been reopening its test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain examinations that have been deemed essential by the local government.[13] Furthermore, Prometric has had to close some reopened test centers due to incidents of COVID–19 cases. The initial nationwide closure in March along with the inability to fully reopen all Prometric test centers due to COVID–19 have led to a significant backlog of individuals who are waiting to sit for FINRA examinations that are not available online, including the General Securities Principal Exam (Series 24).[14]

[3] The term ''ETP Holder'' means the Exchange-approved holder of an ETP. *See* Rule 1.1(i). The term ''ETP'' refers to an Equity Trading Permit issued by the Exchange for effecting approved securities transactions on the Exchange. *See* Rule 1.1(h).

[4] If NYSE National seeks to provide additional temporary relief from the rule requirements identified in this proposed rule change beyond April 30, 2021, NYSE National will submit a separate rule filing to further extend the temporary extension of time.

[5] *See* Exchange Act Release No. 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043) (the ''FINRA Filing''). The Exchange notes that the FINRA Filing also provides temporary relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing.

[6] *See https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe.*

[7] At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March Prometric closed all of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May. Currently, Prometric has resumed testing in many of its United States and Canada test centers, at either full or limited occupancy, based on local and government mandates.

[8] NYSE National Rule 2.1210.03 is the corresponding rule to FINRA Rule 1210.04.

[9] FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. NYSE National Rule 2.1210.03 provides the same allowance to ETP Holders.

[10] *See* Exchange Act Release No. 90117 (October 7, 2020), 85 FR 65116 (October 14, 2020) (Notice of Filing and Immediate Effectiveness of SR–NYSENAT–2020–30).

[11] *See, e.g.,* Meryl Kornfield, Jacqueline Dupree, Marisa Iati, Paulina Villegas, Siobhan O'Grady and Hamza Shaban, New daily coronavirus cases in U.S. rise to 145,000, latest all-time high, Wash. Post, November 11, 2020, *https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/.*

[12] Information about the continued impact of COVID–19 on FINRA-administered examinations is available at *https://www.finra.org/rules-guidance/key-topics/covid-19/exams.*

[13] Information from Prometric about its safety practices and the impact of COVID–19 on its operations is available at *https://www.prometric.com/corona-virus-update. See also supra* note 12.

[14] Earlier this year, an online test delivery service was launched for candidates seeking to take qualification examination remotely. Only certain

In addition, firms are continuing to experience operational challenges with much of their personnel working from home due to shelter-in-place orders, restrictions on businesses and social activity imposed in various states, and adherence to other social distancing guidelines consistent with the recommendations of public health officials.[15] As a result, firms continue to face potentially significant disruptions to their normal business operations that may include a limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19. Such potential disruptions may be further exacerbated and may even affect client services if firms cannot continue to keep principal positions filled as they may have difficulty finding other qualified individuals to transition into these roles or may need to reallocate employee time and resources away from other critical responsibilities at the firm.

These ongoing, extenuating circumstances make it impracticable for ETP Holders to ensure that the individuals whom they have designated to function in a principal capacity, as set forth in NYSE National Rule 2.1210.03, are able to successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule, or to find other qualified staff to fill this position. The ongoing circumstances also require individuals to be exposed to the health risks associated with taking an in-person examination, because the General Securities Principal examination is not available online. Therefore, NYSE National is proposing to extend the effective date of the temporary relief provided through SR–NYSENAT–2020–30 until April 30, 2021. The proposed rule change would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. Any individuals designated to function as a principal on or after January 1, 2021, would need to successfully pass an appropriate qualification examination within 120 days.

NYSE National believes that this proposed continued extension of time is tailored to address the needs and constraints on an ETP Holder's operations during the COVID–19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID–19 on ETP Holders by providing continued flexibility so that ETP Holders can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by the ETP Holder's continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as NYSE National rules.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[16] in general, and furthers the objectives of Section 6(b)(5),[17] 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.

The proposed rule change is intended to minimize the impact of COVID–19 on ETP Holder operations by extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under NYSE National Rule 2.1210.03 until April 30, 2021. The proposed rule change does not relieve ETP Holders from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable NYSE National rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, NYSE National believes that the proposed rule change is a sensible accommodation that will continue to afford ETP Holders the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

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. As set forth in SR–NYSENAT–2020–30, the proposed rule change is intended solely to extend temporary relief necessitated by the continued impacts of the COVID–19 pandemic and the related health and safety risks of conducting in-person activities. In its filing, FINRA notes that the proposed rule change is necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID–19 pandemic that would otherwise result if the temporary amendments were to expire on December 31, 2020.[18] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

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) of the Act [19] and Rule 19b–4(f)(6) thereunder.[20]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the proposed extension of time will help minimize the impact of the COVID–19

qualification examinations are available online. *See supra* note 12. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[15] *See, e.g.,* Centers for Disease Control and Prevention, How to Protect Yourself & Others, *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.*

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(5).

[18] *See* FINRA Filing, 85 FR at 81260.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

outbreak on ETP Holders' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. The Exchange further stated that the ongoing extenuating circumstances of the COVID–19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules. The Exchange also explained that shelter-in-place orders, quarantining, restrictions on business and social activity and adherence to social distancing guidelines consistent with the recommendations of public officials remain in place in various states.[21] In addition, the Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local government.[22] Although, as the Exchange noted, FINRA has launched an online test delivery service to help address this backlog, the General Securities Principal (Series 24) Examination is not available online.[23] Nevertheless, the Exchange explained that the proposed rule change will provide needed flexibility to ensure that these positions remain filled and is tailored to address the constraints on ETP Holders' operations during the COVID–19 pandemic without significantly compromising critical investor protection.[24]

The Commission observes that the Exchange's proposal, like the FINRA Filing, provides only an extension to temporary relief from the requirement to pass certain qualification examinations within the 120-day period in the rules. As proposed, this relief would extend the 120-day period that certain individuals can function as principals through April 30, 2021. If a further extension of temporary relief from the rule requirements identified in this proposal beyond April 30, 2021 is required, the Exchange noted that it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.[25] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.[26] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[27]

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–NYSENAT–2020–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSENAT–2020–38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2020–38 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28801 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[21] *See supra* note 15.

[22] *See supra* notes 12 and 13. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID–19 cases.

[23] *See supra* note 14. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[24] The Exchange states that ETP Holders remain subject to the continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as NYSE National rules.

[25] *See supra* note 4.

[26] As noted above by NYSE National, this proposal is an extension of temporary relief provided in a prior filing where NYSE National also requested and the Commission granted a waiver of the 30-day operative delay. *See supra* note 10, 85 FR at 65118.

[27] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90772; File No. SR–NASDAQ–2020–088]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Withdraw the Exchange's QView Product From Sale

December 22, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 14, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to withdraw the Exchange's QView product from sale.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to withdraw QView from sale due to low customer demand.

QView

QView is a web-based user interface that displays execution and open order information in a user-friendly format.[3] It is a type of dashboard that displays information regarding the number of executions and their dollar value, executions by symbol, total volume, whether an order has been added or removed, whether the order is for a buy or a sell, whether an order is open, and information related to routing strategies. Information can be tracked in real-time and through historical order and execution summaries, and is available on a daily or a monthly basis.

As a dashboard, QView presents information in a convenient and easy-to-read format, and provides analytic tools to help the user understand that information. It is not, however, the only source for the underlying data, which is provided by TradeInfo.[4] TradeInfo is also a web-based tool, and presents the member with detailed data on the status of orders, executions, cancels and breaks, generates reports for download, and allows the member to cancel or correct open orders. QView and TradeInfo are designed to work together. QView provides summary information, and TradeInfo provides the underlying data that supports that summary information. TradeInfo is complementary as part of the Nasdaq workstation, or may be purchased separately for a fee of $95 per user per month.

QView is offered with the Latency Optics add-on service, which compares three types of latency to Nasdaq averages: (i) The roundtrip time between order entry and receipt of acknowledgement; (ii) roundtrip time between order entry and the time that the order appears on the TotalView ITCH multicast feed; and (iii) the roundtrip time between the entry of an order cancellation request and the time that the message in reply is received by the client device.[5] Data is displayed graphically and in table format, and may be segregated by MPID or ports.

Proposed Withdrawal

Nasdaq proposes to withdraw QView because of low customer demand. QView was introduced in December 2011,[6] and, owing to the age of the product, the seventeen servers required to support QView will reach the end of their useful life at the end of this year. In light of low customer demand—only 10 firms currently purchase QView, of which only two purchase the Latency Optics add-on service, and further sales do not appear to be forthcoming[7]—the additional investment required to replace these servers is not economically viable.

Nasdaq does not expect the withdrawal of QView to significantly impact any of its current customers. As noted, QView (including Latency Optics) is a dashboard that summarizes information in a convenient, user-friendly format, but the underlying data supporting the QView display will remain available on TradeInfo. Nasdaq has discussed its proposed withdrawal with each of the 10 current purchasers, and none indicated that it was essential for their business. Indeed, all 10 purchasers indicated that their actual usage was low, and did not expect to continue using the product. Nasdaq publicly announced its intent to withdraw QView as of December 31, 2020, in a Data News publication issued on October 14, 2020,[8] and received no feedback concerning additional demand for the product. There will be no interruption in the ability of current customers to see the status of orders, executions, cancels and breaks, generate reports for download, or cancel or correct open orders, as all of the data presented in QView will remain available through TradeInfo. The ''dashboard'' functions of QView that provide a user-friendly interface and summary statistics can be replaced by the member with any number of similar, commercially available dashboards or other products that summarize data.

QView was designed to provide summary statistics on trade executions to broker-dealers in a convenient, user-friendly format. All of the data needed to generate that summary information, including the Latency Optics add-on service,[9] will remain available to Nasdaq customers via TradeInfo, which allows users to generate reports and download the data using Microsoft Excel. Once the user has the data on Excel, the user would be able to use commercially available programs or proprietary software to generate the charts, graphs and summary statistics previously generated by QView. All of

[3] *See* Securities Exchange Act Release No. 65851 (November 30, 2011), 76 FR 75924 (December 5, 2011) (SR–Nasdaq–2011–157) (introducing the QView product); *see also* Securities Exchange Act Release No. 66636 (March 21, 2012), 77 FR 18280 (March 27, 2012) (SR–NASDAQ–2012–035) (introducing QView fees). For additional technical details on QView as well as screen shots, see QView Order and Execution Management & Latency Optics, available at *http://www.nasdaqtrader.com/Trader.aspx?id=QView.*

[4] *See* Equity 7, Section 115(f).

[5] The user of TradeInfo will be able to calculate these latencies for itself, as the underlying transaction information is timestamped.

[6] *See* Securities Exchange Act Release No. 65851 (November 30, 2011), 76 FR 75924 (December 5, 2011) (SR–Nasdaq–2011–157) (introducing the QView product); *see also* Securities Exchange Act Release No. 66636 (March 21, 2012), 77 FR 18280 (March 27, 2012) (SR–NASDAQ–2012–035) (introducing QView fees); Securities Exchange Act Release No. 68617 (January 10, 2013), 78 FR 3480 (January 16, 2013) (SR–Nasdaq–2013–005) (introducing the Latency Optics add-on).

[7] Staff Guidance on SRO Filings Related to Fees states that the Purpose section should include ''the projected number of purchasers (including members, as well as non-members) of any new or modified product or service and the expected number of purchasers likely to be subject to a new fee or pricing tier, including members and non-members. . . .'' *See* Division of Trading and Markets, U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Filings Related to Fees'' (May 21, 2019) (''Staff Guidance''), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.* It also states that ''[w]hen a Fee Filing changes an existing fee, the purpose section also should compare the projected number of purchasers likely to be subject to the proposed fee following the proposed fee change and the expected cost of the proposed fee for different types of firms. . . .'' As indicated, there are 10 firms that currently purchase QView, of which two firms purchase the Latency Optics add-on service, and no new firms are projected to purchase this product, even if it were not withdrawn.

[8] *See* Nasdaq Data News No. 2020–9 (October 14, 2020), available at *https://www.nasdaqtrader.com/TraderNews.aspx?id=dn2020-9.*

[9] *See supra* note 5.

the 10 current QView customers already have access to TradeInfo.[10]

Withdrawal of QView will not have a different impact on different types of market participants.[11] All of the basic data needed for current customers to replicate the product and manage trading activity and monitor latency is available through TradeInfo and Trading Insights. Current customers were unconcerned with withdrawal, and indicated that they did not intend to continue using the product. Broker-dealers that do not currently purchase QView will not be affected by its absence. No other market participants will be affected, as the product was designed exclusively for broker-dealers that manage order flow.

Thus, Nasdaq proposes to withdraw QView based on lack of demand, and does not expect the withdrawal to negatively impact current customers, based on their feedback.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Section 6(b)(5) of the Act,[13] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

QView was designed to facilitate the work of broker-dealers executing orders on the Exchange, and its usefulness depended on its effectiveness in helping the broker-dealer manage order flow. Nasdaq proposes to withdraw QView because low customer demand has rendered the product no longer economically viable. Withdrawing a product that has been determined to not be economically viable in a competitive marketplace promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.

The Proposal is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Broker-dealers that currently utilize the product did not express concern that the withdrawal will negatively impact their business, and did not expect to continue using the product. These customers will still have access to the underlying information, and will remain able to summarize that information through their own dashboards or other similar products. Broker-dealers that do not currently utilize the product will not be affected. The Proposal therefore does not permit unfair discrimination.

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.

Intermarket Competition

The withdrawal of QView will have no impact on intermarket competition (the competition among SROs). Indeed, the Proposal may generate competitive responses from other exchanges by, for example, introducing their own versions of QView, although, as is evident from Nasdaq's experience, this type of product does not appear to be subject to high customer demand.

Intramarket Competition

The Proposal will not cause any unnecessary or inappropriate burden on intramarket competition (competition among exchange customers). As explained in our discussion of unfair discrimination above, broker-dealers that currently utilize the product did not indicate that they would be adversely impacted in any way. Such broker-dealers would still have access to the underlying information, and would remain able to summarize that information through their own dashboards or other similar products. Broker-dealers that do not currently utilize the product would not be affected in any way. The Proposal therefore will not cause any unnecessary or inappropriate burden on intramarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed under Rule 19b–4(f)(6)[16] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[17] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. According to the Exchange, current QView customers and other market participants have already been notified of the end-of-year withdrawal; each customer that currently purchases QView has been individually notified, and other market participants have been notified through a Nasdaq Data News item published on October 14, 2020. Because QView and Latency Optics are

[10] One of the two current purchasers of the Latency Optics add-on service indicated that it intends to obtain similar information through Trading Insights. Nasdaq Trading Insights is an optional market data service that employs advanced analytics and machine learning to analyze order activity. It is comprised of three active market data components: (a) Missed Opportunity—Liquidity; (b) Missed Opportunity—Latency; and (c) Peer Benchmarking. The Missed Opportunity—Liquidity component identifies when an order from a market participant could have been increased in size, resulting in the execution of additional shares. This component is designed to provide information to a market participant interested in gaining insight into hidden pockets of liquidity. The Missed Opportunity—Latency component identifies the amount of time by which an otherwise marketable order missed execution. This component is designed to provide information to market participants interested in optimizing their models and trading patterns. The Peer Benchmarking component ranks the quality of a market participant's trading performance against its peers, allowing market participants to view their relative trading performance by port, with each port ranked independently by each metric against the ports of peer firms trading on the Exchange. *See* Equity 7, Section 146; Securities Exchange Act Release No. 80856 (June 5, 2017), 82 FR 26820 (June 9, 2017) (SR–NASDAQ–2017–051). Trading Insights can be used by the customer to place the latency information that it calculates using TradeInfo in context by comparing its performance against others.

[11] Staff Guidance also states that the Purpose section should identify ''how the fee may apply differently (*e.g.,* additional cost vs. additional discount) to different *types* of market participants (*e.g.,* market makers, institutional brokers, retail brokers, vendors, etc.) and different *sizes* of market participants (*e.g.,* large, medium or small entity. . . .''

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6)(iii).

both charged as monthly fees, waiver of the operative delay would allow the Exchange to withdraw these products at the end of the calendar month on December 31, 2020, which would provide for a more orderly withdrawal for both the Exchange and current customers. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–088 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–2020–088. 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–2020–088 and should be submitted on or before January 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28802 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[18] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90791; File No. SR–NYSEArca–2020–113]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Reflect a Change to the Index Underlying the United States Copper Index

December 23, 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 18, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to reflect a change to the index underlying the United States Copper Index Fund, shares of which are currently listed and traded on the Exchange under NYSE Arca Rule 8.200–E. 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 Commission has approved a proposed rule change relating to listing and trading on the Exchange of ''Units'' of the United States Copper Index Fund for listing and trading on the Exchange under NYSE Arca Rule 8.200–E (''Trust Issued Receipts'').[3] The Exchange proposes to reflect a change to the SummerHaven Copper Index Total Return (the ''Index''), which is the index underlying the Units.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 65249 (September 2, 2011), 76 FR 55956 (September 9, 2011) (SR–NYSEArca–2011–63) (Notice of Filing of Proposed Rule Change To List and Trade Shares of the United States Metals Index Fund, the United States Agriculture Index Fund and the United States Copper Index Fund Under NYSE Arca Equities Rule 8.200) (''Prior Notice''); 65601 (October 20, 2011), 76 FR 66339 (October 26, 2011) (SR–NYSEArca–2011–63) (Order Approving a Proposed Rule Change To List and Trade Shares of the United States Metals Index Fund, the United States Agriculture Index Fund and the United States Copper Index Fund Under NYSE Arca Equities Rule 8.200) (''Prior Order'' and, together with the Prior Notice, the ''Prior Releases'').

[4] On December 1, 2020 the Trust filed with the Commission an amended registration statement on Form S–1 under the Securities Act of 1933 relating

Continued

As stated in the Prior Releases, the Index is designed to reflect the performance of the investment returns from a portfolio of futures contracts for copper that are traded on the COMEX (such futures contracts, collectively, ''Eligible Copper Futures Contracts''). The Index is comprised of either two or three Eligible Copper Futures Contracts that are selected on a monthly basis based on quantitative formulas relating to the prices of the Eligible Copper Futures Contracts developed by SummerHaven Indexing.[5]

The Exchange proposes to amend this representation to state that, beginning December 31, 2020, the Index will be revised such that, on the new Selection Date, as defined below, it will be comprised of either one or three Eligible Copper Futures Contracts that are selected on a monthly basis based on quantitative formulas relating to the prices of the Eligible Copper Futures Contracts developed by SummerHaven Indexing. The Trust announced this change in a Form 8–K filed with the Commission on December 1, 2020 and in the Registration Statement.[6] The Form 8–K and the Registration Statement state that this revision to the composition of the Index is intended to ensure that the Index components at any given time represent copper futures contracts for which there is an active and liquid trading market.

The Exchange also proposes to change the description in the Prior Notice regarding how Eligible Copper Futures Contracts are allocated in the Index. Specifically, the Prior Notice stated that, at the end of each month, (1) the copper futures curve is assessed to be in either backwardation or contango, and (2) the annualized percentage price difference between the closest-to-expiration Eligible Copper Futures Contract and each of the next four Eligible Copper Futures Contracts is calculated. If the copper futures curve is in backwardation at the end of a month, the Copper Index takes positions in the two Eligible Copper Futures Contracts with the highest annualized percentage price difference, each weighted at 50%. If the copper futures curve is in contango, then the Copper Index takes positions in three Eligible Copper Futures Contracts, as follows: First, the Copper Index takes positions in the two Eligible Copper Futures Contracts with the highest annualized percentage price difference, each weighted at 25%; then the Copper Index also takes a position in the nearest-to-maturity December Eligible Copper Futures Contract that has expiration more distant than the fourth nearest Eligible Copper Futures Contract, which position is weighted at 50%.

The Exchange proposes to change this representation to state that, if the copper futures curve is in backwardation on the ''Selection Date'', the Index takes positions in the first Eligible Copper Futures Contract (which is the next nearest to maturity of the Eligible Futures Contracts), weighted at 100%. If the copper futures curve is in contango, then the Index takes positions in the first three Eligible Copper Futures Contracts, each position weighted at 33.33%.[7] The ''Selection Date'' is the 10th business day of each month. In addition, the rebalancing period for the Index will change from the first four business days of each month to the 11th–14th business days of each month, based on signals used for contract selection on the Selection Date, rather than the last business day of each month as is currently the case. As noted above, the Sponsor represents that these revisions to the composition of the Index are intended to ensure that the Index components at any given time represent copper futures contracts for which there is an active and liquid trading market.

Regarding the proposed changes to the Selection Date and roll dates for the Index and the Fund, the Sponsor represents that moving the Selection Date would allow the Index and the Fund to include or hold Eligible Copper Futures Contracts in nearer months (meaning shorter duration) and with the greatest liquidity. This is particularly important when copper is in backwardation when it is advantageous for the Index and the Fund to include or hold Eligible Copper Futures Contracts in the closest month possible.

The Exchange notes that the Prior Releases stated that the Fund will create Units only in blocks of 100,000 Units called ''Creation Baskets'' and redeem Units only in blocks of 100,000 Units called ''Redemption Baskets''. The Registration Statement states that the Fund creates Units only in blocks of 50,000 Units and redeems Units only in blocks of 50,000 Units, which is the current size of Creation Baskets and Redemption Baskets. United States Commodity Funds LLC (the ''Sponsor'') represents that a lower size of a Creation or Redemption Basket is beneficial to investors by facilitating additional creation and redemption activity in the Shares that may result in increased secondary market trading activity, tighter bid/ask spreads and narrower premiums or discounts to net asset value.[8]

The Sponsor represents that the proposed changes described above will further assist the Trust to achieve its investment objective. Except for the changes noted above, all other representations made in the Prior Releases remain unchanged.[9]

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)[10] that an exchange have rules that are 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, in general, to protect investors and the public interest.

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. The Sponsor represents that the proposed revisions to the composition of the Index are intended to ensure that the Index components at any given time represent copper futures contracts for which there is an active and liquid trading market, which may help prevent fraudulent and manipulative practices.

to the Trust (File No. 333–237184) (''Registration Statement''). The description of the operation of the Trust herein is based, in part, on the Prior Releases. The procedures described in this proposed rule change will not be implemented until this proposed rule change is effective and operative.

[5] Eligible Copper Futures Contracts that at any given time make up the Index are referred to in the Prior Releases as ''Benchmark Component Copper Futures Contracts.''

[6] *See* Form 8–K filed with the Commission by the Trust on December 1, 2020 (File No. 001–34833).

[7] For each month, the ''Eligible Copper Futures Contracts'' are as set forth in a chart appearing in the Registration Statement.

[8] The Trust's Basket size of 50,000 Shares is consistent with the August 8, 2018 letter from the Division of Trading and Markets granting no-action relief to certain commodity-based investment vehicles from Rules 101 and 102 of Regulation M under the Act. *See* footnote 2 to letter, dated August 8, 2018, from Josephine J. Tao, Assistant Director, Division of Trading and Markets, to Eric Simanek, Sullivan & Worcester LLP. The Commission has previously approved listing and trading of Trust Issued Receipts on the Exchange where the size of a ''Creation Unit'' for a series of Trust Issued Receipts was 50,000 shares. *See, e.g.,* Securities Exchange Act Release Nos. 58161 (July 15, 2008), 73 FR 42380 (July 21, 2008) (SR–Amex–2008–39) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Trust Issued Receipts that Directly Hold Investments in Certain Financial Instruments and to Permit the Listing and Trading of Shares of Fourteen Funds of the Commodities and Currency Trust); 66553 (March 9, 2012), 77 FR 15440 (March 15, 2012) (SR–NYSEArca–2012–04) (Order Granting Approval of Proposed Rule Change Relating to Listing and Trading of Shares of Twenty-Six Series of ProShares Trust II under NYSE Arca Equities Rule 8.200).

[9] *See* note 4, *supra.* All terms referenced but not defined herein are defined in the Prior Releases.

[10] 15 U.S.C. 78f(b)(5).

Regarding the proposed changes to the Selection Date and roll dates for the Index and the Fund, the Sponsor represents that moving the Selection Date would allow the Index and the Fund to include or hold Eligible Copper Futures Contracts in nearer months (meaning shorter duration) and with the greatest liquidity. This is particularly important when copper is in backwardation when it is advantageous for the Index and the Fund to include or hold Eligible Copper Futures Contracts in the closest month possible.

With respect to the lower size of a Creation or Redemption Basket (50,000 Shares rather than 100,000 Shares as stated in the Prior Releases), the Sponsor represents that such lower size is beneficial to investors by facilitating additional creation and redemption activity in the Shares that may result in increased secondary market trading activity, tighter bid/ask spreads and narrower premiums or discounts to net asset value.

The Sponsor represents that the proposed changes described above will further assist the Trust to achieve its investment objective. Except for the changes noted above, all other representations made in the Prior Releases remain unchanged.

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 purpose of the Act and, by permitting the Index to include, and the Fund to hold, more liquid futures components at any given time, will enhance competition among issues of commodity-based Trust Issued Receipts.

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) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) [13] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states the proposed rule change will accommodate the inclusion of more liquid and active copper futures contracts in the Index and, other than the changes to the index methodology and Creation and Redemption basket size described above, all other representations made in the Prior Releases remain unchanged. For this reason, the proposed rule change does not raise any novel regulatory issues, and the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission waives the 30-day operative delay and designates the proposal operative upon filing.[15]

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–NYSEArca–2020–113 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–2020–113. 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–2020–113 and should be submitted on or before January 21, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Eduardo A. Aleman,

Deputy Secretary.

[FR Doc. 2020–28889 Filed 12–29–20; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0064]

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

OMB) Office of Management and Budget, Attn: Desk Officer for SSA.

Comments: https://www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, *Fax:* 410–966–2830, *Email address: OR.Reports.Clearance@ssa.gov.*

Or you may submit your comments online through *www.regulations.gov,* referencing Docket ID Number [SSA–2020–0064].

The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than March 1, 2021. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Letter to Employer Requesting Information About Wages Earned By Beneficiary—20 CFR 404.1520, 20 CFR 404.1571–404.1576, 20 CFR 404.1584–404.1593, and 20 CFR 416.971–416.976—0960–0034. Social Security disability recipients receive payments based on their inability to engage in substantial gainful activity (SGA) because of a physical or mental condition. If the recipients work, SSA must evaluate if they continue to meet the disability requirements of the law. When an individual is unable to provide earnings information and SSA does not have access to proof of earnings, we use Form SSA–L–725 to request monthly earnings information from the recipient's employer. SSA employees send the paper from SSA–L725 to the employer to complete, and use the earnings data we receive from the employers to determine whether the recipient is engaging in SGA, since work above SGA level can cause a cessation of disability payments. The respondents are businesses that employ Social Security disability recipients.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) ***
SSA–L725	170,000	1	40	113,333	* $22.79	** $2,582,859

* We based this figure on the average Payroll and Timekeeping Clerks hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes433051.htm*).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. Letter to Employer Requesting Wage Information—20 CFR 416.203 & 416.1110—0960–0138. SSA must establish and verify wage information for Supplemental Security Income (SSI) applicants and recipients when determining SSI eligibility and payment amounts. SSA collects wage data from employers on Form SSA–L4201 to determine eligibility and proper payment amounts for SSI applicants and recipients. The respondents are employers of SSI applicants and recipients.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) ***
SSA–L4201	133,000	1	30	66,500	* $22.79	** $1,515,535

* We based this figure on the average Payroll and Timekeeping Clerks hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes433051.htm*).

** This figure does not represent actual costs that we are imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. Request for Review of Hearing Decision/Order—20 CFR 404.967–404.981, 416.1467–416.1481—0960–0277. Claimants have a right under current regulations to request review of an administrative law judge's (ALJ) hearing decision, or dismissal of a hearing request on Title II and Title XVI claims. Claimants may request Appeals Council review by filing a written request using paper Form HA–520, or the internet application, i520. SSA uses the information we collect to establish the claimant filed the request for review within the prescribed time, and to ensure the claimant completed the requisite steps permitting the Appeals Council review. The Appeals Council

then uses the information to: (1) Document the claimant's reason(s) for disagreeing with the ALJ's decision or dismissal; (2) determine whether the claimant has additional evidence to submit; and (3) determine whether the claimant has a representative or wants to appoint one. The respondents are claimants requesting review of an ALJ's decision or dismissal of hearing.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
HA–520—Paper	105,000	1	10	17,500	* $10.73	** 24	*** $638,435
i520—Internet	70,000	1	15	17,500	* 10.73		*** 187,775
Totals	175,000			35,000			*** 826,210

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

4. Social Security Benefits Application—20 CFR 404.310–404.311, 404.315–404.322, 404.330–404.333, 404.601–404.603, and 404.1501–404.1512—0960–0618. Title II of the Social Security Act provides retirement, survivors, and disability benefits to individuals who meet the eligibility criteria and file the appropriate application. This collection comprises the various application methods for each type of benefits. SSA uses the information we gather through the multiple information collection tools in this information collection request to determine applicants' eligibility for specific Social Security benefits, as well as the amount of the benefits. Individuals filing for disability benefits can, and in some instances SSA may require them to, file applications under both Title II, Social Security disability benefits, and Title XVI, SSI payments. We refer to disability applications filed under both titles as ''concurrent applications.'' This collection comprises the various application methods for each type of benefits. These methods include the following modalities: Paper forms (Forms SSA–1, SSA–2, and SSA–16); Modernized Claims System (MCS) screens for in-person interview applications; and internet-based iClaim application. SSA uses the information we collect through these modalities to determine: (1) The applicants' eligibility for the above-mentioned Social Security benefits and (2) the amount of the benefits. The respondents are applicants for retirement, survivors, and disability benefits under Title II of the Social Security Act, or their representative payees.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA–1							
Paper version/SSA–1	1,811	1	11	332	* $25.72	** 24	*** $27,160
Interview/MCS	1,438,058	1	10	239,676	* 25.72	** 24	*** 20,959,202
Internet/iClaim—Domestic Residence:							
First Party	1,422,954	1	15	355,739	* 25.72	** 24	*** 9,149,607
Third party initiated (complete and submit)	25,255	1	15	6,314	* 25.72	** 24	*** 162,396
First party (review and sign)	25,255	1	5	2,105	* 25.72	** 24	*** 54,141
Internet/iClaim—Foreign Residence:							
First Party	10,309	1	18	3,093	* 25.72	** 24	*** 79,552
Third party-initiated (complete and submit)	18,826	1	18	5,648	* 25.72	** 24	*** 145,267
First party (review and sign)	18,826	1	8	2,510	* 25.72	** 24	*** 64,557
Totals	2,961,294			615,417			*** 30,641,882
SSA–2							
Paper version/SSA–2	972	1	15	243	* 25.72	** 24	*** 15,792
Interview/MCS	447,610	1	14	104,442	* 25.72	** 24	*** 7,291,260
iClaim	153,780	1	15	38,445	* 25.72	** 24	*** 988,805
Totals	602,362			143,130			*** 8,295,857
SSA–16							
Paper version/SSA–16	40,346	1	20	13,449	* 25.72	** 24	*** 760,978
Interview/MCS	1,159,121	1	19	367,055	* 25.72	** 24	*** 21,365,681
Internet/iClaim—Domestic Residence:							
First Party	926,750	1	15	231,688	* 25.72	** 24	*** 5,959,015
Third party initiated (complete and submit)	343,327	1	15	85,832	* 25.72	** 24	*** 2,207,599
First party (review and sign)	343,327	1	5	28,611	* 25.72	** 24	*** 735,875
Internet/iClaim—Foreign Residence:							
First Party	1,441	1	18	432	* 25.72	** 24	*** 11,111
Third party-initiated (complete and submit)	123	18	18	37	* 25.72	** 24	*** 952
First party (review and sign)	123	18	8	16	* 25.72	** 24	*** 412
Totals	2,814,558			727,120			** 31,041,623

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
Grand Total							
Total	6,378,214			1,485,667			*** 69,979,362

* We based this figure on the average hourly wage for all occupations in May 2019 as reported by the U.S. Bureau of Labor Statistics (*https://www.bls.gov/oes/current/oes_nat.htm#00-0000*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

5. Authorization to Disclose Information to SSA—20 CFR 404.1512 and 416.912, 45 CFR parts 160 and 164—0960–0623. Sections 223(d)(5)(A) and 1614(a)(3)(H)(i) of the Act require claimants to provide medical and other evidence the Commissioner of Social Security may require to prove they are disabled. SSA must obtain sufficient evidence to make eligibility determinations for Title II and Title XVI payments. The applicants use Form SSA–827, or the internet counterpart, i827, to provide consent for the release of medical records, education records, and other information related to their ability to perform tasks. Once the applicant completes Form SSA–827, or the i827, SSA or the State DDS sends the form to the designated source(s) to obtain pertinent records. The respondents are applicants for Title II and Title XVI disability payments.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
SSA–827 with electronic signature (eAuthorization)	2,354,946	1	9	353,242	* $10.73	** 24	$13,897,711
SSA–827 with wet signature (paper version)	3,408,106	1	10	568,018	* 10.73	** 24	*** 20,722,424
iClaims with electronic signature	404,690	1	9	60,704	* 10.73		*** 651,354
iAppeals with electronic signature	176,202	1	9	26,430	* 10.73		*** 283,594
Totals	6,343,944			1,008,394			*** 35,555,083

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

6. State Death Match Collections—20 CFR 404.301, 404.310–404.311, 404.316, 404.330–404.341, 404.350–404.352, 404.371, and 416.912—0960–0700. SSA uses the State Death Match Collections to ensure the accuracy of payment files by detecting unreported or inaccurate reports of death of beneficiaries. Under the Act, entitlement to retirement, disability, wife's, husband's, or parent's benefits terminate when the beneficiary dies. The states furnish death certificate information to SSA via the manual registration process or the Electronic Death Registration Process (EDR). Both death match processes are electronic transfers between the states and SSA. The respondents are the states' bureaus of vital statistics.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Number of responses	Average cost per record request	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) **	Total annual opportunity cost (dollars) ***
State Death Match CyberFusion/GSO: Non-EDR Records from EDR sites	39	68,621	2,676,219	$0.88	$2,355,072	** $21.09	*** $1,447,217
State Death Match CyberFusion/GSO: Non-EDR sites	5	187,570	937,850	0.88	825,308	** 21.09	*** 3,955,851
Total: Non-EDR	44				3,180,380		5,403,068
State Death Match—EDR	48	2,573,956	123,549,888	2.05	253,277,270	** 21.09	*** 54,284,732
States Expected to Become—State Death Match—EDR Within the Next 3 Years	5	62,600	313,000	3.17	992,210	** 21.09	*** 1,320,234
Totals: EDR and Expected EDR	53				254,269,480		*** 55,604,966
Grand Totals	97				257,449,860		*** 61,008,034

* Please note that both of these data matching processes are electronic and there is only a cost burden, and no hourly burden for the respondent to provide this information.
** We based this figure on the average State BVSs hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes434199.htm*).
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: December 22, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020–28797 Filed 12–29–20; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11293]

Notice of Charter Renewal for the Advisory Committee on Historical Diplomatic Documentation

The Advisory Committee on Historical Diplomatic Documentation has renewed its charter for a period of two years. This Advisory Committee will continue to make recommendations to the Historian and the Department of State on all aspects of the Department's program to publish the *Foreign Relations of the United States* series as well as on the Department's responsibility under statute (22 U.S.C. 4351, *et seq.*) to open its 25-year old and older records for public review at the National Archives and Records Administration. The Committee consists of nine members drawn from among historians, political scientists, archivists, international lawyers, and other social scientists who are distinguished in the field of U.S. foreign relations.

Questions concerning the Committee and the renewal of its Charter should be directed to Adam M. Howard, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, 2300 E Street NW, Washington, DC 20372 (Navy Potomac Annex), telephone (202) 955–0214 (email *history@state.gov*).

The Charter was renewed on December 16, 2020.

For further information about the Board, please contact Adam Howard, Executive Secretary, Office of the Historian at *History@state.gov.*

Renee A. Goings,

Deputy Director, Office of the Historian, Department of State.

[FR Doc. 2020–28867 Filed 12–29–20; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF STATE

[Public Notice 11292]

Advisory Committee on Historical Diplomatic Documentation—Notice of Closed and Open Meetings for 2021

The Advisory Committee on Historical Diplomatic Documentation will meet on March 1–2, June 14–15, August 30–31, and December 6–7, 2021, in open session to discuss unclassified matters concerning declassification and transfer of Department of State records to the National Archives and Records Administration and the status of the *Foreign Relations* series. It is assumed that the public portions of these meetings will not need to be held virtually because of concerns surrounding the coronavirus pandemic. However, should that change based on guidance from public health authorities, the Department will notify those who have RSVP'd.

The Committee will meet in open session from 11:00 a.m. until noon in SA–4D Conference Room 109, Department of State, 2300 E Street NW, Washington, DC 20372 (Potomac Navy Hill Annex), on all four dates. RSVP and requests for reasonable accommodation for each meeting should be sent as directed below:

- March 1, not later than February 22, 2021.
- June 14, not later than June 7, 2021.
- August 30, not later than August 23, 2021.
- December 6, not later than November 29, 2021.

Closed Sessions. The Committee's sessions in the afternoon of Monday, March 1, 2021; in the morning of Tuesday, March 2; in the afternoon of Monday, June 14, 2021; in the morning of Tuesday, June 15, 2021; in the afternoon of Monday, August 30, 2021; in the morning of Tuesday, August 31, 2021; in the afternoon of Monday, December 6, 2021; and in the morning of Tuesday, December 7, 2021, will be closed in accordance with Section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463). The agenda calls for discussions of agency declassification decisions concerning the *Foreign Relations* series and other declassification issues. These are matters properly classified and not subject to public disclosure under 5 U.S.C. 552b(c)(1) and the public interest requires that such activities be withheld from disclosure.

RSVP Instructions. Prior notification and a valid government-issued photo ID (such as driver's license, passport, U.S. Government or military ID) are required for entrance into the Department of State building. Members of the public planning to attend the open meetings should RSVP, by the dates indicated above, to Julie Fort, Office of the Historian (202–955–0214). When responding, please provide date of birth, valid government-issued photo identification number and type (such as driver's license number/state, passport number/country, or U.S. Government ID number/agency or military ID number/branch), and relevant telephone numbers. If you cannot provide one of the specified forms of ID, please consult with Julie Fort for acceptable alternative forms of picture identification.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *https://www.state.gov/wp-content/uploads/2019/05/Security-Records-STATE-36.pdf,* for additional information.

Questions concerning the meeting should be directed to Adam M. Howard, Executive Secretary, Advisory Committee on Historical Diplomatic Documentation, Department of State, Office of the Historian, Washington, DC 20372, telephone (202) 955–0214, (email *history@state.gov).*

Note that requests for reasonable accommodation received after the dates indicated in this notice will be considered but might not be possible to fulfill.

Renee A. Goings,

Deputy Director, Office of the Historian, Department of State.

[FR Doc. 2020–28865 Filed 12–29–20; 8:45 am]

BILLING CODE 4710–34–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0160]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection: Licensing Applications for Motor Carrier Operating Authority

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the information collection request (ICR) described below to the Office of Management and Budget (OMB) for its review and approval and invites public comment. FMCSA requests approval to

renew the ICR titled ''Licensing Applications for Motor Carrier Operating Authority,'' OMB Control No. 2126–0016. This ICR applies to: (1) Existing registrants (*i.e.,* entities that already have a USDOT number and/or operating authority) that are subject to FMCSA's licensing, registration, and certification regulations that wish to apply for additional authorities; and (2) Mexico-domiciled carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. Existing registrants seeking additional authorities must use forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA), to apply for such authority. Mexico-domiciled carriers seeking the authority described above must apply for such authority using Form OP–1(MX).

DATES: Please send your comments by January 29, 2021. OMB must receive your comments by this date in order to act quickly on the ICR.

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: Mr. Jeff Secrist, Office of Registration and Safety Information, Chief, East and South Division, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Telephone: 202–385–2367; Email Address: *jeff.secrist@dot.gov.* Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Licensing Applications for Motor Carrier Operating Authority.

OMB Control Number: 2126–0016.

Type of Request: Renewal of a currently approved collection.

Respondents: Carrier compliance officer or equivalent from motor carriers, motor passenger carriers, freight forwarders, brokers, and certain Mexico-domiciled motor carriers subject to FMCSA's licensing, registration and certification regulations.

Estimated Number of Respondents: 81,209.

Estimated Time per Response: 2 hours for forms OP–1, OP–1(P), and OP–1(FF); 4 hours for forms OP–1(MX) and OP–1(NNA).

Expiration Date: March 31, 2021.

Frequency of Response: Other (as needed).

Estimated Total Annual Burden: 162,476 hours.

Background

FMCSA registers for-hire motor carriers of regulated commodities and of passengers, under 49 U.S.C. 13902(a); surface freight forwarders, under 49 U.S.C. 13903; property brokers, under 49 U.S.C. 13904; and certain Mexico-domiciled motor carriers, under 49 U.S.C. 13902(c). These motor carriers may conduct transportation services in the United States only if they are registered with FMCSA. Each registration is effective from the date specified and remains in effect for such period as the Secretary of Transportation (Secretary) determines by regulations.

Prior to 2015, all entities seeking authority (both first-time applicants and registered entities seeking additional authorities) were required to apply for such authority using the OP–1 series of forms, including OP–1, OP–1(P), OP–1(FF), OP–1(NNA), and OP–1(MX) (for Mexico-domiciled carriers only).

The Final Rule titled ''Unified Registration System,'' (78 FR 52608) dated August 23, 2013, implemented statutory provisions for an online registration system for entities that are subject to FMCSA's licensing, registration, and certification regulations. The Unified Registration System (URS) streamlines the registration process and serves as a clearinghouse and repository of information on motor carriers, brokers, freight forwarders, intermodal equipment providers, hazardous materials safety permit applicants, and cargo tank facilities required to register with FMCSA. When developing URS, FMCSA planned that the OP–1 series of forms—except for OP–1(MX)—would ultimately be folded into one overarching electronic application (MCSA–1), which would be used by all motor carriers seeking authority.

FMCSA began a phased rollout of URS in 2015. The first phase, which went into effect on December 12, 2015, impacts only first-time applicants seeking an FMCSA-issued registration. FMCSA had planned subsequent rollout phases for existing registrants; however, there have been substantial delays, and subsequent phases have not been rolled out to date.

On January 17, 2017, FMCSA issued a Final Rule titled ''Unified Registration System; Suspension of Effectiveness,'' which indefinitely suspended URS effectiveness dates for existing registrants only (82 FR 5292). Pursuant to this Final Rule, FMCSA is still accepting forms OP–1, OP–1(P), OP–1(FF), and OP–1(NNA) for existing registrants wishing to apply for additional authorities. Separately, FMCSA requires Form OP–1(MX) for new and existing Mexico-domiciled motor carriers that wish to operate beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. Information collected through the URS system, utilizing the MCSA–1, does not accept registration form OP–1(MX) and continue to remains a paper form outside the URS.

Forms in the OP–1 series request information to identify the applicant, the nature and scope of its proposed operations, a narrative description of the applicant's safety policies and procedures, and information regarding the drivers and vehicles it plans to use in U.S. operations. The OP–1 series also requests information on the applicant's familiarity with relevant safety requirements, the applicant's willingness to comply with those requirements during its operations, and the applicant's willingness to meet any specific statutory and regulatory requirements applicable to its proposed operations. Information collected through these forms aids FMCSA in determining the type of operation a company may run, the cargo it may carry, and the resulting level of insurance coverage the applicant will be required to obtain and maintain to continue its operating authority.

Changes From Previous Estimates

The previously approved version of this ICR estimated the average annual burden to be 147,124 annual burden hours, with 73,538 total annual respondents. For this renewal, the estimated average annual burden is 162,476, with 81,209 total average annual respondents. The annual burden hourly increase of 15,352 is due to the increase in average annual respondents. This increase is in line with a growing U.S. economy and U.S. population for calendar years 2017, 2018 and 2019.

As described above, only first-time applicants seeking an FMCSA-issued registration must apply via URS. Under URS, all forms in the OP–1 series, except OP–1(MX), are folded into Form MCSA–1. Information collection activities associated with MCSA–1 are covered under a different ICR, titled ''FMCSA Registration/Updates,'' OMB Control Number 2126–0051.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1)

Whether the proposed collection is necessary for the FMCSA to perform its functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2020–28815 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0204]

Agency Information Collection Activities; Renewal of a Currently Approved Information Collection Request: Generic Clearance of Customer Satisfaction Surveys

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: Executive Order 12862 directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. These principles were reaffirmed in Executive Order 13571. In order to work continuously to ensure that our programs are effective and meet our customers' needs, the Federal Motor Carrier Safety Administration (FMCSA) seeks to obtain OMB approval of a currently approved generic clearance to continue collecting feedback on our service delivery. By feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

DATES: We must receive your comments on or before March 1, 2021.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2020–0204 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Services; 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:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. 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 heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above.

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 association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdfE8-794.pdf.*

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal website. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Ms. Roxane Oliver, FMCSA, Office of Analysis/MC–RAA. Telephone (202) 385–2324; or email *Roxane.Oliver@dot.gov.* Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Background: In accordance with the Paperwork Reduction Act of 1995, FMCSA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. Executive Order 12862 Setting Customer Service Standards, and most recently updated in Executive Order 13571, requires the Federal Government to provide the ''highest quality service possible to the American people.'' Under the order, the ''standard of quality for services provided to the public shall be: Customer service equal to the best in business.'' In order to work continuously to ensure that our programs are effective and meet our customers' needs, FMCSA seeks to obtain OMB approval of a generic clearance to collect qualitative feedback from our customers on our service delivery. The surveys covered in this generic clearance will provide a means for FMCSA to collect this data directly from our customers. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas of communication, training or changes in operations that might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will submit a collection for approval under this generic clearance only if it meets the following conditions: that such collections are:

- voluntary;
- low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;

• noncontroversial and do not raise issues of concern to other Federal agencies;

• targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;

• only collecting personally identifiable information (PII) to the extent necessary and not retaining it;

• only collecting information intended to be used only internally for general service improvement and program management, and any release outside the agency must indicate the qualitative nature of the information;

• not to be used for the purpose of substantially informing influential policy decisions; and

• intended to yield only qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalized to the population of study.

This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made; the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size; and the expected response rate, methods for assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other mechanisms that are designed to yield quantitative results. As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Title: Generic Clearance of Customer Satisfaction Surveys.

OMB Control Number: 2126–0061.

Type of Request: Renewal of currently approved collection.

Respondents: State and local agencies, general public and stakeholders; original equipment manufacturers (OEM) and suppliers to the commercial motor vehicle (CMV) industry; fleets, owner-operators, state CMV safety agencies, research organizations and contractors; news organizations and safety advocacy groups.

Estimated Number of Respondents: 5,900 [5,000 customer satisfaction survey respondents + 100 listening sessions/stakeholder feedback forums respondents + 300 focus group respondents + 500 strategic planning customer satisfaction survey respondents].

Estimated Time per Response: Range from 10 to 120 minutes.

Expiration Date: August 31, 2021.

Frequency of Response: Generally, on an annual basis.

Estimated Total Annual Burden: 1,758 hours [833 hours for customer satisfaction surveys + 200 hours for listening sessions/stakeholder feedback forums + 600 hours for focus groups + 125 hours for strategic planning customer satisfaction surveys].

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87.

Thomas P. Keane,

Associate Administrator, Office of Research and Registration.

[FR Doc. 2020–28849 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–38]

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before March 1, 2021.

ADDRESSES: Submit comments and recommendations for the proposed ICR to Ms. Hodan Wells, Information Collection Clearance Officer at email: *hodan.wells@dot.gov* or telephone: (202) 493–0440. Please refer to the assigned OMB control number in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) Reduce reporting burdens; (2) organize information collection requirements in a ''user-friendly'' format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Conductor Certification.

OMB Control Number: 2130–0596.

Abstract: FRA's conductor certification regulation (49 CFR part 242) requires railroads to have a formal program for certifying conductors. As part of that program, railroads are required to have a formal process for training prospective conductors and determining that all persons are competent before permitting them to serve as a conductor. FRA intended the regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors. FRA collects information to ensure that railroads and their employees fully comply with all the requirements of part 242, including a conductor certification/recertification program, fitness requirements, initial and periodic testing of conductors, and territorial qualifications.

Type of Request: Extension with change (estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 765 railroads.

Frequency of Submission: On occasion.

Reporting Burden:

CFR section [1]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total cost equivalent [2]
242.9—Waivers—petitions	765 railroads	3 petitions	3 hours	9	$693
242.103(b)—Approval of design of individual railroad programs by FRA—Certification programs for new railroads.	3 new railroads	3 new conductor certification programs.	8 hours	24	2,880
—(c)(1) Conductor certification submission—Copies to rail labor organizations (RLOs).	765 railroads	6 certification program submission copies.	15 minutes	2	154
—(c)(2) Affirmative statements that copies of submissions were sent to RLOs.	765 railroads	6 affirmative statements	15 minutes	2	154
—(d) Certified comments on submissions	765 railroads	6 certified comments	4 hours	24	1,848
—(g) Certification programs disapproved by FRA and then revised.	765 railroads	15 modified programs	3 hours	45	3,465
—(h) Revised certification programs still not conforming and then resubmitted.	765 railroads	3 resubmitted certification programs.	2 hours	6	462
—(i)(2) Certification programs materially modified after initial FRA approval.	765 railroads	15 certificate program material modifications.	2 hours	30	2,310
—(i)(3) Materially modified programs disapproved by FRA and then revised.	765 railroads	3 modified certification programs.	2 hours	6	462
242.107—Types of service—reclassification to passenger conductor or RR imposes restrictions.	35 railroads	400 records of trainings	2 minutes	13	767
242.109—Opportunity for certification candidates to review and comment on prior safety record, and RRs to retain/respond to comments.	765 railroads	200 records + 200 comments.	30 minutes + 10 minutes	133	9,647
242.111(b)—Prior safety conduct as motor vehicle operator—eligibility determinations.	765 railroads	16,200 eligibility determinations.	10 minutes	2,700	207,900
—(c) Initial certification for 60 days	765 railroads	150 initial certifications	10 minutes	25	1,925
—(d) Recertification for 60 days	765 railroads	125 re-certifications	10 minutes	21	1,617
—(h) Request to obtain driver's license information from licensing agency.	48,500 conductors	16,200 written requests	15 minutes	4,050	238,950
—(k) Notification to RR by persons of never having a license.	48,500 conductors	25 notices	10 minutes	4	236
—(l) Report of motor vehicle incidents	48,500 conductors	400 self-reporting	10 minutes	67	3,953
—(m)–(n) Evaluation of driving record	48,500 conductors	16,200 motor vehicle record evaluations.	5 minutes	1,350	79,650
—(o)(1) Drug and alcohol counselor (DAC) referral by RR after report of driving drug/alcohol incident.	765 railroads	400 DAC referrals	5 minutes	33	3,960
—(o)(2) DAC request and supply by persons of prior counseling or treatment.	765 railroads	20 requests and supplied records.	30 minutes	10	1,200
—(o)(3) Conditional certifications recommended by DAC.	765 railroads	50 conditional certification recommendations.	4 hours	200	24,000
242.113—Prior safety conduct as employee of a different railroad.	48,500 conductors	360 requests + 360 records.	15 minutes + 30 minutes	270	20,790
242.115(b)—Determination that person meets eligibility requirements.	48,500 conductors	16,200 determinations	2 minutes	540	31,860
—(c) Written documents from DAC that person is not affected by a substance abuse disorder.	48,500 conductors	400 filed documents	30 minutes	200	24,000
—(d) Self-referral by conductors for substance abuse counseling.	765 railroads	30 self-referrals	10 minutes	5	600
—(e) Certification reviews for occurrence/documentation of prior alcohol/drug conduct by persons/conductors.	765 railroads	16,200 certification reviews.	10 minutes	2,700	324,000
—(e)(3)(i) Written determination that most recent incident has occurred.	765 railroads	150 written determinations	1 hour	150	18,000
—(e)(3)(ii) Notification to person that recertification has been denied.	765 railroads	300 notifications	30 minutes	150	11,550
—(e)(4) Persons/conductors waiving investigation/de-certifications.	48,500 conductors	300 waived investigations	10 minutes	50	2,950
242.117(b)—Vision and hearing acuity—determination vision standards met.	765 railroads	16,200 records	2 minutes	540	64,800
—(b) Determination hearing standards met	765 railroads	16,200 records	2 minutes	540	64,800
—(c)(1) Medical examiner certificate that person has been examined/passed test.	765 railroads	16,200 medical examiner certificates.	10 minutes	2,700	324,000
—(c)(2)(i) Document standards met with conditions.	765 railroads	100 written documents	30 minutes	50	6,000
—(c)(2)(ii) Document standards not met	765 railroads	100 written documents	30 minutes	50	6,000

CFR section [1]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total cost equivalent [2]
—(e) Notation person needs corrective device (glasses/hearing aid).	765 railroads	5,000 certificate notifications.	10 minutes	833	99,960
—(j) Request for further medical evaluation for new determination.	765 railroads	100 requests + 100 records of field tests.	30 minutes + 10 minutes	67	4,950
—(j) Request for second retest and another medical evaluation.	765 railroads	25 retest requests + 25 reviews.	30 minutes + 10 minutes	17	1,238
—(j) Consultations by medical examiners with railroad officer and issue of conditional certification.	765 railroads	100 consults + 100 certifications.	30 minutes + 10 minutes	67	7,283
—(k) Notification by certified conductor of deterioration of vision/hearing.	765 railroads	20 notifications	10 minutes	3	177
242.119(a)—Training—new railroads—training program.	3 new railroads	3 training programs	3 hours	9	1,080
—(a) Modification to training program	765 railroads	3 programs	30 minutes	2	154
—(c) Completion of training program by conductors/persons—documents.	765 railroads	100 written documents	1 hour	100	7,700
—(d)(5) Modified training programs due to new laws, regulations, orders, technologies, procedures, or equipment.	765 railroads	24 modified training programs.	2 hours	48	3,696
—(f) Employee consultation with qualified supervisory employee if given written test to demonstrate knowledge of physical characteristics of any assigned territory.	765 railroads	1,000 consultations	15 minutes	250	14,750
—(i) Familiarization training for conductor of acquiring railroad from selling company/railroad prior to commencement of new operation.	765 railroads	20 training records	15 minutes	5	295
—(l) RR continuous education/training of conductors.	765 railroads	16,200 training records	15 minutes	4,050	238,950
242.121(a)—Knowledge testing—determining eligibility.	765 railroads	16,200 examination records.	15 minutes	4,050	238,950
—(g) Retests/re-examinations	765 railroads	1,000 retests or reexamination records.	15 minutes	250	14,750
242.123(c)—Monitoring operational performance—unannounced compliance tests and records.	765 railroads	16,200 unannounced compliance test records.	10 minutes	2,700	207,900
—(f) Return to service that requires unannounced compliance test/record.	765 railroads	1,000 unannounced compliance test records.	10 minutes	167	12,859
242.125—Determination made by railroad relying on another railroad's certification.	765 railroads	100 determinations	30 minutes	50	2,950
242.127—Reliance on qualification requirements of other countries.	765 railroads	20 determinations	30 minutes	10	590
242.203(b)—Retaining information supporting determination—records.	765 railroads	16,200 record retentions	15 minutes	4,050	311,850
—(c) Amended electronic records	765 railroads	20 amended records	30 minutes	10	770
242.209(a)—Maintenance of certificates—request to display certificate.	765 railroads	2,000 displayed certificates.	2 minutes	67	3,953
—(b) Notification by conductors that RR request to serve exceeds certification.	765 railroads	1,000 notifications	10 minutes	167	9,853
242.211—Replacement of certificates	765 railroads	500 temporary replacement certificates.	5 minutes	42	3,234
242.213(e)—Multiple certificates—notification to engineer that no conductor is on train.	35 railroads	5 locomotive engineer notifications.	10 minutes	1 hour	70
—(f) Notification of denial of certification by individuals holding multiple certifications.	765 railroads	10 notifications	10 minutes	2	118
242.215(a)—Railroad oversight responsibility—review and analysis of administration of certification program.	53 railroads	53 reviews and analyses	40 hours	2,120	163,240
—(d) Report of findings by RR to FRA	765 railroads	53 reports	4 hours	212	16,324
242.301(a)—Determinations—territorial qualification and joint operations.	320 railroads	1,000 determinations	15 minutes	250	14,750
—(b) Notification by persons who do not meet territorial qualification.	320 railroads	500 notifications	10 minutes	83	4,897
242.401(a)—Denial of certification—notification to candidate of information that forms basis for denying certification.	765 railroads	40 notices + 40 responses	1 hour + 1 hour	80	5,440
—(c) Written notification of denial of certification, including the basis and response to any rebuttal from the candidate.	765 railroads	80 notifications	1 hour	80	6,160
242.403—Criteria for revoking certification—review of compliance conduct.	765 railroads	1,000 certification reviews	15 minutes	250	14,750
242.405—Period of ineligibility—written determination that the most recent incident has occurred.	765 railroads	1,000 written determinations.	1 hour	1,000	59,000
242.407(a)—Process for revoking certification—revocation for violations of § 242.115(e).	765 railroads	1,000 revoked certifications.	8 hours	8,000	960,000
—(b)(1) Immediate suspension of certificate	765 railroads	1,000 suspended certification letters.	1 hour	1,000	77,000
—(b)(5) Determinations based on railroad hearing record.	765 railroads	1,000 determinations	15 minutes	250	14,750
—(b)(7) Hearing record	765 railroads	1,000 records	15 minutes	250	19,250
—(c) Written decisions by railroad official	765 railroads	1,000 written decisions	2 hours	2,000	240,000
—(c) Service of written decision on employee by RR and RR retains proof of service.	765 railroads	1,000 served written decisions + 1,000 service proofs.	10 minutes + 5 minutes	250	19,250

CFR section [1]	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total cost equivalent [2]
—(f) Written waiver of right to hearing	48,500 conductors	700 written waivers	10 minutes	117	6,903
—(g) Revocation of certification based on information that another railroad has done so.	765 railroads	15 revoked certifications	10 minutes	3	360
—(j) Placing relevant information in record prior to suspending certification/convening hearing.	765 railroads	100 updated records	1 hour	100	7,700
Totals	765 railroads	222,386 responses	N/A	49,761	4,303,437

Total Estimated Annual Responses: 222,386.

Total Estimated Annual Burden: 49,761 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $4,303,437.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2020–28832 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2020–0027–N–37]

Proposed Agency Information Collection Activities; Comment Request

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

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On October 16, 2020, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before January 29, 2021.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division, Federal Railroad Administration, telephone: (202) 493–0440, email: *Hodan.wells@dot.gov.*

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On October 16, 2020, FRA published a 60-day notice in the **Federal Register** soliciting comment on the ICR for which it is now seeking OMB approval. *See* 85 FR 65899. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve the proposed collection of information, it must provide 30 days for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983 (Aug. 29, 1995). OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983 (Aug. 29, 1995). Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Safety and Health Requirements Related to Camp Cars.

OMB Control Number: 2130–0595.

Abstract: Subparts C and E of 49 CFR part 228 address the construction of railroad-provided sleeping quarters (camp cars) and set certain safety and health requirements for such camp cars. Specifically, subpart E of part 228 prescribes minimum safety and health requirements for camp cars that a railroad provides as sleeping quarters to any of its train employees, signal employees, and dispatching service employees (covered-service employees) and individuals employed to maintain its right-of-way. Subpart E requires railroad-provided camp cars to be clean, safe, and sanitary, and be equipped with indoor toilets, potable water, and other features to protect the health of car occupants. Subpart C of part 228 prohibits a railroad from positioning a camp car intended for occupancy by individuals employed to maintain the railroad's right-of-way in the immediate vicinity of a switching or humping yard that handles railcars containing hazardous materials. Generally, the requirements of subparts C and E of part 228 are intended to provide covered-service employees an opportunity for rest free from the interruptions caused by noise under the control of the railroad.

[1] The current inventory exhibits a total burden of 856,406 hours while the total burden of this notice is 49,761 hours. FRA determined some of the burdens were outdated and already completed. Other burdens were not derived from PRA requirements, thus leading to the increased figures in the current inventory, which were decreased accordingly in this notice. Also, totals may not add due to rounding.

[2] The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes a 75-percent overhead charge.

The information collected under this rule is used by FRA to ensure railroads operating camp cars comply with all the requirements mandated in this regulation to protect the health and safety of camp car occupants.

Type of Request: Extension with change (estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 1 railroad.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 6,125.

Total Estimated Annual Burden: 994 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $74,440.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that a respondent is not required to respond to, conduct, or sponsor a collection of information that does not display a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2020–28830 Filed 12–29–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Notice of Information Collection and Request for Public Comment

ACTION: Notice and request for public comment.

SUMMARY: The U.S. Department of the Treasury, as part of a continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act (PRA) of 1995. Currently, the Community Development Financial Institutions (CDFI) Fund, Department of the Treasury, is soliciting comments concerning: The Capital Magnet Fund (CMF) Application (Application), and reporting and record retention requirements of the CMF Annual Performance Report (CMF Performance Report). Both the Application and CMF Performance Report are online forms submitted through the CDFI Fund's Award Management Information System (AMIS).

DATES: Written comments must be received on or before March 1, 2021 to be assured of consideration.

ADDRESSES: Submit your comments via email to Daniel Aiello, Program Manager for the Capital Magnet Fund, CDFI Fund at *cmf@cdfi.treas.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel Aiello, CMF Program Manager, CDFI Fund, U.S. Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220, (202) 653–0421 (not a toll-free number), or *cmf@cdfi.treas.gov.* Other information regarding the CDFI Fund and its programs may be obtained on the CDFI Fund website at *https://www.cdfifund.gov.* Two documents are provided to aid the public in providing comments requested by this Notice. The CMF Application Template, which presents the questions that will comprise the online Application, includes substantive revisions relative to the existing Application. The proposed revisions relative to the existing Application are highlighted in yellow in the CMF Application Template. The CMF Performance Report Data Points presents the information proposed to be collected in the online CMF Performance Report. Substantive changes being made to the CMF Performance Report are highlighted in blue in this document, and a list of proposed deletions is also included. Both documents may be obtained from the CMF program page of the CDFI Fund website at *https://www.cdfifund.gov/cmf.*

SUPPLEMENTARY INFORMATION:

Title: Capital Magnet Fund Application; Capital Magnet Fund Performance Report.

OMB Number: 1559–0036.

Abstract: The Capital Magnet Fund was established through the Housing and Economic Recovery Act of 2008 (Pub. L. 110–289) or HERA, as a competitive grant program administered by the CDFI Fund. Through CMF, the CDFI Fund provides financial assistance grants to Certified Community Development Financial Institutions (CDFIs) and qualified Nonprofit Organizations with the development or management of Affordable Housing, as defined in 12 CFR part 1807, as one of their principal purposes. Capitalized terms not defined in this Notice (other than titles) have the meaning set forth in the CMF Interim Rule (12 CFR part 1807). CMF awards must be used to attract private financing for and increase investment in: (i) The Development, Preservation, Rehabilitation, and Purchase of Affordable Housing for primarily Extremely Low-, Very Low-, and Low-Income Families; and (ii) Economic Development Activities which, in conjunction with Affordable Housing Activities will implement a Concerted Strategy to stabilize or revitalize a Low-Income Area or an Underserved Rural Area.

CMF Award Recipients are selected through a competitive process involving a careful review of their Application for program funding. The Application requires the submission of quantitative data and narrative responses for three parts: (1) Business and Leveraging Strategy, (2) Community Impact, and (3) Organizational Capacity. The Award selection process is defined in the Notice of Funding Availability (NOFA) for each funding round.

CMF Award Recipients enter into Assistance Agreements with the CDFI Fund that set forth required terms and conditions of the Award, including reporting and data collection requirements. The Assistance Agreement requires the submission of an annual CMF Performance Report. The information collected in the CMF Performance Report is reviewed to ensure the Recipient's compliance with its Performance Goals and contractual obligations, as well as the overall performance of the program.

Estimated Number of Respondents: 130 (Application); 250 (CMF Performance Report).

Estimated Annual Time per Respondent: 120 hours (Application); 20 hours (CMF Performance Report).

Estimated Annual Burden Hours: 15,600 hours (Application); 5,000 hours (CMF Performance Report).

Request for Comments: Comments submitted in response to this Notice will be summarized and/or included in the request for Office of Management and Budget approval. All comments will become a matter of public record and may be published on the CDFI Fund website at *https://www.cdfifund.gov.*

CMF Application

The CDFI Fund is seeking input on the content of the proposed Application with regard to the following: (a) Is the collection of information as proposed necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility in evaluating Applications; (b) the accuracy of the agency's estimate of the burden related to the collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of

capital or start-up costs and costs of operation, maintenance and purchase of services required to provide information.

Additionally, the CDFI Fund specifically requests comments concerning the following questions related to the proposed Application (set forth in the CMF Application Template):

(a) *Impact:* The proposed Application includes questions about the intended impact of an Applicant's CMF strategy. (1) How should the CDFI Fund assess the impact of CMF Awards on Low-Income Families and communities? (2) The CDFI Fund has identified for Applicants a set of impacts in the proposed Application from which to choose. Are the current impact choices sufficiently comprehensive? Are there impacts that should be added or modified? (3) The CDFI Fund is proposing a standard set of metrics for each impact in the Application. Are the metrics proposed in the Application reasonable? Should any be added or removed?

(b) *Entity Types:* Financing entities (including CDFIs) and affordable housing developers/managers participate in the CMF program. These two entity types generally have different business models and may have different approaches to using the CMF Award. (1) Are additional questions or revisions to existing questions needed in the Application to further differentiate the two entity types? If so, please describe and justify. (2) Both the existing and proposed Application currently asks non-CDFI Applicants to self-identify as financing entities or affordable housing developers/managers; all CDFIs are classified as financing entities. Should a CDFI be permitted to self-identify as an affordable housing developer/manager if the CDFI intends to primarily act in a developer role when executing its CMF Award strategy?

(c) *Areas of Economic Distress and High Opportunity Areas:* Along with focusing on Areas of Economic Distress, the CMF authorizing statute enables the program to prioritize ''projects that target Extremely Low-, Very Low-, and Low-Income Families in or outside a designated economic distress area.'' To this end, the CDFI Fund is proposing to implement this statutory language by adding High Opportunity Areas, as defined by the Federal Housing Finance Agency (FHFA), as a priority alongside Areas of Economic Distress. High Opportunity Areas are priorities in the FHFA's Duty to Serve Rule, and generally encompass areas outside of existing CMF Areas of Economic Distress, including areas with lower poverty rates, and is seeking public comment on the following questions: (1) Should the CDFI Fund add High Opportunity Areas as a priority in the Application? (2) If added, should High Opportunity Areas be weighted the same or differently as Areas of Economic Distress in the evaluation of Applications? (3) Should the CDFI Fund rely on the criteria established by the FHFA in the Duty to Serve Rule to designate such areas? Under the FHFA definition, a High Opportunity Area must (i) be designated by HUD as a Difficult to Develop Area whose poverty rate is lower than the rate specified by FHFA in the most recently published Duty to Serve Evaluation Guidance; or (ii) be designated by a state Qualified Allocation Plan as a high opportunity area and approved by FHFA in its most recently published Duty to Serve Evaluation Guidance. (4) Should the CDFI Fund consider an alternative, nationally applicable definition of High Opportunity Areas instead of the FHFA definition? If so, what federal sources of data are available to define these areas at the census tract level?

(d) *Areas of Economic Distress Data Sets:* Currently, the CMF program publishes a distinct data set for Areas of Economic Distress for each round, in part to allow for annual changes to CDFI Fund areas of emphasis and to reflect changing market conditions. This approach is different from other CDFI Fund programs, which update their program data every five years and apply these changes to all program requirements and Recipients. Should the CDFI Fund continue to provide a specific data set of the CMF Areas of Economic Distress for each round? Or, should another approach be used to maintain and update the Areas of Economic Distress data?

(e) *Rental and Homeownership Housing:* Affordable rental housing and affordable Homeownership are eligible uses for a CMF Award. The CDFI Fund has differentiated between the two in past NOFAs and Applications as each relates to targeted income levels. Specifically, the targeted income level for Homeownership is Low-Income (80% of Area Median Income (AMI) and below), compared to a targeted income level of Very-Low Income (50% AMI and below) for rental housing. In addition to targeted income levels, are there other areas in the proposed Application where there should be different approaches to requesting and evaluating information on Homeownership and rental housing strategies?

(f) *Economic Development Activities:* The CMF Interim Rule allows up to 30% of a CMF Award to be used for Economic Development Activities in conjunction with affordable housing and as part of a concerted strategy. In recent rounds, few Applicants requested to use their Award for Economic Development Activities. What, if any, barriers exist to using CMF Awards for Economic Development Activities? What, if any, changes are needed to the Application to address these barriers?

(g) *Priorities:* From funding round to funding round, new priorities may emerge, such as disaster response, an economic downturn, or new initiatives. In the past, the CDFI Fund has addressed changing priorities on a round-by-round basis for Applications in a specific funding round. Should this approach be continued or adjusted? If it should be adjusted, what alternative approach should the CDFI Fund consider?

(h) *Multi-State Service Areas:* The most recent CMF funding round (FY 2020) limits Applicants with multi-state service areas to a maximum of 15 states. The limit stems from a statutory requirement to ensure geographic diversity among CMF Awards. As a result, it is important to know which states can reasonably be expected to be served during the selection process. How can the CMF program best ensure geographic diversity? What, if any, changes should be made to the current approach to achieve this goal?

(i) *Rural Areas:* CMF has a statutory obligation to ensure geographic diversity among Metropolitan and rural areas. Currently, Recipients are limited to serving rural areas within their approved Service Area. Should Recipients be allowed to serve any rural area census tract in any state, regardless of Service Area, in order to meet its rural commitments under the Award?

(j) *Leverage:* Attracting capital, or leveraging the CMF Award, is a statutory requirement and key component of CMF. (1) Is the current approach, set forth in the proposed Application, where Applicants are asked to describe their different types of leverage (*e.g.* Enterprise-Level, Reinvestment-Level, and Project-Level), clear? If not, how could it be clearer or otherwise improved? (2) The CDFI Fund is considering requesting that Applicants provide more documentation about the leverage they have secured at the time of the Application. What types of documentation related to proposed sources of leverage should the CDFI Fund collect? What, if any, burdens would collecting such documentation place on Applicants? (3) Per the CMF authorizing statute, Applicants to the CMF program must leverage their

Award by at least 10 times. Currently, the CDFI Fund does not evaluate Applicants exceeding the 10:1 ratio more favorably than Applicants that meet the minimum 10 times benchmark. Should this approach be changed to recognize and score more favorably Applicants with total leverage exceeding the minimum requirement?

(k) *Program Income:* During the five-year Investment Period, the repayment of principal and/or equity from projects financed with CMF is considered Program Income and must be reinvested in CMF-eligible projects. To date, the reinvestment has been limited to the Recipient's approved Service Area. Should Recipients be allowed to reinvest CMF Program Income in anywhere in the United States without restriction?

(l) *Streamlined Collection of Data on Track Record/Projections:* As part of the Application, the CDFI Fund collects and evaluates information from Applicants related to their five-year track record and projections. In past Applications, this information has been collected in a format that indicates activity (cost and units) on an annual basis. In the proposed Application, the information collection format in Tables A–C has been changed to a cumulative five-year basis. Is the approach of collecting cumulative data sufficient or should the CDFI Fund continue to collect data for each year?

(m) *Alignment with other Housing Programs:* The CDFI Fund recognizes that the Low Income Housing Tax Credit (LIHTC) program is a significant resource used by many CMF Recipients in CMF-financed projects. Are there ways the CDFI Fund can increase alignment with LIHTC to reduce the burden on Applicants, particularly related to requirements or reporting for tenant income determination, long term deed restrictions or restrictive covenants, and income averaging? If so, please describe specific ways the alignment could best be achieved?

(n) *Loan Loss Reserves/Guarantees:* The capitalization of Loan Loss Reserves and providing Loan Guarantees are eligible CMF activities. To ensure oversight and effective use of CMF Awards, the CDFI Fund is considering a requirement that Loan Loss Reserves or Guarantees provided with a CMF Award be established as segregated funds or accounts restricted to provide credit enhancement only for eligible CMF activities. Would such a requirement be feasible for Recipients?

CMF Performance Report

The CDFI Fund is also seeking input on the content of the CMF Performance Report. The CMF Assistance Agreement requires the collection of annual reports for compliance monitoring and program evaluation purposes.

Data collected through the CMF Performance Report consists of three categories of data: (1) Mandatory data points, (2) conditionally required data points based on project characteristics, financing type or other condition, and (3) optional data points. For most compliance measures, AMIS calculates whether the Recipient is compliant or non-compliant based on the data reported into the system. When the system determines that a non-compliance has occurred, the Recipient is required to complete an explanation of non-compliance prior to submitting the report to the CDFI Fund.

Comments concerning the CMF Performance Report are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the CDFI Fund, including whether the information shall have practical utility; (b) the accuracy of the CDFI Fund's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

The CDFI Fund also seeks comments on the following specific questions related to the proposed CMF Performance Report:

(a) *Data Collection Changes:* Are the proposals for new data points and deleted data points in the CMF Performance Report appropriate? As explained above, proposed changes are highlighted or listed in the CMF Performance Report Data Points file. Will any of the proposed new data points for the CMF Performance Report highlighted in this file be infeasible or overly burdensome to collect?

(b) *Bulk Upload of Data:* The CMF Performance Report does not currently allow Recipients to use a bulk upload process to create new ''project records'' in the reporting system. A ''project record'' is a unique record that is created through the entry of basic data about an investment, such as the location of the investment, the amount of the CMF Award Committed, and other information that typically is entered when an investment is made; data in the project record typically does not have to be revised or changed. The intent of the current policy is to minimize the accidental creation of duplicate ''project records'' by Recipients. The CDFI Fund is evaluating the feasibility of allowing Recipients to upload and create multiple project records, such as by uploading a spreadsheet. How can the CDFI Fund ensure that Recipients do not create duplicate records or generate other data quality issues if ''project records'' are allowed to be created in this manner?

(c) *Output Reports:* The CDFI Fund began providing output reports (summary data based on data inputted by Recipients) in the CMF Performance Report that can be downloaded for individual Recipients to use beginning in July 2020. What modifications to these reports or other output reports would be helpful to Recipients?

(d) *Data Collection Frequency:* An ''annual project report'' record is a record within the reporting system that generally consists of data points that are updated as a Project progresses, such as dates, or data that is associated with single performance years, such as occupancy in that performance year. A ''project record'' generally consists of information entered only one time for each Project. Is there any data currently being collected annually on an ''annual project report'' record that should be collected only once? Is there any data on the ''project record'' that should be collected annually instead of only once?

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collections of information displays a valid OMB control number.

Authority: Pub. L. 110–289, 12 CFR part 1807.

Jodie L. Harris,

Director, Community Development Financial Institutions Fund.

[FR Doc. 2020–28757 Filed 12–29–20; 8:45 am]

BILLING CODE 4810–70–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in

property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Andrea Gacki, Director, tel.: 202–622–2420; 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; or Assistant Director for Regulatory Affairs, tel.: 202–622–4855.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On December 23, 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.

Individual

1. KAZAKEVICH, Henadz Arkadzievich (Cyrillic: КАЗАКЕВІЧ, Генадзь Аркадзьевіч) (a.k.a. KAZAKEVICH, Genadz Arkadzievich; a.k.a. KAZAKEVICH, Gennadi; a.k.a. KAZAKEVICH, Gennadi Arkadievich (Cyrillic: КАЗАКЕВИЧ, Геннадий Аркадьевич); a.k.a. KAZAKEVICH, Gennady (Cyrillic: КАЗАКЕВИЧ, Геннадий); a.k.a. KAZAKEVICH, Gennady Arkadyevich; a.k.a. KAZAKEVICH, Henadz), Minsk, Belarus; DOB 14 Feb 1975; POB Minsk, Belarus; nationality Belarus; Gender Male (individual) [BELARUS].

Designated pursuant to section 1(a)(ii)(A) of Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus,'' 71 FR 35485, 3 CFR 13405 (E.O. 13405) for being responsible for, or having participated in, actions or policies that undermine democratic processes or institutions in Belarus.

Entities

1. CENTRAL COMMISSION OF THE REPUBLIC OF BELARUS ON ELECTIONS AND HOLDING REPUBLICAN REFERENDA (a.k.a. BELARUSIAN CENTRAL ELECTION COMMISSION; a.k.a. CEC BELARUS; a.k.a. TSENTRALNAYA KAMISIYA RESPUBLIKI BELARUS PA VYBARAKH I PRAVYADZENNI RESPUBLIKANSKIKH REFERENDUMAU (Cyrillic: ЦЭНТРАЛЬНАЯ КАМІСІЯ РЭСПУБЛІКІ БЕЛАРУСЬ ПА ВЫБАРАХ І ПРАВЯДЗЕННІ РЭСПУБЛІКАНСКІХ РЭФЕРЭНДУМАУ); a.k.a. TSENTRALNAYA KOMISSIYA RESPUBLIKI BELARUS PO VYBORAM I PROVEDENIYU RESPUBLIKANSKIKH REFERENDUMOV (Cyrillic: ЦЕНТРАЛЬНАЯ КОМИССИЯ РЕСПУБЛИКИ БЕЛАРУСЬ ПО ВЫБОРАМ И ПРОВЕДЕНИЮ РЕСПУБЛИКАНСКИХ РЕФЕРЕНДУМОВ)), 11 Sovetskaya St., House of Government, Minsk 220010, Belarus [BELARUS].

Designated pursuant to section 1(a)(ii)(A) of Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus,'' 71 FR 35485, 3 CFR 13405 (E.O. 13405) for being responsible for, or having participated in, actions or policies that undermine democratic processes or institutions in Belarus.

2. KGB ALPHA (Cyrillic: КГБ АЛЬФА) (a.k.a. ALFA SPETZNAZ; a.k.a. KGB ALFA; a.k.a. ''ALPHA GROUP''; a.k.a. ''ALPHA UNIT''), Minsk, Belarus [BELARUS].

Designated pursuant to section 1(a)(ii)(A) of Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus,'' 71 FR 35485, 3 CFR 13405 (E.O. 13405) for being responsible for, or having participated in, actions or policies that undermine democratic processes or institutions in Belarus.

3. MAIN INTERNAL AFFAIRS DIRECTORATE OF THE MINSK CITY EXECUTIVE COMMITTEE (Cyrillic: ГЛАВНОЕ УПРАВЛЕНИЕ ВНУТРЕННИХ ДЕЛ МИНСКОГО ГОРОДСКОГО ИСПОЛНИТЕЛЬНОГО КОМИТЕТА) (a.k.a. GLAVNOYE UPRAVLENIE VNUTRENNIKH DEL MINSKOVO GORISPOLKOMA; a.k.a. MINSK GUVD (Cyrillic: ГУВД МИНСК); a.k.a. THE GENERAL DIRECTORATE OF INTERNAL AFFAIRS OF MINSK CITY EXECUTIVE COMMITTEE), Dobromislenski Lane, 5, Minsk, Belarus (Cyrillic: пер.Добромысленский,5, г.Минск, Belarus) [BELARUS].

Designated pursuant to section 1(a)(ii)(A) of Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus,'' 71 FR 35485, 3 CFR 13405 (E.O. 13405) for being responsible for, or having participated in, actions or policies that undermine democratic processes or institutions in Belarus.

4. MINSK SPECIAL PURPOSE POLICE UNIT (Cyrillic: МИНСКИЙ ОТРЯД МИЛИЦИИ ОСОБОГО НАЗНАЧЕНИЯ) (a.k.a. MINSK OMON (Cyrillic: МИНСК ОМОН); a.k.a. MINSK OTRYAD MILITSII OSOBOVO NAZNACHENIYA; a.k.a. MINSK SPECIAL PURPOSE MOBILE UNIT; a.k.a. MINSK SPECIAL TASK POLICE FORCE), Heroes of the 120th Division St, 42, Minsk, Belarus (Cyrillic: ул.Героев 120-й дивизии, 42, г.Минск, Belarus) [BELARUS].

Designated pursuant to section 1(a)(ii)(A) of Executive Order 13405 of June 16, 2006, ''Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus,'' 71 FR 35485, 3 CFR 13405 (E.O. 13405) for being responsible for, or having participated in, actions or policies that undermine democratic processes or institutions in Belarus.

Dated: December 23, 2020.

Bradley T. Smith,

Deputy Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2020–28863 Filed 12–29–20; 8:45 am]

BILLING CODE 4810–AL–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 removed from the SDN List. Their property and interests in property are no longer blocked, and U.S. persons are no longer generally prohibited from engaging in transactions with them. OFAC is also publishing an update to the identifying information of persons currently included in the SDN List.

DATES: See **SUPPLEMENTARY INFORMATION** section.

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; or Assistant Director for Regulatory Affairs, tel.: 202–622–4855.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website. (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On August 2, 1990, the President issued Executive Order 12722, ''Blocking Iraqi Government Property and Prohibiting Transactions with Iraq.'' On August 9, 1990, the President issued Executive Order 12724, ''Blocking Iraqi Government Property and Prohibiting Transactions with Iraq.'' On July 29, 2004, the President issued E.O. 13350, ''Termination of Emergency Declared in Executive Order 12722 With Respect to Iraq and Modification of Executive Order 13290, Executive Order 13303, and Executive Order 13315,'' which included an annex listing, in part,

persons previously designated pursuant to E.O. 12722 or E.O. 12724, or the Iraqi Sanctions Regulations, Title 31, Code of Federal Regulations, who were also determined to be subject to Executive Order 13315 (''E.O. 13315'') and E.O. 13350. Through the cancellation of E.O.s 12722 and 12724 in E.O. 13350 persons were effectually delisted from the SDN List pursuant to E.O.s 12722 and 12724 and simultaneously re-listed on the SDN List pursuant to E.O. 13350. On December 23, 2020, OFAC determined that circumstances no longer warrant the inclusion of the following persons on the SDN List under this authority. These persons are no longer subject to the blocking provisions of E.O. 13350.

Individual

1. AL–KHAFAJI, Sabah, 254 Rue Adolphe Pajeaud, Antony 92160, France (individual) [IRAQ2]

Entity

2. BABIL INTERNATIONAL, Aeroport D'Orly, Orly Aerogare 94390, France [IRAQ2]

Dated: December 23, 2020.

Bradley T. Smith,

Deputy Director, Office of Foreign Assets Control.

[FR Doc. 2020–28856 Filed 12–29–20; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Preparer Hardship Waiver Request and Preparer Explanation for Not Filing Electronically

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning preparer hardship waiver request and preparer explanation for not filing electronically.

DATES: Written comments should be received on or before March 1, 2021 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317–5751 or Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.Dennis@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Preparer Hardship Waiver Request and Preparer Explanation for Not Filing Electronically.

OMB Number: 1545–2200.

Form Number(s): 8944 and 8948.

Abstract: A tax preparer uses Form 8944 to request a waiver from the requirement to file tax returns on magnetic media when the filing of tax returns on magnetic media would cause a hardship. A specified tax return preparer uses Form 8948 to explain which exception applies when a covered return is prepared and filed on paper.

Current Actions: There is no change in the paperwork burden previously approved by OMB. These forms are being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profit organizations.

Estimated Number of Respondents: 8,910,000.

Estimated Time per Response: 2.05 hours.

Estimated Total Annual Burden Hours: 18,270,900.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 18, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–28796 Filed 12–29–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0013]

Agency Information Collection Activity: Application for United States Flag for Burial Purposes

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before March 1, 2021.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy Kessinger, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0013'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Danny S. Green, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue

NW, Washington, DC 20420, (202) 421–1354 or email *danny.green2@va.gov.* Please refer to ''OMB Control No. 2900–0013'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on:

(1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 2301(f)(1)).

Title: Application for United States Flag for Burial Purposes, VA Form 27–2008.

OMB Control Number: 2900–0013.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 27–2008 is used for family members and/or next-of-kin to apply for a burial flag.

Affected Public: Individuals and households.

Estimated Annual Burden: 189,000 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: On Occasion.

Estimated Number of Respondents: 753,000.

By direction of the Secretary.

Danny S. Green,

VA PRA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.

[FR Doc. 2020–28844 Filed 12–29–20; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 85 Wednesday,

No. 250 December 30, 2020

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 292

Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978; Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Docket Nos. RM19–15–001 and AD16–16–001; Order No. 872–A]

Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Order addressing arguments raised on rehearing and clarifying prior order in part.

SUMMARY: In this Order, the Federal Energy Regulatory Commission addresses arguments raised on rehearing and clarifies, in part, its final rule adopting revisions to its regulations implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). These changes will enable the Commission to continue to fulfill its statutory obligations under sections 201 and 210 of PURPA.

DATES: This rule is effective February 16, 2021.

FOR FURTHER INFORMATION CONTACT:

Lawrence R. Greenfield (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6415, *lawrence.greenfield@ferc.gov*

Helen Shepherd (Technical Information), Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6176, *helen.shepherd@ferc.gov*

Thomas Dautel (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6196, *thomas.dautel@ferc.gov*

SUPPLEMENTARY INFORMATION:

Table of Contents

	Paragraph
I. Background	4
A. Statutory Background	4
B. Final Rule's Updating of the PURPA Regulations	10
C. Summary of Changes to the PURPA Regulations Implemented by the Final Rule	11
II. Discussion	23
A. Threshold Issues	24
1. Whether the Commission Appropriately Consulted With Representatives of Relevant State and Federal Agencies	24
a. Requests for Rehearing	24
b. Commission Determination	25
2. Whether the PURPA Regulations Continue To Encourage QFs	27
a. Requests for Rehearing	27
b. Commission Determination	39
B. QF Rates	46
1. Overview	46
2. LMP as a Permissible Rate for Certain As-Available Avoided Cost Rates	53
a. Requests for Rehearing	60
b. Commission Determination	63
3. Tiered Avoided Cost Rates	66
a. Request for Clarification	66
b. Commission Determination	72
4. Providing for Variable Energy Rates in QF Contracts Is Consistent With PURPA	74
a. Whether the Current Approach Has Resulted in Payments to QFs in Excess of Avoided Costs	84
i. Requests for Rehearing	95
ii. Commission Determination	104
b. Whether the Proposed Change Would Violate the Statutory Requirement That the PURPA Regulations Encourage QFs and Do Not Discriminate Against QFs	114
i. Requests for Rehearing	118
ii. Commission Determination	134
c. Effect of Variable Energy Rates on Financing	145
i. Requests for Rehearing	159
ii. Commission Determination	172
d. Requested Clarification of the Final Rule	178
i. Commission Determination	179
5. Consideration of Competitive Solicitations To Determine Avoided Costs	181
i. Requests for Rehearing	203
ii. Commission Determination	214
C. Rebuttable Presumption of Separate Sites	232
1. Need for Reform	235
a. Requests for Rehearing	236
b. Commission Determination	238
2. Distance Between Facilities	246
a. Requests for Rehearing	250
b. Commission Determination	255
3. Factors	261
a. Requests for Rehearing	265
b. Commission Determination	273
D. QF Certification Process	280
1. Requests for Rehearing	290
2. Commission Determination	306
E. Corresponding Changes to the FERC Form No. 556	327
1. Requests for Rehearing	330
2. Commission Determination	331
F. PURPA Section 210(m) Rebuttable Presumption of Nondiscriminatory Access to Markets	334
1. Requests for Rehearing and Clarification	354
2. Commission Determination	360
G. Legally Enforceable Obligation	374
1. Requests for Rehearing	381
2. Commission Determination	384
III. Information Collection Statement	389
A. Request for Rehearing	392
B. Commission Determination	393
1. QFs Submitting Self-Certifications	403
a. Small Power Production Facility Greater Than 1 MW, and Less Than One Mile From an Affiliated Small Power Production QF	404
b. Small Power Production Facility Greater Than 1 MW, and More Than One Mile but Less Than 10 Miles From an Affiliated Small Power Production QF	405
c. Small Power Production Facility Greater Than 1 MW and 10 Miles or More From an Affiliated Small Power Production QF	406
2. QFs Submitting Applications for Commission Certification	407
a. Small Power Production Facility Greater Than 1 MW, and Less Than One Mile From an Affiliated Small Power Production QF	408
b. Small Power Production Facility Greater Than 1 MW, and More Than One Mile but Less Than 10 Miles From an Affiliated Small Power Production QF	409

TABLE OF CONTENTS—Continued

	Paragraph
c. Small Power Production Facility Greater Than 1 MW and 10 Miles or More From an Affiliated Small Power Production QF	410
3. Calculations for Additional Burden and Cost	411
IV. Environmental Analysis	412
A. No EIS or EA Is Required	412
1. NEPA Analysis Is Not Required Where Environmental Impacts Are Not Reasonably Foreseeable	414
a. Requests for Rehearing	420
b. Commission Determination	425
2. A Categorical Exclusion Applies	436
a. Exception to Categorical Exclusion	443
i. Requests for Rehearing	443
ii. Commission Determination	444
b. Applying a Categorical Exclusion for Clarifying and Corrective Actions Is Appropriate	445
i. Requests for Rehearing	445
ii. Commission Determination	449
3. That the Commission Prepared NEPA Analyses for the Promulgation of the Original PURPA Rule and Other Prior Rulemakings Does Not Mean That Such Analysis Was Possible or Required Here	455
a. Requests for Rehearing	462
b. Commission Determination	465
V. Regulatory Flexibility Act Certification	469
VI. Document Availability	471
VII. Effective Dates and Congressional Notification	474

1. On July 16, 2020, the Federal Energy Regulatory Commission (Commission) issued its final rule (final rule or Order No. 872) [1] adopting revisions to its regulations (PURPA Regulations) [2] implementing sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[3] Those regulations were promulgated in 1980 and have been modified in only specific respects since then. On August 17, 2020, the Commission received requests for rehearing and/or clarification of the final rule from the following entities and individuals: (1) California Utilities; [4] (2) Electric Power Supply Association (EPSA); (3) Northwest Coalition; [5] (4) One Energy Enterprises; (5) Public Interest Organizations; [6] (6) Solar Energy Industries Association (Solar Energy Industries); and (7) Thomas Mattson. On September 1, 2020, California Public Utilities Commission (California Commission) filed a response to California Utilities' request for clarification.

2. Pursuant to *Allegheny Defense Project* v. *FERC,*[7] the rehearing requests filed in this proceeding may be deemed denied by operation of law. As permitted by section 313(a) of the Federal Power Act (FPA),[8] however, we modify the discussion in the final rule and continue to reach the same result in this proceeding, as discussed below.[9]

3. Specifically, we either dismiss or disagree with most arguments raised on rehearing. We also provide further clarification on (1) states' use of tiered avoided cost pricing; (2) states' use of variable energy rates in QF contracts and availability of utility avoided cost data; (3) the role of independent entities overseeing competitive solicitations; (4) the circumstances under which a small power production qualifying facility (QF) needs to recertify; (5) application of the rebuttable presumption of separate sites for the purpose of determining the power production capacity of small power production facilities; and (6) the PURPA section 210(m) rebuttable presumption of nondiscriminatory access to markets and accompanying regulatory text, as further discussed below.

I. Background

A. Statutory Background

4. PURPA section 210(a) requires that the Commission prescribe rules that it determines necessary to encourage the development of qualifying small power production facilities and cogeneration facilities (together, QFs).[10] PURPA section 210(b) sets out the standards governing the rates purchasing utilities must pay to QFs.[11] Sections 210(b)(1) and (b)(2) provide that QF rates ''shall

[1] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Order No. 872, 85 FR 54638 (Sep. 2, 2020), 172 FERC ¶ 61,041 (2020).

[2] 18 CFR part 292. In connection with the revisions to the PURPA Regulations, the Commission also revised its delegation of authority to Commission staff in 18 CFR part 375.

[3] 16 U.S.C. 796(17)–(18), 824a–3.

[4] California Utilities consist of Pacific Gas & Electric Company; San Diego Gas & Electric Company; and Southern California Edison Company.

[5] Northwest Coalition consists of Northwest and Intermountain Independent Power Producers Association; the Community Renewable Energy Association; the Renewable Energy Coalition; IdaHydro; Oregon Solar Energy Industries Association; and NewSun Energy LLC. Excluding IdaHydro and NewSun Energy LLC, the entities comprising Northwest Coalition filed comments referred to in Order No. 872 as ''NIPPC, CREA, REC, and OSEIA.'' For ease of reference, in some instances below, we refer to Northwest Coalition below interchangeably with ''NIPPC, CREA, REC, and OSEIA.''

[6] Public Interest Organizations consist of Alabama Interfaith Power and Light; Appalachian Voices; Center for Biological Diversity; Environmental Law and Policy Center; Gasp; Georgia Interfaith Power and Light; Montana Environmental Information Center; Natural Resources Defense Council; North Carolina Sustainable Energy Association; Sierra Club; South Carolina Coastal Conservation League; Southern Alliance for Clean Energy; Southern Environmental Law Center; Southface Institute; Sustainable FERC Project; Tennessee Interfaith Power and Light; Upstate Forever; and Vote Solar. Some of these entities filed comments as ''Southeast Public Interest Organizations'' and some of these entities filed comments as ''Public Interest Organizations.'' For ease of reference, we refer below to these organizations on rehearing as ''Public Interest Organizations,'' however, but when referring to the separate groups' comments in this rulemaking proceeding, we refer to their separate comments.

[7] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[8] 16 U.S.C. 825*l*(a) (''Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.'').

[9] *Allegheny Def. Project,* 964 F.3d at 16–17. The Commission is not changing the outcome of the final rule. *See Smith Lake Improvement & Stakeholders Ass'n* v. *FERC,* 809 F.3d 55, 56–57 (D.C. Cir. 2015).

[10] 16 U.S.C. 824a–3(a).

[11] 16 U.S.C. 824a–3(b).

be just and reasonable to the electric consumers of the electric utility and in the public interest'' and ''shall not discriminate against qualifying cogenerators or qualifying small power producers.'' [12]

5. After establishing these standards, Congress then imposed statutory limits on the extent to which the PURPA Regulations may encourage the development of QFs pursuant to PURPA section 210(a), and also placed bounds on how the PURPA Regulations may implement the statutory provisions in PURPA section 210(b) governing QF rates.

6. The first such statutory limit appears in the final sentence of PURPA section 210(b). There, Congress established a cap on the level of the rates utilities could be required to pay QFs: ''No such rule prescribed under subsection (a) *shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.*'' [13] As the Conference Report for PURPA (PURPA Conference Report) explains:

> [T]he utility would not be required to purchase electric energy from a qualifying cogeneration or small power production facility *at a rate which exceeds the lower of* the rate described above, namely a rate which is just and reasonable to consumers of the utility, in the public interest, and nondiscriminatory, or the incremental cost of alternate electric energy. This limitation on the rates which may be required in purchasing from a cogenerator or small power producer *is meant to act as an upper limit on the price* at which utilities can be required under this section to purchase electric energy.[14]

7. Another way in which Congress set boundaries on the Commission's ability to encourage development of QFs was to define small power production facilities, one of the categories of generators that is to be encouraged under the statute. This statutory definition of small power production facilities applies to almost all renewable resources that wish to be QFs, requiring that those facilities have ''a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.'' [15] In order to comply with this statutory requirement that the capacity of all small power production facilities ''located at the same site'' not exceed 80 MW, the Commission is required to define what constitutes a ''site.'' In 1980, the Commission determined that, essentially, those facilities that are owned by the same or affiliated entities and using the same energy resource should be deemed to be at the same site ''if they are located within one mile of the facility for which qualification is sought.'' [16] This approach, known as the ''one-mile rule,'' interpreted Congress's limitation of 80 MW located at the same site to apply to those affiliated small power production qualifying facilities located within one mile of each other that use the same energy resource.

8. Finally, Congress amended PURPA in 2005 to place further limits on the extent to which the PURPA Regulations may encourage QFs. Congress amended PURPA section 210 to, among other things, add section 210(m), which provides for termination of the requirement that an electric utility enter into a new obligation or contract to purchase from a QF (frequently described as the ''mandatory purchase obligation'') if the QF has nondiscriminatory access to certain defined types of markets.[17] This amendment reflected Congress's judgment that non-discriminatory access to these markets provided adequate encouragement for those QFs, such that the mandatory purchase obligation could be lifted.

9. Congress directed the Commission to amend the PURPA Regulations to implement this new requirement, which the Commission did in Order No. 688. In that order, pursuant to PURPA section 210(m), the Commission identified markets in which utilities would no longer be subject to the PURPA mandatory purchase obligation because QFs have nondiscriminatory access to such markets.[18] Although not required by PURPA section 210(m), the Commission also established a rebuttable presumption for small QFs, which the Commission determined at that time were QFs at or below 20 MW, because they may not have nondiscriminatory access to such markets.[19] In creating this rebuttable presumption, the Commission made clear that ''we are not making a finding that all QFs smaller than a certain size lack nondiscriminatory access to markets.'' [20]

B. Final Rule's Updating of the PURPA Regulations

10. In the final rule, the Commission amended the PURPA Regulations, principally with regard to the three statutory provisions described above: (1) The avoided cost cap on QF rates; (2) the 80 MW limitation applicable to the combined capacity of affiliated small power production QFs that use the same energy resource located at the same site; and (3) the termination of the mandatory purchase obligation for QFs with nondiscriminatory access to markets. The Commission stated that it was modifying the PURPA Regulations, based on demonstrated changes in circumstances that took place after the PURPA Regulations were first adopted, to ensure that the regulations continue to comply with PURPA's statutory requirements established by Congress.[21]

C. Summary of Changes to the PURPA Regulations Implemented by the Final Rule

11. In the final rule, the Commission revised the PURPA Regulations based on the record of this proceeding, including comments submitted in the technical conference in Docket No. AD16–16–000 (Technical Conference),[22] the record evidence cited in the Notice of Proposed Rulemaking (NOPR),[23] and the comments submitted in response to the NOPR.[24] These changes, including modifications to the proposals made in the NOPR, are summarized below.

12. *First,* the Commission granted states [25] the flexibility to require that

[12] *Id.*

[13] *Id.* (emphasis added). The statute defines an electric utility's ''incremental costs'' as ''the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.'' 16 U.S.C. 824a–3(d); *see also* 18 CFR 292.101(b)(6) (implementing same and defining such ''incremental costs'' as ''avoided costs'').

[14] H.R. Rep. No. 95–1750, at 98 (1978) (Conf. Rep.) (emphasis added).

[15] 16 U.S.C. 796(17)(A)(ii).

[16] 18 CFR 292.204(a)(ii).

[17] *See* 16 U.S.C. 824a–3(m).

[18] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at PP 9–12 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008) (*AFPA* v. *FERC*).

[19] 18 CFR 292.309(d)(1).

[20] Order No. 688, 117 FERC ¶ 61,078 at P 74.

[21] Order No. 872, 172 FERC ¶ 61,041 at P 20.

[22] Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (May 9, 2016). The Technical Conference covered such issues as: (1) Various methods for calculating avoided cost; (2) the obligation to purchase pursuant to a legally enforceable obligation (LEO); (3) application of the one-mile rule; and (4) the rebuttable presumption the Commission has adopted under PURPA section 210(m) that QFs 20 MW and below do not have nondiscriminatory access to competitive organized wholesale markets.

[23] *Qualifying Facility Rates and Requirements,* 84 FR 53246 (Oct. 4, 2019), 168 FERC ¶ 61,184 (2019) (NOPR).

[24] Order No. 872, 172 FERC ¶ 61,041 at P 56.

[25] Nonregulated electric utilities implement the requirements of PURPA with respect to themselves. An electric utility that is ''nonregulated'' is any electric utility other than a ''state regulated electric

Continued

energy rates (but not capacity rates) in QF power sales contracts and other LEOs[26] vary in accordance with changes in the purchasing electric utility's as-available avoided costs at the time the energy is delivered. If a state exercises this flexibility, a QF no longer would have the ability to elect to have its energy rate be fixed but would continue to be entitled to a fixed capacity rate for the term of the contract or LEO.[27]

13. *Second,* the Commission granted states additional flexibility to allow QFs to have a fixed energy rate and provided that such state-authorized fixed energy rate can be based on projected energy prices during the term of a QF's contract based on the anticipated dates of delivery.[28]

14. *Third,* the Commission implemented a number of revisions intended to grant states flexibility to set ''as-available'' QF energy rates based on market forces. The Commission established a rebuttable presumption that the locational marginal price (LMP) established in the organized electric markets defined in 18 CFR 292.309(e), (f), or (g) represents the as-available avoided costs of energy for electric utilities located in these markets.[29] With respect to QFs selling to electric utilities located outside of the organized electric markets defined in 18 CFR 292.309(e), (f), or (g), the Commission permitted states to set as-available energy avoided cost rates at competitive prices from liquid market hubs or calculated from a formula based on natural gas price indices and specified heat rates, provided that the states first determine that such prices represent the purchasing electric utilities' energy avoided costs.[30]

15. The Commission granted states the flexibility to choose to adopt one or more of these options or to continue setting QF rates under the standards long established in the PURPA Regulations.[31]

16. *Fourth,* the Commission provided states the flexibility to set energy and capacity rates pursuant to a competitive solicitation process conducted under transparent and non-discriminatory procedures consistent with the Commission's *Allegheny* standard.[32]

17. *Fifth,* the Commission modified its ''one-mile rule'' for determining whether generation facilities are considered to be at the same site for purposes of determining qualification as a qualifying small power production facility. Specifically, the Commission allowed electric utilities, state regulatory authorities, and other interested parties to show that affiliated small power production facilities that use the same energy resource and are more than one mile apart and less than 10 miles apart actually are at the same site (with distances one mile or less apart still irrebuttably at the same site and distances 10 miles or more apart irrebuttably at separate sites). The Commission also allowed a small power production facility seeking QF status to provide further information in its certification (whether a self-certification or an application for Commission certification) or recertification (whether a self-recertification or an application for Commission recertification) to defend preemptively against subsequent challenges, by identifying factors affirmatively demonstrating that its facility is indeed at a separate site from other affiliated small power production qualifying facilities. The Commission added a definition of the term ''electrical generating equipment'' to the PURPA Regulations to clarify how the distance between facilities is to be calculated.[33]

18. *Sixth,* the Commission allowed an entity to challenge an initial self-certification or self-recertification without being required to file a separate petition for declaratory order and to pay the associated filing fee. However, the Commission clarified that such protests may be made to new certifications (both self-certifications and applications for Commission certification) but only to self-recertifications and applications for Commission recertifications making substantive changes to the existing certification.[34]

19. *Seventh,* the Commission revised its regulations implementing PURPA section 210(m), which provide for the termination of an electric utility's obligation to purchase from a QF with nondiscriminatory access to certain markets. Under the PURPA Regulations before the final rule becomes effective, there is a rebuttable presumption that certain small QFs (*i.e.,* those below 20 MW) may not have nondiscriminatory access to such markets. The Commission updated the rebuttable presumption threshold for small power production facilities (but not cogeneration facilities) from 20 MW to 5 MW and revised the PURPA Regulations to provide a nonexclusive list of examples of factors that QFs may cite to support an argument that they lack nondiscriminatory access to such markets.[35]

20. *Finally,* the Commission clarified that a QF must demonstrate commercial viability and a financial commitment to construct its facility pursuant to objective and reasonable state-determined criteria before the QF is entitled to a contract or LEO. The Commission prohibited states from imposing any requirements for a LEO other than a showing of commercial viability and a financial commitment to construct the facility.[36]

21. The Commission explained that these changes will enable the Commission to continue to fulfill its statutory obligations under PURPA sections 201 and 210. The Commission emphasized that these changes are effective prospectively for new contracts or LEOs and for new facility certifications and recertifications filed on or after the effective date of the final rule; the Commission stated that it does not by the final rule permit disturbance of existing contracts or LEOs or existing facility certifications.[37]

22. On August 17, 2020, (1) EPSA, California Utilities, Northwest Coalition, One Energy Enterprises, and Thomas Mattson filed timely requests for rehearing of the final rule; (2) One Energy Enterprises, Public Interest Organizations, and Solar Energy Industries filed timely requests for rehearing and clarification of the final rule; and (3) California Utilities filed a timely request for clarification of the

utility.'' 16 U.S.C. 2602(9). The term ''state regulated electric utility,'' in contrast, means any electric utility with respect to which a state regulatory authority has ratemaking authority. 16 U.S.C. 2602(18). The term ''state regulatory authority,'' as relevant here, means a state agency which has ratemaking authority with respect to the sale of electric energy by an electric utility. 16 U.S.C. 2602(17).

[26] The Commission has held that a LEO can take effect before a contract is executed and may not necessarily be incorporated into a contract. *JD Wind 1, LLC,* 129 FERC ¶ 61,148, at P 25 (2009), *reh'g denied,* 130 FERC ¶ 61,127 (2010) (''[A] QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.''). For ease of reference, however, references herein to a contract also are intended to refer to a LEO that is not incorporated into a contract.

[27] Order No. 872, 172 FERC ¶ 61,041 at P 57.

[28] *Id.* P 58.

[29] These are the markets operated by Midcontinent Independent System Operator, Inc. (MISO); PJM Interconnection, L.L.C. (PJM); ISO New England Inc. (ISO–NE); New York Independent System Operator, Inc. (NYISO); Electric Reliability Council of Texas (ERCOT); California Independent System Operator, Inc. (CAISO); and Southwest Power Pool, Inc. (SPP).

[30] Order No. 872, 172 FERC ¶ 61,041 at P 59.

[31] *Id.*

[32] *Id.* P 60 (referencing *Allegheny Energy Supply Co., LLC,* 108 FERC ¶ 61,082, at P 18 (2004) (*Allegheny Energy*)).

[33] *Id.* P 62.

[34] *Id.* P 63.

[35] *Id.* P 64.

[36] *Id.* P 65.

[37] *Id.* P 66.

Final Rule. On September 1, 2020, California Public Utilities Commission (California Commission) filed an answer to California Utilities' request for clarification of the final rule.[38]

II. Discussion

23. In this order, we sustain the final rule. Specifically, we either dismiss or disagree with most arguments raised on rehearing. We also provide further clarification on (1) states' use of tiered avoided cost pricing; (2) states' use of variable energy rates in QF contracts and availability of utility avoided cost data; (3) the role of independent entities overseeing competitive solicitations; (4) the circumstances under which a small power production QF needs to recertify; (5) application of the rebuttable presumption of separate sites in PURPA 210(m) proceedings; and (6) the PURPA section 210(m) rebuttable presumption of nondiscriminatory access to markets and accompanying regulatory text, as further discussed below.

A. Threshold Issues

1. Whether the Commission Appropriately Consulted With Representatives of Relevant State and Federal Agencies

a. Requests for Rehearing

24. Public Interest Organizations state that the final rule is flawed because the Commission failed to consult with state and federal officials as required by PURPA section 210(a).[39] Public Interest Organizations argue that the Commission's actions to hold a technical conference and invite public comments, both of which involved participation from state and federal entities, are insufficient to meet this statutory requirement.[40] Public Interest Organizations aver that these actions satisfy the statutory requirement to provide ''notice and reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments'' but that the Commission failed to satisfy what Public Interest Organizations claim is a separate and distinct requirement: To ''consult[ ]'' with representatives of state and federal officials.[41] Public Interest Organizations argue that Congress included the word ''consultation'' in the statute to connote deliberations more formal and focused than the general notice and comment process and further assert that statutes and regulations routinely distinguish between the two.[42] Public Interest Organizations contend that this lack of consultation has hamstrung the Commission and prevents the Commission from crafting informed policy.[43]

b. Commission Determination

25. Public Interest Organizations' argument that the Commission failed to fulfill the consultation provision has no merit. First, we reemphasize the participation by state entities at the Commission's 2016 Technical Conference. Upon the Commission's open invitation,[44] several state entities participated in that conference and filed post-conference comments, including members of state regulatory authorities and the president of the national association representing state commissions (NARUC).[45] Second, several federal and state entities availed themselves of the opportunity to be heard via the NOPR's notice and comment process. More than 20 state entities, including state commissions, state consumer advocates, state attorneys general, governors, and others, submitted comments in response to the NOPR.[46] In addition, NARUC submitted several filings throughout this process, and a group calling themselves State Entities—a diverse group including eight attorneys general and two state commissions—filed a combined comment on the PURPA NOPR; the NOPR was published in the **Federal Register**.[47] Third, no state or federal entity has sought rehearing on this (or any other) basis.

26. In sum, throughout this process, the Commission repeatedly sought information and input from state and federal entities. As explained above, numerous state entities submitted comments or otherwise participated in the process and other state and federal entities had the opportunity to participate in the process. The Commission fully satisfied its consultation obligations.

2. Whether the PURPA Regulations Continue To Encourage QFs

a. Requests for Rehearing

27. Solar Energy Industries and Public Interest Organizations state that the Commission is required under PURPA section 210 to apply its regulations in a manner that encourages QFs and that it has failed to do so.[48]

28. Solar Energy Industries argue that, in the final rule, the Commission failed

[38] Because California Utilities requested clarification, and not rehearing, of the final rule, we accept California Commission's answer to California Utilities' request for clarification of the final rule. *See* 18 CFR 385.213(a)(3).

[39] Public Interest Organizations Request for Rehearing at 6, 12–14.

[40] *Id.* at 13.

[41] *Id.* (citing 16 U.S.C. 824a–3(a)(2)).

[42] *Id.* at 13–14 (citing 50 CFR 402.14; *Cooling Water Intake Structure Coal.* v. *U.S. Envtl. Prot. Agency,* 905 F.3d 49, 78 (2d Cir. 2018)).

[43] *Id.* at 14.

[44] *See* Notice Inviting Post-Technical Conference Comments, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (Sept. 6, 2016); Supplemental Notice of Technical Conference, *Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Docket No. AD16–16–000 (Mar. 4, 2016) (announcing preliminary agenda and inviting interested speakers).

[45] Connecticut Public Utilities Regulatory Authority (Connecticut Authority) and Massachusetts Department of Public Utilities (Massachusetts DPU) Comments, Docket No. AD16–16–000 (Nov. 7, 2016); Idaho Public Utilities Commission (Idaho Commission) Comments, Docket No. AD16–16–000 (Nov. 7, 2016); Commissioner Paul Kjellander, Idaho Commission Comments, Docket No. AD16–16–000 (June 29, 2016); Commissioner Christine Raper, Idaho Commission Comments, Docket No. AD16–16–000 (June 29, 2016); Commissioner Travis Kavulla, Montana Public Service Commission (Montana Commission) and on behalf of NARUC Comments, Docket No. AD16–16–000 (June 29, 2016).

[46] Commissioner Anthony O'Donnell, Montana Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Arizona Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); California Public Utilities Commission (California Commission) Comments, Docket No. RM19–15–000 (Dec. 3, 2019); District of Columbia Public Service Commission (DC Commission) Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Governor Brad Little (Idaho) Comments, Docket No. RM19–15–000 (Dec. 2, 2019); Idaho Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Kentucky Public Service Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Massachusetts Attorney General Maura Healey Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Massachusetts DPU Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Michigan Public Service Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Montana Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); North Carolina Attorney General Comments, Docket No. RM19–15–000 (Dec. 3, 2019); North Carolina Public Service Commission Public Staff Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Nebraska Power Review Board Comments, Docket No. RM19–15–000 (Nov. 22, 2019); Ohio Consumers Counsel Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Oregon Public Utility Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Pennsylvania Public Utility Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019); Public Utility Commission of Ohio Federal Energy Advocate Comments, Docket No. RM19–15–000 (Dec. 3, 2019); South Dakota Public Utilities Commission Comments, Docket No. RM19–15–000 (Dec. 3, 2019).

[47] State Entities Comments, Docket No. RM19–15–000 (Dec. 3, 2019) (filed on behalf of Massachusetts Attorney General, Delaware Attorney General, District of Columbia Attorney General, Maryland Attorney General, Michigan Attorney General, New Jersey Attorney General, North Carolina Attorney General, Oregon Attorney General, New Jersey Board of Public Utilities, Rhode Island Division of Public Utilities and Carriers); NARUC Comments, Docket No. RM19–15–000 (Dec. 3, 2019); NARUC Supplemental Comments, Docket No. AD16–16–000 (Oct. 17, 2018); *see also* NOPR, 168 FERC ¶ 61,184, (NOPR published in **Federal Register**).

[48] Public Interest Organizations Request for Rehearing at 8, 43–60; Solar Energy Industries Request for Rehearing and/or Clarification at 2–4, 4–6, 8–9, 42–45.

to meet this statutory requirement in the following ways:

(1) Terminating a Qualifying Facility's right to elect a long-term energy rate when delivering energy under a long-term contract; (2) revising the long-standing regulations providing that a Qualifying Facility is not ''at the same site'' so long as the facilities are located more than one mile apart; and (3) allowing utilities within the boundaries of [Regional Transmission Organization or an Independent System Operator (RTO/ISO)] to seek a waiver of the [obligation] to purchase from small power production Qualifying Facilities larger than 5 MW despite the fact that few, if any, of such facilities have meaningful access to organized wholesale markets.[49]

29. Solar Energy Industries claim that the Commission's assertion that the final rule ''continue[s] to encourage the development of QFs consistent with PURPA'' is unsupported by the record and erroneous.[50] Solar Energy Industries argue that requiring utilities to interconnect with QFs and allowing QFs to purchase station power services is not new and is part and parcel of a utility's obligation to provide open access service today.[51] Solar Energy Industries add that maintaining existing exemptions from the FPA and similar state and federal regulations is not helpful because other rule changes serve as severe obstructions to QF development in the first place.

30. Public Interest Organizations assert that the Commission incorrectly framed this issue as a set of false choices between encouraging QFs or violating statutory limits and encouraging QFs or never modifying its 1980 regulations.[52] Public Interest Organizations argue that the Commission has inappropriately focused on whether the final rule eliminates all encouragement, rather than whether the final rule advances the goal of encouraging QFs in comparison to a suite of alternatives that could be more favorable to QFs. Public Interest Organizations add that the Commission must give effect to every relevant clause and use the significant space between encouraging and exceeding other statutory mandates, rather than following the conclusion in the final rule that PURPA itself limits the extent to which PURPA Regulations can encourage QFs, which would create a false dichotomy between meeting the mandate that QFs be encouraged and violating Congressionally defined limits.[53]

31. Public Interest Organizations contend that the Commission is acting arbitrarily and capriciously because the record fails to support the Commission's claim that the changes in the final rule encourage QFs.[54] Public Interest Organizations point to the Commission's statements in the final rule that these revisions will ''lower payments from certain electric utilities to certain QFs,'' will result in additional filing burdens, and may result in more protests being filed in opposition to QF filings.[55] Public Interest Organizations argue that the Commission implicitly admitted that the majority of the changes do not encourage QF development when the Commission stated that ''several of the changes'' in the final rule provide encouragement.[56]

32. Public Interest Organizations argue that the final rule is not the product of reasoned decision-making because the Commission's assertions that these revisions encourage QFs are insufficient, even if true.[57] Public Interest Organizations state that in Order No. 69 the Commission identified three major obstacles and crafted its rules to address these barriers. Public Interest Organizations aver that, in contrast, the Commission conducted no such inquiry here to identify whether those barriers persist or new ones exist.[58]

33. Public Interest Organizations claim that the Commission ignored evidence in the record.[59] Public Interest Organizations state that the Commission dismissed as beyond the scope of the rulemaking evidence that the PURPA Regulations in place since 1980 fail to encourage QFs, yet at the same time rely on the strength of those rules to support its claim that the PURPA Regulations continue to encourage QFs.[60] Public Interest Organizations argue that the Commission avoided consideration of this evidence by making the following three claims: (1) Relaxing some standards may actually induce some states to more robustly implement the rules; (2) evidence claiming that existing rules fail to encourage QF development should be dismissed as overstated; and (3) any lack of implementation of PURPA speaks to states' failures to implement, rather than gaps in the PURPA Regulations themselves.[61]

34. Public Interest Organizations argue that examples of the Commission's failure to fully consider the record were that one of the commenters described the amendments to the Public Utility Holding Company Act of 1935 (PUHCA) in 2005 that effectively repealed that statute and that interconnection procedures stymie QF development. Public Interest Organizations argue that the Commission did not sufficiently consider this information in the record and, if it had, it would not have mistakenly asserted that related regulatory exemptions provided in the 1980 rules are sufficient to encourage QF development.[62]

35. Public Interest Organizations contend that, because the Commission explicitly considered broad changes from Order No. 69 and addressed a broad range of topics in the final rule, the Commission improperly excluded consideration of evidence of barriers faced by QFs when it found that such evidence is outside the scope of this proceeding.[63]

36. Public Interest Organizations argue that the Commission was misguided in its reliance on U.S. Energy Information Administration (EIA) data showing that some states with the highest rates of QF penetration are located in non-RTO regions to support the claim that evidence of barriers to QFs in such regions are overblown.[64] Public Interest Organizations aver that three states (North Carolina, Idaho, and Utah) skew the data with successful outcomes for QFs, while PURPA remains largely irrelevant in the 47 other states. Public Interest Organizations add that reliance even on these three states is in error because these states saw significant QF penetration due to long-term fixed energy rates, which the Commission is

[49] Solar Energy Industries Rehearing Request at 4, 8–9.

[50] *Id.* at 6 (citing Order No. 872, 172 FERC ¶ 61,041 at P 78).

[51] *Id.*

[52] Public Interest Organizations Request for Rehearing at 43–45.

[53] *Id.* at 44–46 (citing Order No. 872, 172 FERC ¶ 61,041 at P 72).

[54] *Id.* at 46–60.

[55] *Id.* at 46 (citing Order No. 872, 172 FERC ¶ 61,041 at PP 553, 584, 587, 746).

[56] *Id.* at 46–47 (citing Order No. 872, 172 FERC ¶ 61,041 at P 78).

[57] *Id.* at 48–49 (citing *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, 45 FR 12214 (Feb. 25,1980), FERC Stats. & Regs. ¶ 30,128, at 30,863 (cross-referenced 10 FERC ¶ 61,150), *order on reh'g,* Order No. 69–A, 45 FR 33958 (May 21, 1980), FERC Stats. & Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst., Inc.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983) (*API*)).

[58] *Id.*

[59] *Id.* at 49–57.

[60] *Id.* at 49.

[61] *Id.* at 49–50 (citing Order No. 872, 172 FERC ¶ 61,041 at PP 43–46).

[62] *Id.* at 51–52 (citing Harvard Electricity Law Initiative (Harvard Electricity Law) Comments, Docket No. RM19–15–000, at 19–21 (Dec. 3, 2019); Solar Energy Industries Supplemental Comments, Docket No. AD16–16–000, at 16 (Aug. 28, 2019)).

[63] *Id.* at 52–53.

[64] *Id.* at 53.

now no longer requiring, claiming that, even in Idaho, barriers have since been erected with a subsequent cessation in QF development.[65]

37. Public Interest Organizations assert that the Commission inappropriately dismissed barriers to QF development as matters only relevant to state implementation or PURPA enforcement dockets.[66] Public Interest Organizations add that the Commission's claim that more relaxed standards will lead to more robust state implementation is speculative, internally contradictory, and ignores relevant evidence.[67]

38. Public Interest Organizations argue that, even if the Commission properly considered the full record, the Commission's finding that the revised rules encourage QFs is arbitrary and capricious.[68] Public Interest Organizations restate their concern that providing more flexibility will not lead to more robust PURPA implementation by states. Public Interest Organizations contend that the changes adopted in the final rule overwhelmingly cut in favor of utilities and against encouraging QFs and that none of the revisions require regulators to strengthen incentives or eliminate burdens on QF development.[69] Public Interest Organizations aver that these changes amount to lowering the federal floor, therefore reducing QF bargaining power, even if state regulators implement the rules in good faith. Public Interest Organizations add that, contrary to the Commission's assertions in the final rule, leaving intact the requirement for full avoided costs is insufficient to continue to encourage QFs, especially in the face of new barriers erected by the final rule.[70]

b. Commission Determination

39. Contrary to claims that the PURPA Regulations as revised do not encourage QFs, the PURPA Regulations as revised in the final rule continue as a whole to encourage the development of QFs consistent with the statutory limits on such encouragement, as explained below.[71]

40. Public Interest Organizations improperly frame the encouragement analysis. In Public Interest Organizations' view, the encouragement standard should be analyzed on the basis that a revision is inadequate in encouraging QFs if there exist alternative revisions that are more favorable to QFs.[72] We reject this premise. PURPA requires the Commission's regulations to encourage QFs, but that is not all that PURPA says. PURPA also requires that the Commission prescribe no rule requiring that states set payments to QFs that exceed avoided costs and PURPA requires that qualifying small power production facilities do not exceed 80 MW. Furthermore, in the final rule, the Commission strikes a balance among the interests of *all* relevant stakeholders, including not just the selling QFs, but also the purchasing electric utilities and, moreover, consumers, consistent with PURPA.

41. Regarding QF rates, the final rule provides states further flexibility to better enable states to implement PURPA's statutory obligation that QF rates not exceed the purchasing electric utility's avoided costs. We acknowledge that different states have implemented PURPA differently, but such differences are not prohibited by the statute. If parties believe that a state has failed to implement the PURPA Regulations consistent with their terms, then these parties may bring an enforcement petition before the Commission or other fora.[73] But just because parties are unsatisfied with some states' implementation of PURPA to date[74] does not preclude the Commission from making the revisions to its PURPA Regulations adopted in the final rule.

42. In the final rule, the Commission complied with PURPA's requirement that rates not exceed avoided costs by, for example, allowing states to implement variable avoided cost energy rates if they so choose.[75] The Commission also continued to fulfill its obligation under PURPA to encourage the development of QFs. Specifically, with the additions from the final rule, the PURPA Regulations continue to encourage QFs by combining elements that include, among other things: (1) Providing the potential for increased transparency of avoided cost determinations under competitive solicitations or competitive market prices; (2) continuing to provide the ability for QFs to be exempt from most of the provisions of the FPA and PUHCA and certain state laws and regulations; (3) continuing to grant QFs special rights to supplementary and backup power; (4) providing extra benefits and rights for QFs 5 MW or smaller and especially those smaller than 100 kW; and (5) clarifying that states may only impose objective and reasonable criteria, limited to demonstrating commercial viability and financial commitment, as prerequisites to QF LEO formation that states may impose, which ensures that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises.[76] These elements of the PURPA Regulations, among others, will continue to provide rules that, as a whole, encourage QF development.

43. We disagree with Public Interest Organizations' assertion that there is insufficient evidence to support the Commission's conclusion that providing more flexibility to states may better enable states to encourage QF development. As one example, Idaho State Commissioner, Kristine Raper, stated during the 2016 Technical Conference that ''[s]tate Commissions do not have enough tools in the toolbox'' and that this lack of flexibility caused Idaho to amend its regulations to award only two-year standard contracts for QFs, rather than twenty-year standard contracts with periodic updates to the avoided cost rate.[77] Therefore, it was reasonable for the Commission to conclude that the new flexibility granted by the final rule may lead states to lengthen the contract period, which could encourage QF development. Additionally, the new competitive market price options should be less burdensome for all involved,

[65] *Id.* at 54.

[66] *Id.* at 55.

[67] *Id.* at 56.

[68] *Id.* at 57.

[69] *Id.* at 58–59.

[70] *Id.* at 59–60.

[71] In subsequent sections of this order, we address Solar Energy Industries' concerns that the PURPA Regulations, as revised, fail to encourage QFs due to the specific revisions (1) allowing states to set avoided energy costs using variable energy rates; (2) expanding the one-mile rule; and (3) lowering the threshold for presumptive nondiscriminatory access for facilities in competitive wholesale markets from 20 MW to 5 MW. *See infra* sections III.B.4, III.C, and III.F.

[72] *See* Public Interest Organizations Request for Rehearing at 46 (footnote omitted) (''There is significant space provided within the confines of the limitations Congress established to encourage QFs. FERC's reasoning that because it cannot encourage QFs by exceeding the bounds set by Congress it need not fully encourage QFs within the bounds of the statute fails to give effect to Congress' command to encourage QFs. The Commission can, and must, issue rules that support QF development while complying with the other statutory requirements and limits on the form of that support.'').

[73] Order No. 872, 172 FERC ¶ 61,041 at P 359 (citing *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304 (1983)).

[74] *See* Public Interest Organizations Request for Rehearing at 37–39.

[75] Order No. 872, 172 FERC ¶ 61,041 at PP 232–360.

[76] In addition, the Commission in Order No. 872 kept intact the regulations issued to overcome the barriers to QFs identified in Order No. 69. Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,863; *see also* Order No. 872, 172 FERC ¶ 61,041 at PP 10, 28–41, 78.

[77] Technical Conference Tr. at 143–44 (Commissioner Kristine Raper, Idaho Commission).

compared to the administrative determination of avoided cost rates, because the new options rely on transparent, publicly available competitive prices or transparent and non-discriminatory competitive solicitations.[78] QFs may spend less time and money pursuing their interests in a competitive market price environment than they previously did in the administrative determination process. Finally, to the extent energy prices rise at some point in the future, QFs with variable rates would necessarily benefit.

44. We disagree with Public Interest Organizations' claim that the Commission has failed to adequately consider the evidence that states have achieved various levels of PURPA implementation. Public Interest Organizations have overly relied on the examples of North Carolina, Idaho, and Utah, which they contend have unusually high levels of QF development. We are committed to promoting PURPA's central feature of cooperative federalism.[79] In the final rule, the Commission provided states further flexibility to implement this statutory obligation as most appropriate and consistent with the terms of the statute.

45. We disagree with Public Interest Organizations that retaining the exemption from PUHCA is unimportant or that PUHCA has been repealed. While now more focused on record-keeping obligations,[80] PUHCA remains a regulatory obligation for entities, including entities that seek QF status retroactively. By granting QFs retroactive status when they had not yet certified but should have done so previously, the Commission has relieved those entities of PUHCA's record-keeping obligations (similar to other federal and state exemptions), thereby further encouraging the development of QFs.[81] Similarly, contrary to Public Interest Organizations' request for rehearing, alleged deficiencies in state-administered QF interconnection procedures are not within the scope of this rulemaking.

B. QF Rates

1. Overview

46. PURPA requires the Commission to promulgate rules to be implemented by the states that ''shall insure'' that the rates electric utilities pay for purchases of electric energy from QFs meet the statutory criteria, including that ''[n]o such rule . . . shall provide for a rate which exceeds'' the purchasing utility's ''incremental cost . . . of alternative electric energy.'' [82] Under PURPA, such rates must (1) be just and reasonable to the electric consumers of the electric utility and in the public interest; (2) not discriminate against qualifying cogenerators or qualifying small power producers; [83] and, as noted above, (3) not exceed ''the incremental cost to the electric utility of alternative electric energy,'' [84] which is ''the cost to the electric utility of the electric energy which, *but for* the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.'' [85] The ''incremental cost to the electric utility of alternative electric energy'' referred to in prong (3) above, which sets out a statutory upper bound on a QF rate, has been consistently referred to by the Commission and industry by the short-hand phrase ''avoided cost,'' [86] although the term ''avoided cost'' itself does not appear in PURPA.

47. In addition, the PURPA Regulations in effect before the final rule provide a QF two options for how to sell its power to an electric utility. The QF could choose to sell as much of its energy as it chooses when the energy becomes available, with the rate for the sale calculated at the time of delivery (frequently referred to as a so-called ''as-available'' sale).[87] Alternatively, the QF could choose to sell pursuant to a LEO (such as a contract) over a specified term.[88]

48. If the QF chooses to sell under the second option, the PURPA Regulations in effect before the final rule provide the QF the further option of receiving, in terms of pricing, either: (1) The purchasing electric utility's avoided cost calculated at the time of delivery; [89] or (2) the purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred.[90]

49. In implementing the PURPA Regulations, the Commission recognized that a contract with avoided costs calculated at the time a LEO is incurred could exceed the electric utility's avoided costs at the time of delivery in the future, thereby seemingly violating PURPA's requirement that QFs not be paid more than an electric utility's avoided costs. The Commission reasoned, however, that the fixed avoided cost rate might also turn out to be lower than the electric utility's avoided costs over the course of the contract and that, ''in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.'' [91] The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire life of the contract was that fixing the rate provides ''certainty with regard to return on investment in new technologies.'' [92]

50. In the NOPR, the Commission proposed to revise its PURPA Regulations to permit states to incorporate competitive market forces in setting QF rates. Specifically, the Commission proposed to revise its PURPA Regulations with regard to QF rates to provide states with the flexibility to:

- Require that ''as-available'' QF energy rates paid by electric utilities

[78] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 30–32.

[79] *See FERC* v. *Miss.,* 456 U.S. 742, 767 (1982) (internal quotations omitted) (stating that PURPA is a ''program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs'').

[80] *See* 18 CFR 366.3(a)(1).

[81] *See, e.g., GRE 314 East Lyme LLC,* 171 FERC ¶ 61,199 (2020); *Branch Street Solar Partners, LLC,* 169 FERC ¶ 61,269 (2019); *Zeeland Farm Servs., Inc.,* 163 FERC ¶ 61,115 (2018); *Minwind I,* 149 FERC ¶ 61,109 (2014); *Beaver Falls Mun. Auth.,* 149 FERC ¶ 61,108 (2014).

[82] 16 U.S.C. 824a–3(b).

[83] 16 U.S.C. 824a–3(b)(1)–(2).

[84] 16 U.S.C. 824a–3(b).

[85] 16 U.S.C. 824a–3(d) (emphasis added).

[86] *See* 18 CFR 292.101(b)(6) (defining avoided costs in relation to the statutory terms); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865 (''This definition is derived from the concept of 'the incremental cost to the electric utility of alternative electric energy' set forth in section 210(d) of PURPA. It includes both the fixed and the running costs on an electric utility system which can be avoided by obtaining energy or capacity from qualifying facilities.'').

[87] 18 CFR 292.304(d)(1).

[88] 18 CFR 292.304(d)(2)(i)–(ii); *see also FLS Energy, Inc.,* 157 FERC ¶ 61,211, at P 21 (2016) (*FLS*) (citing 18 CFR 292.304(d)). The LEO or contract is frequently referred to as a long-term transaction, when contrasted with an ''as available'' sale and rate.

[89] 18 CFR 292.304(d)(2)(i).

[90] 18 CFR 292.304(d)(2)(ii). Rates calculated at the time of a LEO (for example, a contract) do not violate the requirement that the rates not exceed avoided costs if they differ from avoided costs at the time of delivery. 18 CFR 292.304(b)(5).

[91] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880; *see also* 18 CFR 292.304(b)(5) (''In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.''); *Entergy Servs., Inc.,* 137 FERC ¶ 61,199, at P 56 (2011) (''Many avoided cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost.'').

[92] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

located in RTO/ISO markets be based on the market's LMP, or similar energy price derived by the market, in effect at the time the energy is delivered.

• Require that ''as-available'' QF energy rates paid by electric utilities located outside of RTO/ISO markets be based on competitive prices determined by (1) liquid market hub energy prices, or (2) formula rates based on observed natural gas prices and a specified heat rate.

• Require that energy rates under QF contracts and LEOs be based on as-available energy rates determined at the time of delivery rather than being fixed for the term of the contract or LEO.

• Implement an alternative approach of requiring that the fixed energy rate be calculated based on estimates of the present value of the stream of revenue flows of future LMPs or other acceptable as-available energy rates at the time of delivery.

• Require that energy and/or capacity rates be determined through a competitive solicitation process, such as a request for proposals (RFP), with processes designed to ensure that the competitive solicitation is performed in a transparent, non-discriminatory fashion.[93]

51. Although the Commission proposed to modify how the states are permitted to calculate avoided costs, it did not propose to terminate the requirement that the states continue to calculate, and to set QF rates at, such avoided costs.[94]

52. In the final rule, the Commission adopted these proposals, with certain modifications.

2. LMP as a Permissible Rate for Certain As-Available Avoided Cost Rates

53. In the final rule, the Commission revised 18 CFR 292.304 to add subsections (b)(6) and (e)(1). In combination, these subsections permit a state the flexibility to set the as-available energy rate paid to a QF by an electric utility located in an RTO/ISO at LMPs calculated at the time of delivery.[95]

54. The Commission adopted with one modification the NOPR proposal to allow LMP to be used as a measure of as-available energy avoided costs for electric utilities located in RTO/ISO markets.[96]

55. The Commission found that (1) LMPs reflect the true marginal cost of production of energy, taking into account all physical system constraints; (2) these prices would fully compensate all resources for their variable cost of providing service; (3) LMP prices are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time; and (4) unlike average system-wide cost measures of the avoided energy cost used by many states, LMP should provide a more accurate measure of the varying actual avoided energy costs, hour by hour, for each receipt point on an electric utility's system where the utility receives power from QFs.[97]

56. The Commission recognized that an LMP selected by a state to set a purchasing utility's avoided energy cost component might not always reflect a purchasing utility's actual avoided energy costs. Accordingly, the Commission found that it is appropriate to modify the option for a state to set avoided energy costs using LMP from a per se appropriate measure of avoided cost to a rebuttable presumption that LMP is an appropriate means to determine avoided cost.[98]

57. The Commission disagreed with the arguments made by Union of Concerned Scientists,[99] NIPPC, CREA, REC, and OSEIA,[100] and Public Interest Organizations [101] that LMP should not be used as a measure of avoided energy costs because LMP prices are depressed in many markets where self-scheduling rights and state cost-recovery mechanisms for fuel and operating costs create the opportunity for market participation at a loss. The Commission recognized that, all other things being equal, self-scheduling of resources may impact market clearing prices. The Commission found that this potential price effect, however, does not mean that the LMP is not an accurate measure of avoided energy costs. The Commission stated that, while self-scheduling or other factors may impact LMPs, in any case, an electric utility's purchases during periods when these price impacts are occurring would be made at the resulting LMPs, whatever those LMPs may be. Therefore, the Commission found that LMPs meet the Commission's long-standing definition of avoided costs for a purchasing electric utility, even if they happen to reflect price impacts from self-scheduling or other factors.[102]

58. The Commission rejected the related request for clarification made by Solar Energy Industries,[103] *i.e.,* that the flexibility to set QF payments for as-available energy at the applicable LMP should require an on-the-record determination that the purchasing utility procures incremental energy from the identified LMP market at those prices. The Commission found that, unless an aggrieved entity seeks to rebut this presumption in a state avoided cost adjudication, rulemaking, legislative determination, or other proceeding, that state would not need to make such an on-the-record determination before it decides to use LMP.[104]

59. The Commission rejected the arguments made by NIPPC, CREA, REC, and OSEIA that, more generally, prices for long-term QF contracts should be set by reference to long-term price indices or other indicators that genuinely reflect the long-term costs of generation avoided by the purchasing utility.[105] The Commission stated that it only addressed as-available energy and as-available energy prices by definition are short term.[106]

a. Requests for Rehearing

60. Public Interest Organizations argue that it was erroneous for the Commission to make a ''rebuttable presumption'' that the state or nonregulated utility can use the LMP as ''a rate for as-available qualifying facility energy sales to electric utilities located in a market defined in [18 CFR] 292.309(e), (f), or (g).'' [107] Public Interest Organizations claim that the Commission acted contrary to precedent that limits an administrative agency's authority to establish presumptions by creating a rebuttable presumption that LMP is the avoided cost price ''for as-available qualifying facility energy sales to electric utilities located in'' an organized market.[108] Public Interest Organizations claim that the

[93] NOPR, 168 FERC ¶ 61,184 at PP 32–33.

[94] Order No. 872, 172 FERC ¶ 61,041 at P 101.

[95] *Id.* P 124.

[96] *Id.* P 151.

[97] *See id.* P 153 (citing NOPR, 168 FERC ¶ 61,184 at PP 44–45 (citing *SMUD,* 616 F.3d at 524; *FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. at 768–69 (describing how LMP is typically calculated); *Offer Caps in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 831, 81 FR 87770 (Dec. 5 2016), 157 FERC ¶ 61,115, at P 7 (2016), *order on reh'g and clarification,* Order No. 831–A, 82 FR 53403 (Nov. 16, 2017), 161 FERC ¶ 61,156 (2017))).

[98] *Id.* P 152.

[99] Union of Concerned Scientists Comments, Docket No. RM19–15–000, at 3–8 (Nov. 15, 2019).

[100] NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 52 (Dec. 3, 2019).

[101] Public Interest Organizations Comments, Docket No. RM19–15–000, at 52–64 (Dec. 3, 2019).

[102] Order No. 872, 172 FERC ¶ 61,041 at PP 155–56.

[103] Solar Energy Industries Comments, Docket No. RM19–15–000, at 27–28 (Dec. 3, 2019).

[104] Order No. 872, 172 FERC ¶ 61,041 at P 158.

[105] NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 53 (Dec. 3, 2019).

[106] Order No. 872, 172 FERC ¶ 61,041 at P 160.

[107] Public Interest Organizations Request for Rehearing at 60–72 (citing 18 CFR 292.304(b)(6)).

[108] *Id.* at 62.

presumption unlawfully shifts the burden under the statute and is not based on record evidence showing that avoided cost energy prices are necessarily the same as the LMP, adding that there are no alternative explanations for a utility ever to incur energy prices that exceed the LMP.[109]

61. Public Interest Organizations argue that, because the final rule stated that ''an LMP selected by a state to set a purchasing utility's avoided energy cost component might not always reflect a purchasing utility's actual avoided energy costs,'' the Commission cannot make the necessary finding under the statute that the LMP is, per se, the full avoided energy cost.[110] Public Interest Organizations contend that, to create the LMP presumption lawfully, the Commission must have substantial record evidence showing that ''a sound and rational connection between'' the LMP and the full avoided cost of each utility (as necessary to ensure full encouragement and nondiscrimination) is ''so probable that it is sensible and timesaving to assume'' it unless disproven, arguing that there are no alternative explanations for a conclusion contrary to the presumption.[111] Public Interest Organizations maintain that the record contains numerous examples of instances in which a utility in an organized market incurs costs greater than the LMP.[112]

62. Public Interest Organizations claim that the Commission relies on an implicit and absolute connection between price and cost by repeatedly conflating the cost to buy in the day ahead market with the cost of energy to the utility.[113] Public Interest Organizations maintain that, even when a utility is simultaneously selling into and buying energy from the day ahead market, the utility's costs for energy are the higher of the market price or the cost to produce or procure the power it sells into the market. Public Interest Organizations refer for example to a utility that dispatches its own generation at $35/MWh, sells into the market at $20/MWh, and then buys back at $20/MWh to meet load; the LMP price is $20, but the cost to the utility for energy is $35.[114]

b. Commission Determination

63. We reject the arguments against establishing the rebuttable presumption that LMP reflects avoided costs for as-available energy. We disagree with Public Interest Organizations that the relevant precedent prohibits establishing a rebuttable presumption. Indeed, the courts have made clear that ''[u]nder the APA, agencies may adopt evidentiary presumptions provided that the presumptions (1) shift the burden of production and not the burden of persuasion . . . and (2) are rational.'' [115] The final rule did not shift the burden of persuasion, only the burden of production. We emphasize that LMP typically reflects a purchasing utility's actual avoided energy costs.[116]

64. However, we also acknowledged in the final rule that there may be instances when LMP does not reflect a purchasing utility's avoided cost and that is why the Commission allowed the presumption to be challenged. Requiring an entity challenging the state's use of the presumption in the first instance to show why the state was wrong does not negate the legal requirement that, unless the parties agree to another rate, the rates for purchases in a QF contract must equal a purchasing utility's avoided costs. If so challenged, a state would need to address the challenging entity's arguments in order to demonstrate that LMP represents the purchasing utility's avoided costs. Therefore, the Commission did not change the burden of persuasion.[117] Moreover, in the final rule, the Commission appropriately established a rebuttable presumption to frame how it (and, potentially, reviewing courts) would evaluate challenges to states setting avoided costs at LMP.[118]

65. We also disagree with Public Interest Organizations' assertion that the Commission failed to provide adequate support for why the presumption is rational in organized markets. As explained in the final rule, the Commission relied on a variety of supporting facts, including the fact that LMP definitionally reflects the true marginal cost of production of energy, taking into account physical system constraints, and other listed benefits of LMP.[119] Because LMP is likely to reflect the true marginal cost of energy in the vast majority of cases for the reasons discussed in the final rule, it is ''so probable that it is sensible and timesaving to assume'' [120] that LMP for a particular utility is an appropriate measure of the utility's avoided costs for as-available energy, unless disproven in a particular case. We leave open for specific cases to determine the appropriateness of using a particular LMP such that a QF could rebut the presumption that LMP is appropriate.[121] Regarding Public Interest Organizations' claims that numerous examples in the record support their argument that utilities often incur costs greater than the LMP, we disagree. Public Interest Organizations' assertion is based on the evidence of self-scheduling they supplied in NOPR comments, and their assertion that this self-scheduling behavior is enabled by out-of-market subsidization through retail rate cost recovery.[122] However, Public Interest Organizations have provided no proof that such out-of-market subsidization takes place and there are legitimate reasons for self-scheduling that are consistent with rational market participant behavior. For example,

[109] *Id.*

[110] *Id.* at 64 (citing Order No. 872, 172 FERC ¶ 61,041 at P 52).

[111] *Id.* at 66 (citing *Cablevision Sys. Corp.* v. *FCC,* 649 F.3d 695, 716 (D.C. Cir. 2011) (*Cablevision*); *Nat'l Mining Ass'n* v. *Dep't of Interior,* 177 F.3d 1, 6 (D.C. Cir. 1999)); *Sec'y of Labor* v. *Keystone Coal Min. Corp.,* 151 F.3d 1096, 1100–01 (D.C. Cir. 1998)).

[112] *Id.* at 68 & n.200 (citing Public Interest Organizations Comments, Docket No. RM19–15–000, at 47–54 (Dec. 3, 2019)).

[113] *Id.* at 69.

[114] *Id.* at 69–72.

[115] *See Cablevision,* 649 F.3d at 716 (citing 5 U.S.C. 556(d)).

[116] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 153, 156.

[117] *See id.* P 152.

[118] *See AFPA* v. *FERC,* 550 F.3d at 1183 (permitting Commission to establish rebuttable presumption via rulemaking rather than case-by-case adjudication in PURPA section 210(m) context).

[119] Order No. 872, 172 FERC ¶ 61,041 at P 153 (finding that ''(1) LMPs reflect the true marginal cost of production of energy, taking into account all physical system constraints; (2) these prices would fully compensate all resources for their variable cost of providing service; (3) LMP prices are designed to reflect the least-cost of meeting an incremental megawatt-hour of demand at each location on the grid, and thus prices vary based on location and time; and (4) unlike average system-wide cost measures of the avoided energy cost used by many states, LMP should provide a more accurate measure of the varying actual avoided energy costs, hour by hour, for each receipt point on an electric utility's system where the utility receives power from QFs'') (citing NOPR, 168 FERC ¶ 61,184 at PP 44–45 (citing *FERC* v. *Elec. Power Supply Ass'n,* 136 S. Ct. 760, 768–69 (2016) (describing how LMP is typically calculated); *Sacramento Mun. Util. Dist.* v. *FERC,* 616 F.3d 520, 524 (D.C. Cir. 2010); Order No. 831, 157 FERC ¶ 61,115 at P 7).

[120] *Nat'l Mining Ass'n* v. *U.S. Dep't of Interior,* 177 F.3d at 6.

[121] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 155–71 (discussing why LMP is presumptively an appropriate measure of avoided energy costs even if in particular circumstances it is not appropriate).

[122] *See* Public Interest Organizations Request for Rehearing at 71 (footnote omitted) (citing Public Interest Organizations Comments, Docket No. RM19–15–000, at 46–55 (Dec. 3, 2019)) (''[E]ven utilities that operate in organized markets acquire energy outside of the day ahead market or produce energy at variable costs that exceed the market price and sell at a loss to the day ahead market. Price suppression is thus one indicator of the larger problem that the day ahead market is not reflecting the actual cost of energy supply to utilities, which belies FERC's assumption that the LMP reflects all utilities' actual cost for all marginal energy.'').

generation units with start-up and shut-down sequences longer than a single market commitment period may decide to self-schedule at a loss in one period in order to earn profits in other periods that they expect to exceed the temporary loss. Absent proof that retail rate subsidization is the dominant driver for self-scheduling behavior, there is little evidence in the record that purchasing utilities often incur costs greater than the LMP. Nevertheless, entities may seek to rebut the presumption if, for example, the RTO/ISO market is affected by persistent price distortions that are not the result of legitimate market participant behavior (such as persistent self-scheduling at a loss that is proven to be the result of out-of-market subsidization, and thus demonstrates that the utility regularly incurs costs that exceed LMP).

3. Tiered Avoided Cost Rates

a. Request for Clarification

66. California Utilities request that the Commission clarify that it is no longer the Commission's policy or intent to permit states to subsidize QFs by the use of ''tiered'' avoided costs.[123] California Utilities request that the Commission find that avoided cost rates may not be based only on the costs of a subset of facilities from which a state has mandated purchases or only on facilities that meet state-determined characteristics such as the facilities' use of a renewable fuel. As such, California Utilities further request that the Commission find that the United States Court of Appeals for the Ninth Circuit decision in *CARE* v. *CPUC* [124] as well as certain aspects of the Commission's orders [125] are no longer valid precedent.

67. According to California Utilities, Commission precedent on avoided costs for tiered resources is as follows for the following periods:[126]

1978–2010: All resources must be used to set avoided costs.[127]

2010–2019: States were permitted to adopt tiered avoided costs based on the costs of specific types of QFs, if the state had an unmet purchase mandate.[128]

April 2019–2020: Tiered avoided costs mandated within the Ninth Circuit if state procurement mandates are unmet.[129]

2020: The Commission returns to an all-resource approach and rejects using PURPA to subsidize QFs that are not otherwise financeable.[130]

68. California Utilities request clarification for the following reasons: (1) The Commission's failure to state in the final rule that it is overruling the CPUC cases or *CARE* v. *CPUC;* (2) the need for the Commission to defend a change in policy before an appellate court that will ask why the Commission no longer supports the policy it espoused in *CPUC* 2010; (3) the regulation that lists the factors a state may consider in determining avoided cost (18 CFR 292.304, which have been moved to 18 CFR 292.304(e)(2)) have not changed, which leaves them open to misinterpretation; and (4) the words ''taking into account the operating characteristics of the needed capacity'' [131] regarding competitive solicitations, although clarified by Paragraph 433 of the final rule, could be misread as allowing avoided costs for QFs with ''operating characteristics'' such as renewable fuel, cogeneration technology, under a certain size, or at specific locations (*i.e.,* located on the distribution system).[132]

69. California Utilities maintain that adding the following language after 18 CFR 292.304(b)(5) will ensure that states will not use tiered avoided cost rates under PURPA as a vehicle to subsidize certain state-favored resources: ''(6) Rates for purchases may not be based on an avoided cost set by determining the cost of procuring energy and/or capacity to fulfill a State regulatory authority or non-regulated electric utility mandate to procure energy and/or capacity from resources using a specific fuel type, using a specific technology, of a particular size, and/or located only on local distribution systems.'' [133]

70. California Commission disagrees that the final rule overrules *CPUC* 2011 and the Commission's earlier precedent. California Commission contends that the Commission's 1995 precedent prohibits assuming that ''the utility can provide the capacity and generate the energy itself (*i.e.,* through the establishment of the utility benchmark price), only to exclude the utility, cogenerators, and other resources from ultimately being able to supply the capacity and energy, by segmenting the portfolio and permitting only certain QFs to bid in certain segments against the benchmark and ultimately produce a higher-than-avoided-cost rate.'' [134] California Commission interprets Commission precedent as permitting a state to determine what capacity a utility would be avoiding, to decide from which generators a utility could purchase to satisfy state programs, and to set tiered avoided cost rates based on those qualifying resources.[135]

71. California Commission asserts that the final rule's requirement that competitive solicitations be open to all sources was intended to prevent discrimination against QFs and did not preclude states from using tiered avoided cost rates.[136] California Commission argues that, contrary to California Utilities' assertion, the final rule does not treat tiered rates as impermissible subsidies to QFs. California Commission contends, instead, that the final rule permits states to continue recognizing non-energy benefits outside the context of PURPA payments.[137] California Commission requests that, with respect to *CARE* v. *CPUC's* holding that a state that uses QFs to meet a renewable portfolio standard (RPS) must set avoided cost only on resources that could satisfy that RPS, the Commission clarify that ''operating characteristics that qualify a QF to meet a state's [RPS] are energy-related benefits that can be the basis for determining avoided costs and multi-tier pricing, as opposed to benefits unrelated to their production of energy—akin to renewable energy credits—that may not be compensated by rates under PURPA.'' [138]

b. Commission Determination

72. We deny California Utilities' request for clarification. Although Commission precedent does not allow the use of non-operational externalities, such as environmental benefits, in setting avoided cost rates, PURPA neither requires nor prohibits states from establishing tiered procurement (and thus tiered pricing), such as California does. California's tiered supply procurement requirements reflect decisions regarding utility generation procurement (*e.g.,* by specific fuel type or technology) that are within the boundaries of a state's traditional authority. Once such tiered generation procurement requirements have been

[123] California Utilities Motion for Clarification at 1–2.

[124] *Californians for Renewable Energy* v. *Cal. Pub. Utils. Comm'n,* 922 F.3d 929 (9th Cir. 2019) (*CARE* v. *CPUC*).

[125] *Cal. Pub. Utils. Comm'n,* 133 FERC ¶ 61,059 (2010) (*CPUC* 2010), *clarification and reh'g denied,* 134 FERC ¶ 61,044 (2011) (*CPUC* 2011).

[126] California Utilities Motion for Clarification at 3–8.

[127] *Id.* at 3 (citing *S. Cal. Edison Co.,* 70 FERC ¶ 61,215 (*CPUC* 1995 I), *reconsideration denied,* 71 FERC ¶ 61,269 (1995) (*CPUC* 1995 II)).

[128] *Id.* at 4 (citing *CPUC* 2010, 133 FERC ¶ 61,059 at P 30).

[129] *Id.* at 5 (citing *CARE* v. *CPUC,* 922 F.3d 929).

[130] *Id.* (citing Order No. 872, 172 FERC ¶ 61,041 at P 123).

[131] *See* new 18 CFR 292.304(d)(8)(i)(B).

[132] California Utilities Motion for Clarification at 9–10.

[133] *Id.* at 13–14.

[134] California Commission Answer at 4–5.

[135] *Id.* at 5–6.

[136] *Id.* at 7–9.

[137] *Id.* at 9–11.

[138] *Id.* at 11–12.

established by a state, if a QF qualifies for a particular generation procurement tier, it is reasonable to assume that the mandatory QF purchase will displace resources otherwise in that tier; therefore, the rates for that tier are in fact the cost avoided by the purchasing utility when it instead purchases from that QF.

73. We cannot overrule a Court of Appeals decision, as California Utilities suggest. In addition, California Utilities have not adequately supported that there is any conflict between the final rule and the precedent they cite.[139] Therefore, we decline to add additional regulatory language to address the issues they raise.

4. Providing for Variable Energy Rates in QF Contracts Is Consistent With PURPA

74. As explained above, if a QF chooses to sell energy and/or capacity pursuant to a contract, the PURPA Regulations in effect before the final rule provide the QF the option of receiving the purchasing electric utility's avoided cost calculated and fixed at the time the LEO is incurred.[140] The Commission's justification in Order No. 69 for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty ''with regard to return on investment in new technologies necessary for the QF to obtain financing'' [141] The Commission stated that its regulations pertaining to LEOs ''are intended to reconcile the requirement that the rates for purchases equal the utilities' avoided costs with the need for qualifying facilities to be able to enter contractual commitments based, by necessity, on estimates of future avoided costs.'' [142] Further, the Commission agreed with the ''need for certainty with regard to return on investment in new technologies,'' and stated its belief that any overestimations or underestimations ''will balance out.'' [143]

75. In the NOPR, the Commission proposed to revise 18 CFR 292.304(d) to permit a state to limit a QF's option to elect to fix at the outset of a LEO the energy rate for the entire length of its contract or LEO, and instead allow the state the flexibility to require QF energy rates to vary during the term of the contract. However, under the proposed revisions to 18 CFR 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* cost rates (assuming there are avoided capacity costs) calculated and fixed at the time the contract or LEO is incurred. Only the *energy* rate in the contract or LEO could be required by a state to vary. Further, the NOPR did not propose to obligate states to require variable avoided cost energy rates; they would retain the ability to allow the QF's energy rate be fixed at the time the LEO is incurred.[144]

76. In the final rule, the Commission adopted without modification the NOPR variable rate proposal. The Commission found that setting QF avoided energy cost contract and LEO rates at the level of the purchasing utility's avoided energy costs at the time the energy is delivered is consistent with PURPA, which limits QF rates to the purchasing utility's avoided costs. The Commission explained that a variable avoided cost energy rate approach is a superior way to ensure that payments to QFs equal, but do not exceed, avoided costs.[145] The Commission stated that it is inevitable that, over the life of a QF contract or other LEO, a fixed avoided cost energy rate, such as that used in past years, will deviate from actual avoided costs.[146]

77. The Commission found that the record justifies its conclusions that long-term forecasts of avoided energy costs are inherently imperfect and that states should be given the flexibility to rely on a more reliable variable avoided cost energy rate approach. Further, the Commission pointed to instances where overestimates and underestimates have not balanced out.[147] The Commission found that, when that has occurred, consumers have borne the brunt of the overpayments, which subsidized QFs, in contravention of Congressional intent and the Commission's expectations. Given that PURPA section 210(b) prohibits the Commission from requiring QF rates in excess of avoided costs, the Commission explained that record evidence supports its decision to give the states the flexibility to require variable avoided cost energy rates in QF contracts and other LEOs to prevent QF rates from exceeding avoided costs.[148]

78. The Commission found that the variable avoided cost energy rate provision is not based on any determination that the Commission's

[139] The Commission in the final rule addressed arguments that QFs provide non-energy benefits. The Commission stated that such benefits may be addressed by states outside of PURPA. Because tiered QF rates result from tiered procurement not limited to QFs, and are therefore established outside of PURPA, nothing in PURPA prohibits such tiered rates. *See* Order No. 872, 172 FERC ¶ 61,041 at P 123; *see also CPUC* 2010, 133 FERC ¶ 61,059 at P 31 (''[A]lthough a state may not include a bonus or an adder in the avoided cost rate unless it reflects actual costs avoided, a state may separately provide additional compensation for environmental externalities, outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits. . . .'').

[140] 18 CFR 292.304(d)(2)(ii).

[141] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies'').

[142] *Id.*

[143] *Id.*

[144] NOPR, 168 FERC ¶ 61,184 at P 67.

[145] 16 U.S.C. 824a–3(b)(1).

[146] Order No. 872, 172 FERC ¶ 61,041 at P 253.

[147] *See id.* (citing Duke Energy Comments, Docket No. RM19–15–000, at 6 (Dec. 3, 2019) (Duke's QF contracts cost $4.66 billion but its ''actual current avoided costs'' are $2.4 billion); Idaho Power Comments, Docket No. RM19–15–000, at 10–11 (Dec. 3, 2019) (''The cost of PURPA generation contained in Idaho Power's base rates, on a dollars per MWh basis, is not just greater than Mid-C market prices, it is greater than all the net power supply cost components currently recovered in base rates. Idaho Power's average cost of PURPA generation included in base rates is $62.49/MWh. At $62.49/MWh, the average cost of PURPA purchases is greater than the average cost of FERC Account 501, Coal at $22.79/MWh; greater than FERC Account 547, Natural Gas at $33.57/MWh; greater than FERC Account 555, Non-PURPA Purchases at $50.64/MWh; and significantly greater than what is being sold back to the market as FERC Account 447, Surplus Sales at $22.41/MWh.''); Portland General Comments, Docket No. RM19–15–000, at 5 (Dec. 3, 2019) (''for a typical 3 MW Solar QF project that incurred a LEO in 2016 and reaches commercial operations three years later, [Portland General's] customers would pay 67% more for the project's energy than if the 2019 avoided cost rate had been used. As a result of this lag, [Portland General's] customers would pay an additional $1.6 million more for the energy from the QF facility over the 15-year contract term.'')); *see also* NOPR, 168 FERC ¶ 61,184 at P 64 n.101 (citing Alliant Energy Comments, Docket No. AD16–16–000, at 5 (Nov. 7, 2016) (''Current market-based wind prices in the Iowa region of MISO are approximately 25% lower than the PURPA contract obligation prices [Interstate Power and Light Company] is forced to pay for the same wind power for long-term contracts entered into as of June 2016. As a result, PURPA-mandated wind power purchases associated with *just one project* could cost Alliant Energy's Iowa customers an incremental $17.54 million above market wind prices over the next 10 years.'') (emphasis in original); Edison Electric Institute (EEI) Supplemental Comments, Docket No. AD16–16–000, attach. A at 3–4 (June 25, 2018) (''On August 1, 2014, a 10-year fixed price contract at the Mid-Columbia wholesale power market trading hub was priced at $45.87/MWh. On June 30, 2016, the same contract was priced as $30.22/MWh, a decline of 34% in less than two years. However, over the next 10 years, PacifiCorp has a legal obligation to purchase 51.9 million MWhs under its PURPA contract obligations at an average price of $59.87/MWh. The average forward price curve for the Mid-Columbia trading hub during the same period is $30.22/MWh, or 50% below the average PURPA contract price that PacifiCorp will pay. The additional price required under long-term fixed contracts will cost PacifiCorp's customers $1.5 billion above current forward market prices over the next 10 years.''); Comm'r Kristine Raper, Idaho Commission Comments, Docket No. AD16–16–000, at 3–4 (June 30, 2016) (''Idaho Power demonstrated that the average cost for PURPA power since 2001 has exceed the Mid-Columbia (Mid-C) Index Price and is projected to continue to exceed the Mid-C price through 2032. Likewise, PacifiCorp's levelized avoided cost rates for 15-year contract terms in Wyoming shows a decrease of approximately 50% from 2011 through 2015 (from approximately $60 per megawatt-hour to less than $30 per megawatt-hour).'')).

[148] Order No. 872, 172 FERC ¶ 61,041 at PP 254–55.

rules no longer should encourage QF development. The Commission found, instead, that it was revising the PURPA Regulations by giving states the flexibility to require variable avoided cost energy rates in QF contracts and other LEOs in order to better comply with Congress's clear requirement in PURPA that the Commission may not require QF rates in excess of a purchasing utility's avoided costs.[149]

79. Opponents of variable avoided cost energy rates urged the Commission to continue placing this risk on the customers of electric utilities, as in the past, by retaining the option for QFs to fix their avoided cost energy rates in their contracts or LEOs notwithstanding record evidence that fixed energy rates compared to actual avoided costs have not balanced out over time. But, after consideration of the record, the Commission decided instead to allow states the flexibility to require variable avoided cost energy rates in QF contracts and LEOs and thereby reduce the risk to customers. The Commission found that its determination ensures that the PURPA Regulations continue to be consistent with the statutory avoided cost rate cap in PURPA section 210(b), coupled with the directive in the PURPA Conference Report that customers of utilities not be required to subsidize QFs.[150]

80. The Commission found that there is no merit to the contention that the PURPA Conference Report expresses Congressional intent that QFs are entitled to long-term fixed energy rates. The Commission found that, while Congress recognized that the better measure of avoided cost in certain scenarios might be the cost of the alternative fossil fuel unit that would not be run at that later date,[151] nothing in the section of the PURPA Conference Report quoted by opponents of the variable energy rate proposal suggests that Congress intended the Commission to require that all avoided cost energy rates be fixed at the outset for the life of a QF contract or other LEO. The Commission further found that nothing in the revision being implemented in the final rule would prohibit a state from calculating a QF's avoided cost energy rate for a QF contract or LEO in the manner suggested in the PURPA Conference Report or, indeed, in the manner the Commission has long allowed, if a state determined that such an approach best reflects the purchasing electric utility's avoided costs.[152]

81. The Commission described the variable avoided cost energy rate provision as not running afoul of the *Freehold Cogeneration* and *Smith Cogeneration* cases cited by Harvard Electricity Law.[153] The Commission described those decisions, which overturned state avoided cost determinations allowing for changes in QF rates, as based on the provision in the original PURPA Regulations giving QFs the option to select contracts with long-term fixed avoided cost rates.[154] The Commission explained that neither decision suggests that PURPA would prevent the Commission from revising its regulations to allow states the flexibility to require variable avoided cost energy rates.

82. The Commission found that it was not subjecting QFs to the same type of examination that is traditionally given to electric utility rate applications (*e.g.,* cost-of-service rate regulation).[155] Indeed, the Commission found that the regulation it adopted does not subject QF rates to any examination whatsoever of the costs incurred by QFs in producing and selling power. Rather, the Commission stated that the variable avoided cost energy rate provision applicable to QF contracts and other LEOs that the Commission adopted in the final rule sets QF rates based on the avoided costs of the purchasing utility. The Commission stated that this variable avoided cost energy rate provision cannot be characterized as imposing utility-style regulation on the QFs themselves.[156]

83. Finally, the Commission determined that state regulators may not change rates in existing QF contracts or other existing LEOs.[157] The Commission explained that, by its terms, the variable avoided cost energy rate provision applies only prospectively to new contracts and new LEOs entered into after the effective date of the final rule. The Commission emphasized that nothing in the final rule should be read as sanctioning the modification of existing fixed-rate QF contracts and LEOs.[158]

a. Whether the Current Approach Has Resulted in Payments to QFs in Excess of Avoided Costs

84. In the final rule, the Commission gave states the flexibility to require variable energy pricing in QF contracts and other LEOs, instead of providing QFs the right to elect fixed energy prices, based on the Commission's concern that, at least in some circumstances, long-term fixed avoided cost energy rates have been well above the purchasing utility's avoided costs for energy and that this was a result prohibited by PURPA section 210(b). The Commission found that the record evidence demonstrates that QF contract and LEO prices for energy can exceed and have exceeded avoided costs for energy without any subsequent balancing out. In addition to the examples presented in the record of the Technical Conference that were cited in the NOPR, the Commission noted that commenters have provided additional examples of such overpayments.[159] The Commission explained that such evidence persuaded it that it is necessary to give states the flexibility to address QF contract and LEO rates for energy that exceed avoided costs for energy, while at the same time still allowing states the flexibility to continue requiring long-term fixed avoided cost energy rates in QF contracts and other LEOs when such treatment is appropriate.[160]

85. In the final rule, the Commission found, as acknowledged in Harvard Electricity Law's NOPR comments, that the examples of QF contract rates that exceed avoided costs that are in the record illustrate the general proposition that ''energy forecasts have a manifest

[149] *Id.* P 256.

[150] *Id.* P 258 (citing Conf. Rep. at 98 (emphasis added) (''The provisions of this section *are not intended to require the rate payers of a utility to subsidize* cogenerators or small power produc[er]s.'')).

[151] Under the approach adopted in the final rule, with the flexibility granted to states to adopt—but not a mandate directing states to adopt—variable avoided cost energy rates for QF contracts and other LEOs, the Commission permitted states to adopt a pricing approach that best fits their circumstances, including adopting the pricing approach described by the PURPA Conference Report to address the circumstances described by the PURPA Conference Report. *Id.* P 260 n.409.

[152] *Id.* P 260.

[153] *Id.* P 261 (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 29 (Dec. 3, 2019) (citing *Freehold Cogeneration Ass'n* v. *Bd. of Regulatory Comm'rs of State of N.J.,* 44 F.3d 1178, 1193 (3d Cir. 1995) (*Freehold Cogeneration*); *Smith Cogeneration Mgmt.* v. *Corp. Comm'n,* 863 P.2d 1227, 1227 (Okla. 1993) (*Smith Cogeneration*))).

[154] *Id.* (citing *Smith Cogeneration,* 863 P.2d at 1241 (emphasis added) (holding that allowing reconsideration of established avoided costs ''makes it impossible to comply with PURPA *and FERC regulations requiring established rate certainty for the duration of long term contracts* for qualifying facilities that have incurred an obligation to deliver power''); *Freehold Cogeneration,* 44 F.3d at 1193 (emphasis added) (relying on *Smith Cogeneration* analysis that ''that PURPA *and FERC regulations* preempted the State Commission rule'')).

[155] *Id.* P 262.

[156] *Id.* P 263.

[157] *Id.* P 264 (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 23 (Dec. 3, 2019) (citing *API,* 461 U.S. at 414)).

[158] *Id.*

[159] *Id.* P 283 (citing Duke Comments, Docket No. RM19–15–000, at 6 (Dec. 3, 2019); Idaho Power Comments, Docket No. RM19–15–000, at 10–11 (Dec. 3, 2019); Portland General Comments, Docket No. RM19–15–000, at 5 (Dec. 3, 2019); NOPR, 168 FERC ¶ 61,184 at P 64 n.101).

[160] *Id.*

record of failure.'' [161] The Commission explained that it was this ''manifest record of failure'' including evidence in the record that the failure has been at the expense of consumers that motivated the Commission to make the change adopted in the final rule.[162]

86. The Commission also found that challenges to the idea that fixed avoided cost energy rates in QF contracts and other LEOs have exceeded actual avoided costs largely either conceded that overestimations have occurred while arguing that such overestimations impacted purchasing electric utilities just as much as QFs or attempted to argue that such overestimations were temporary or unusual.[163]

87. First, the Commission determined that the record evidence demonstrates that, contrary to the Commission's finding in 1980, overestimations and underestimations of future avoided costs may not even out.[164] Consequently, the Commission found that its determination in 1980, based on the record at that time, does not preclude the Commission from relying on new record evidence showing a change in circumstances since 1980 to revise the 1980 rule.

88. The Commission agreed with Public Interest Organizations that the recent electricity price overestimations were not unique to QFs and can be explained by general declines in natural gas prices since the adoption of hydraulic fracturing and the 2007–2009 recession.[165] But the Commission explained that these overestimations are precisely why the estimates of avoided costs reflected in the QF contracts and LEOs were incorrect and why the resulting fixed avoided cost energy rates reflected in such QF contracts and other LEOs resulted in QF rates well above utility avoided costs in violation of PURPA section 210(b); the precipitous decline in natural gas prices caused a corresponding reduction in utilities' energy costs, and thus in their avoided energy costs but this decline was not reflected in the QFs' fixed contract rates that remained at their previous levels.[166]

89. Similarly, the Commission found that arguments that electric utilities also based resource acquisitions on incorrect forecasts of natural gas prices [167] ignore a key distinction between utility rates and fixed QF rates. As the Commission explained, electric utilities may have relied on incorrect natural gas price forecasts to justify the timing and type of their resource acquisitions, as commenters assert. However, the Commission found that, once an electric utility resource decision was made, electric utilities' cost-based rate regimes typically obligated them eventually to pass through to customers any energy cost savings realized as a result of declining natural gas and other fuel prices, as well as any energy cost savings due to lower purchased power rates resulting from the decline in natural gas prices. The Commission found that, by contrast, once QF avoided cost energy rates were fixed based on now-incorrect (and now-high) natural gas price forecasts, those energy rates remained fixed for the term of the QFs' contracts and LEOs. Therefore, unlike fixed avoided cost energy rates in QF contracts and LEOs, the Commission determined that cost-based electric utility energy rates declined as the cost of natural gas and other fuels and purchased power declined.[168]

90. The Commission also disagreed with Public Interest Organizations' assertions that it was improper to have used competitive market hub prices to determine whether fixed QF contract and LEO prices resulted in overpayments as compared to electric utilities' actual avoided costs.[169] The Commission recognized that the competitive market hub prices used in the comparisons may not have precisely reflected the avoided energy costs of all electric utilities located in the same region as the competitive market hub. However, the Commission found that competitive market prices in general should reflect the marginal avoided energy costs of utilities with access to such markets and that those markets generally reflect the marginal cost of energy in the region.[170] The Commission further found that the magnitude of the differences between the market hub prices and the QF contract and LEO prices provides solid evidence that the QF contract and LEO prices used in the comparison were well above actual avoided energy costs at the time the energy was delivered by the QFs, even if the exact magnitude is unclear.[171]

91. The Commission acknowledged that energy prices may increase in the future but explained that giving states the flexibility to require variable avoided cost energy rates in QF contracts and in other LEOs will allow states to better ensure that avoided cost energy payments made to QFs will more accurately reflect the purchasing utility's avoided costs regardless of whether energy prices are increasing or declining. The Commission also noted that, if energy prices do in fact increase, variable avoided cost energy pricing would protect and even benefit the QF itself because it would not be locked into a fixed energy rate contract or LEO that would be below the purchasing electric utility's avoided energy cost.[172]

92. The Commission noted that, although many commenters agreed that fixed QF energy rates were higher than actual avoided energy costs in at least some instances, challenges were raised against both Duke Energy's estimate that its fixed QF contract rates were $2.6 billion above market costs and the Concentric Report's comparison of QF fixed rates for wind and solar facilities with the cost of wind and solar projects with competitive, non-PURPA contracts.[173]

93. The Commission found that the expert testimony cited by the SC Solar Alliance, that the witness ''wouldn't put a whole lot of weight in [Duke's

[161] *Id.* P 284 (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 24 (Dec. 3, 2019) (citing Vaclav Smil, *Energy at the Crossroads: Global Perspectives and Uncertainties,* Mass. Inst. Tech., 2003, at 121, 145–49)).

[162] *Id.*

[163] *Id.* P 285.

[164] *Id.* P 286 (citing Duke Comments, Docket No. RM19–15–000, at 6 (Dec. 3, 2019); Idaho Power Comments, Docket No. RM19–15–000, at 10–11 (Dec. 3, 2019); Portland General Comments, Docket No. RM19–15–000, at 5 (Dec. 3, 2019); NOPR, 168 FERC ¶ 61,184 at 64 n.101).

[165] *Id.* P 287 (citing Public Interest Organizations Comments, Docket No. RM19–15–000, at 47–50 (Dec. 3, 2019)).

[166] *Id.*

[167] *Id.* P 288 (citing Electricity Consumers Resource Council, American Chemistry Council, and American Forest and Paper Association (ELCON) Comments, Docket No. RM19–15–000, at 22 (Dec. 3, 2019); North Carolina Commission Staff Comments, Docket No. RM19–15–000, at 2–3 (Dec. 3, 2019); NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 31 (Dec. 3, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 40, 43 (Dec. 3, 2019); Solar Energy Industries Comments, Docket No. RM19–15–000, at 36–38 (Dec. 3, 2019)).

[168] *Id.*

[169] *Id.* P 289 (citing Public Interest Organizations Comments, Docket No. RM19–15–000, at 40–41 (Dec. 3, 2019)).

[170] *Id.* The Commission stated that a review of recent Mid-C Hub daily spot prices (from Intercontinental Exchange (ICE) *https://www.eia.gov/electricity/wholesale/,* indicates that they reflect the marginal cost of energy in that area since they are usually the result of a significant number of trades (averaging 54 per day), counterparties (averaging 16 per day), and trading volume (averaging 26,714 MWh/day), which usually exceed those of the NP–15 trading hub, an active Western trading hub in Northern California in the CAISO footprint (averaging 6 trades per day, 4 counterparties per day, and 2,756/MWh per day). The Commission described prices for Mid-C as ranging between an average of approximately $16/MWh high price and $13/MWh low price during the recent spring (Mar 19–Jun 20, 2020). During this period the index was reported for 65 trading days for Mid-C and 9 trading days for NP–15. *Id.*

[171] *Id.*

[172] *Id.* PP 290–91.

[173] *Id.* P 291.

estimate],'' [174] does not address Duke's calculation of past overpayments. Rather, the Commission described the witness as answering a question regarding the potential for overpayments ''[f]or going forward solar,'' *i.e.,* future overpayments as a result of the new fixed avoided cost rates being considered by the South Carolina Commission that were the subject of the expert witness' testimony.[175] The Commission noted that the same witness acknowledged the past overpayments made by Duke Energy, which he attributed to ''drops in natural gas prices that no one could've foreseen.'' [176] The Commission explained that it was these overpayments due to unforeseen declines in natural gas prices that formed an important basis for the Commission's determination in the final rule to now give states the flexibility to require variable avoided cost energy rates in QF contracts and LEOs.[177]

94. The Commission also emphasized that it did not rely on the Concentric Report to support the variable energy avoided cost provision adopted in the final rule. The Commission determined that it is not clear that the difference in costs identified by Concentric can be ascribed to the fixed rates in the QF contracts or rather to the fact that the avoided cost rates in the QF contracts were based on more expensive non-renewable capacity that was avoided by the purchasing utilities.[178]

i. Requests for Rehearing

95. EPSA argues that the Commission erred in relying on the idea that overestimates and underestimates have not balanced out because the Commission has neither validated these allegations, nor assessed whether the overestimations of avoided cost have, in fact, balanced out.[179] Public Interest Organizations argue that the Commission's determination to permit variable energy rates to mitigate the risk of alleged overpayments to QFs is arbitrary and capricious and unsupported by substantial evidence.[180] Likewise, Solar Energy Industries assert that there is a lack of evidence to conclude that protecting electric consumers warrants terminating the QF's right to elect long-term fixed energy rates.[181] EPSA argues that over- and under-estimations over time is irrelevant absent evidence that avoided cost forecasts are inherently less accurate than the cost estimates used to set the purchasing utilities' own rates.[182]

96. Public Interest Organizations contend that the Commission incorrectly defined avoided costs and incorrectly defined avoided costs with short run prices.[183] Public Interest Organizations assert that the Commission did not respond to arguments that historic avoided cost rates ''have likely underestimated utilities' actual 'but for' avoided costs, resulting in underpayment rather than overpayment to QFs.'' [184] They also assert that ''there is no evidence in the record showing that utilities would have—as the Commission assumed—relied on short term energy markets rather than entering into long-term contracts based on similarly speculative avoided cost estimates or building new generating resources,'' and that ''utilities often build and operate generating resources at costs well above their purported avoided cost rate.'' [185] Public Interest Organizations argue that the Commission incorrectly assumed that the cost for energy that a utility would incur ''but for'' a QF is the short run cost and that utilities never lock in energy costs by constructing their own energy resources, executing long term fuel contracts or executing long term energy supply contracts. Public Interest Organizations claim that, if a utility ever locks in energy costs instead of relying on the short run energy or fuel markets for supply, a QF can displace those long-run costs rather than the short run cost, adding that, contrary to the Commission's assertions, avoided energy rates paid to QFs are significantly lower than utilities' true generation costs.[186]

97. Public Interest Organizations argue that the overestimations upon which the Commission relied ''were incorrectly calculated based on long-run contract prices and short-run costs, rather than the long-term QF price and the cost of the resource that the utility would have acquired but for the QFs.'' [187] Public Interest Organizations contend that the Commission assumed without any evidence that those utilities would have built their own energy resources, executed long term fuel contracts, or executed non-QF power purchase agreements without the QF purchases. Public Interest Organizations assert that, while QF contracts entered into before 2007–2009 might not have accounted for declining natural gas prices, which caused these contracts to be higher than short term market prices, alternative long-term commitments those utility might have made without QF purchases might also not have accounted for those natural gas price declines. Public Interest Organizations reason that avoided costs therefore should be based on those alternative sources that a utility would have purchased but for QF purchases rather than short run market prices and the Commission lacked evidence to assert that ''utilities' actual incremental cost of generating energy 'but for' QF generation exceeds rates QFs have received through long-term fixed energy rate contracts.'' [188]

98. Public Interest Organizations maintain that the Commission lacked evidence to assert that natural gas price declines would have decreased the prices of utility power purchase agreements, energy supply investments, fuel contracts and other long-term energy supply commitments. Public Interest Organizations contend that the failure to predict natural gas price declines did not entail any energy cost savings, yielded energy price increases passed along to customers, and rendered uneconomic utilities' long-term coal plant investments, coal contracts, and power supply contracts to ensure long term energy supply. Public Interest Organizations assert that the Commission's conflating short-run market prices with utility supply costs excludes supply beyond the day-ahead market and costs above market price. Public Interest Organizations claim that the Commission did not address concerns that vertically integrated utilities' monopoly status ensures that utilities operate their own plants at above-market prices and would have added their own new generation but for QF purchases. Public Interest Organizations assert that, even though QF prices may have been higher than market prices, that simply reflects foregone utility windfall profits and not

[174] *Id.* P 292 (citing SC Solar Alliance Comments, Docket No. RM19–15–000, at 7 (Dec. 3, 2019)).

[175] *Id.* (citing Public Service Commission of South Carolina, Docket No. 2019–185 & 186–E, Hearing Transcript Vol. 2, Tr. 596: 3–4 (Horii Test.) (attached as Appendix 1 to SC Solar Alliance Comments, Docket No. RM19–15–000 (Dec. 3, 2019))).

[176] *Id.* (citing Horii Test. 593:21–22).

[177] *Id.*

[178] *Id.* P 293.

[179] EPSA Request for Rehearing at 10.

[180] Public Interest Organizations Request for Rehearing at 9, 84.

[181] Solar Energy Industries Request for Rehearing and/or Clarification at 19.

[182] EPSA Request for Rehearing at 10.

[183] Public Interest Organizations Request for Rehearing at 84.

[184] *Id.* at 85.

[185] *Id.*

[186] *Id.* at 86.

[187] *Id.* at 86–87.

[188] *Id.* at 87.

costs that customers would otherwise have paid.[189]

99. Public Interest Organizations argue that the Commission was internally inconsistent in defending its decision to presumptively consider competitive market prices like LMP equal to full avoided cost in conjunction with its determination to allow states to eliminate fixed energy rate contracts.[190] Public Interest Organizations contend that, in permitting competitive market prices like LMP to set avoided costs, the Commission also inconsistently acknowledged that utilities incur long term energy costs that exceed those prices and that the competitive market prices are only being used to set the as-available short term avoided cost rates instead of long-run energy costs that can be avoided with long-term QF contracts.[191] Public Interest Organizations claim that the Commission permitted a price determined at the time of delivery to set the price for long-term contracts, even though the Commission acknowledged that long term QF energy supply avoids alternative long term energy supply commitments and costs that are not reflected in the short run LMP or market hub price.[192]

100. EPSA argues that the Commission's regulations and precedent contradict reliance on the idea that overestimates and underestimates have not balanced out.[193] EPSA points out that 18 CFR 292.304(b)(5) expressly provides that, ''[i]n the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.'' [194]

101. EPSA asserts that, because the final rule did not modify, much less eliminate, 18 CFR 292.304(b)(5), which allows states to retain the fixed energy rate contract option, it is impossible to claim that the fixed energy rate contract option conflicts with the avoided cost cap and that the Commission cannot take a position that is at odds with the terms of its own regulations.[195]

102. According to Solar Energy Industries, there is no indication in the record that any retail rates paid by electric consumers fluctuate based on the purchasing utility's obligation to purchase from QFs. Solar Energy Industries also argue that, for utilities with stated retail rates, there is no evidence to suggest that these rates will be reduced in any manner in the event the state utilizes the ''flexibility'' provided by revised Section 292.304(d), unless the Commission mandates otherwise.[196] Solar Energy Industries add that the evidence in the record of alleged overpayments was both flawed and not adequately supported and thus does not support the contention that overpayments and underpayments did not balance out for an extended period of time.[197]

103. Solar Energy Industries argue that, to the extent that existing methodologies in some states have produced inaccurate forecasts of long-run avoided costs, the solution is better methodologies—not an abandonment of long-run marginal costs.[198]

ii. Commission Determination

104. As an initial matter, it is beyond any reasonable question that the Commission's determination to give the states the flexibility to require variable energy rates in QF contracts is within the Commission's authority under PURPA. By definition, such a rate compensates the QF at a rate reflecting the energy costs avoided by the purchasing utility as a result of its purchase of energy from the QF. Moreover, a utility's avoided purchased energy costs constantly change over the term of a contract as the utility's marginal resource changes due to changes in load, changes in the availability of alternative resources, and changes in the availability of the marginal resource. The avoided energy cost also changes with fluctuations in fuel use at different loading levels and with changes in fuel costs. Consequently, a variable energy contract rate by definition would more accurately reflect the utility's avoided energy costs than a fixed contract that does not vary over the length of a multi-year contract.

105. As a result, there is no question but that the Commission could have imposed a variable energy contract requirement when it promulgated the PURPA Regulations in 1980 instead of requiring fixed energy contract rates. The only question in this proceeding is whether the Commission has adequately supported its holding in the final rule to change the determination made in 1980 and instead give the states the flexibility to require variable energy contract rates.[199] In addition, because the Commission's revision to the fixed energy rate requirement is based on changed circumstances since the issuance of the PURPA Regulations in 1980, we must provide ''a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'' [200] As we explain below, we disagree with assertions that we have not provided such an explanation.

106. We disagree with the arguments raised on rehearing that there was insufficient evidence of overestimations. The Commission explained in the final rule why overestimations and underestimations of avoided costs had not balanced out.[201] Broad price declines over time throughout the energy industry show that long-term fixed price QF contracts likely exceeded the avoided energy costs at the time of delivery for extended periods of time; thus, it is not necessary to confirm every allegation of a lack of balance in the past or every estimation of prices and costs.[202] But even had there been less evidence of lack of balance over time,[203] there was sufficient evidence for the Commission to conclude that the Commission's assumption in 1980 may not be the best way to ensure compliance with PURPA. Allowing a state to set a variable avoided cost energy rate could better avoid that outcome. In the context of long-term fixed QF rates, given evidence of overestimations, the statutory avoided cost cap may be better met if the rates may be varied over time to ensure they stay within the requirements of PURPA. Moreover, as stated in the final rule, to

[189] *Id.* at 87–90.

[190] *Id.* at 9, 90.

[191] *Id.* at 90.

[192] *Id.* at 91–92.

[193] EPSA Request for Rehearing at 14.

[194] *Id.* at 15 (citing 18 CFR 292.305(b)).

[195] *Id.* at 14–15.

[196] Solar Energy Industries Request for Rehearing and/or Clarification at 20.

[197] *Id.* at 21–23.

[198] *Id.* at 23.

[199] *See, e.g., Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 42 (1983) (''An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change'').

[200] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 516 (2009).

[201] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 285–92.

[202] *See id.* P 287 (footnote omitted) (''We agree with Public Interest Organizations that the recent electricity price overestimations were not unique to QFs and can be explained by general declines in natural gas prices since the adoption of hydraulic fracturing and the 2007–2009 recession. But that is precisely why the estimates of avoided costs reflected in the QF contracts and LEOs were incorrect and why the resulting fixed avoided cost energy rates reflected in such QF contracts and other LEOs resulted in QF rates well above utility avoided costs in violation of PURPA section 210(b); the precipitous decline in natural gas prices caused a corresponding reduction in utilities' energy costs, and thus in their energy avoided costs but this decline was not reflected in the QFs' fixed contract rates that remained at their previous levels'').

[203] *See, e.g.,* Public Interest Organizations Request for Rehearing at 85.

the extent energy prices increase over time, QFs could benefit from that variability.[204] Therefore, it was well within the Commission's authority under PURPA, and the Commission had sufficient evidence, to provide a tool states can use to ensure that the avoided cost rates stay within the requirements of the statute and not be based on an assumption that over-recoveries balance out with under-recoveries.

107. States previously had little ability to address the potential for overestimations over the term of a QF contract, which caused some states to respond by adopting shorter contract terms. In the final rule, the Commission did not determine that any particular QF contracts violated the avoided cost cap and did not change its prior determination that PURPA does not ''require a minute-by-minute evaluation of costs which would be checked against rates established in long term contracts between qualifying facilities and electric utilities.'' [205] Instead, the Commission acted reasonably to better ensure that, over the term of a contract, QF rates do not exceed a utility's avoided costs. The Commission achieved this goal by providing the states with a tool that allows them to address the potential that, over the term of a contract, contract rates may exceed a purchasing utility's avoided costs determined at the time of delivery. Providing this tool to the states ensures that they are not required to set rates that exceed avoided costs. Moreover, this tool gives effect to PURPA's requirement that rates paid to QFs be just and reasonable to the consumers of the electric utility and in the public interest.[206]

108. The Commission emphasized that the final rule is prospective, thereby protecting existing contracts. We find no merit in EPSA's argument that the grant of flexibility to states in the final rule to set variable avoided cost energy rates is inconsistent with 18 CFR 292.304(b)(5), which provides: ''In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart if the rates for such purchases differ from avoided costs at the time of delivery.'' [207]

109. Nothing in the final rule is inconsistent with this regulatory provision. The final rule gives states the flexibility to continue to require fixed energy rates for the term of a QF's contract, and this regulatory provision continues to be necessary to make clear that such rates are permitted. The provision does not apply to QF contracts where the energy rate is not fixed based on estimates of avoided costs but instead varies with estimates of avoided costs at the time of delivery.

110. We also disagree with Public Interest Organizations that, in permitting states to set a variable avoided cost energy rate, the Commission ignored utilities' long-run avoided costs.[208] The Commission has not assumed that utilities procure energy only through short-term contracts or never lock in their costs by constructing their own energy resources, executing long term fuel contracts, or executing long term energy supply contracts. In Order No. 69, the Commission defined ''energy'' costs as ''the variable costs associated with the production of electric energy (kilowatt-hours)'' and ''represent[ing] the cost of fuel, and some operating and maintenance expenses.'' [209] By contrast, in Order No. 69, the Commission defined ''capacity'' costs as ''the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities.'' [210] The Commission has not changed these definitions; they still apply to both ''short-run'' (energy or non-firm power) and long-run (capacity or firm power) avoided costs.

111. While the final rule changed how states may calculate avoided energy costs (both pursuant to competitive market prices and variable rates), the Commission did not change the factors states must take into account, to the extent practicable, for setting fixed, avoided capacity costs; among these factors states must take into account, to the extent practicable, are the utility's own avoided cost data and the utility's deferral of capacity additions.[211] Under this existing and unchanged framework, states already should take into account the long-run (capacity) and short-run (energy) incremental costs that utilities would incur but for their purchase from QFs.

112. As stated in the final rule, the difficulty in predicting prices necessarily also applies to predicting which costs a utility would incur from generating power itself or purchasing such power from another source over the term of a QF contract. Therefore, while there may be open questions over which costs a utility would incur from generating power itself or purchasing such power from another source in lieu of QF purchases, continuing to prohibit a state from allowing an energy rate to fluctuate would prevent states from choosing not to use unreliable price forecasts in setting avoided cost energy rates in QF contracts.

113. Public Interest Organizations' characterization of overestimated energy costs as ''foregone windfall profits'' due to utilities' monopoly status not only is inapt,[212] but it ignores that utility customers ultimately bore the cost of avoided cost estimates that ultimately exceeded avoided costs in a way that is inconsistent with PURPA's avoided cost cap. Likewise, Solar Energy Industries'

[204] *See* Order No. 872, 172 FERC ¶ 61,041 at P 290.

[205] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[206] 16 U.S.C. 824a–3; *see also Indep. Energy Producers Ass'n, Inc.* v. *Cal. Pub. Utils. Comm'n,* 36 F.3d 848, 850 (9th Cir. 1994) (''Section 210(b) requires that Commission to promulgate regulations that ensure that the rates for these purchases 'shall be just and reasonable to the electric consumers of the electric utility and in the public interest.' However, these rates may not exceed the incremental cost to the utility of purchasing alternative energy.''); *Exelon Wind 1, L.L.C.* v. *Nelson,* 766 F.3d 380, 384 (5th Cir. 2014) (''While Congress sought to promote energy generation by Qualifying Facilities, it did not intend to do so at the expensive of the American consumer. PURPA thus strikes a balance between these two interests . . . PURPA requires utilities to purchase power generated by Qualifying Facilities, but also mandates that the rates that utilities pay for such power 'shall be just and reasonable to the electric consumers of the electric utility and in the public interest.' ''); *Conn. Valley Elec. Co.* v. *FERC,* 208 F.3d 1037, 1045 (D.C. Cir. 2000) (''PURPA expressly requires the Commission to balance the interests of consumers against those of producers. . . . ''); *see also Swecker* v. *Midland Power Co-op,* 807 F.3d 883, 884 (8th Cir. 2015) (citing legislative history that PURPA is ''not intended to require the rate payers of a utility to subsidize cogenerators or small power producers'').

[207] EPSA Request for Rehearing at 15.

[208] *See* Public Interest Organizations Request for Rehearing at 87 (''FERC conflates short-run market prices with utilities' energy supply costs. . . . [T]he latter includes costs of supply other than the day ahead market and that impose costs above the market price'').

[209] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865; *see also id.* at 30,881–82 (also defining energy as ''non-firm power'' that entails ''the cost of operating [the seller's] generating units and administration'').

[210] *Id.* at 30,865; *see also id.* at 30,881–82 (also defining capacity as ''firm'' power that entails ''payments for the cost of fuel and operating expenses, and also for the fixed costs associated with the construction of generating units needed to provide power at the purchaser's discretion.'').

[211] *See* 18 CFR 292.304(e); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865 (''If a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility, then the rates for such a purchase will be based on the avoided capacity and energy costs.'').

[212] As explained in the final rule, electric utilities almost always are required to pass decreases in energy costs through to their retail customers, whereas QFs with fixed energy contract rates are not obligated to reduce their rates as avoided energy costs decline. Order No. 872, 172 FERC ¶ 61,041 at P 122.

assertion that there is no evidence that states will lower retail rates if states require variable energy rates in QF contracts is irrelevant to whether the Commission may provide that flexibility under PURPA. The requirement found in PURPA is that the Commission cannot require that a rate paid to the QF exceed a certain amount.

b. Whether the Proposed Change Would Violate the Statutory Requirement That the PURPA Regulations Encourage QFs and Do Not Discriminate Against QFs

114. In the final rule, the Commission determined, based on the record evidence, that it is not necessarily the case that overestimations and underestimations of avoided energy costs will balance out over time. The Commission concluded that a fixed energy rate in a QF contract or LEO potentially could violate the statutory avoided cost cap on QF rates.[213]

115. The Commission found that the PURPA Regulations continue to encourage the development of QFs by, among other things, allowing a state to vary the rate paid to the QF over time but in a way that satisfies the rate cap established in PURPA section 210(b). In this way, over time, the QF can obtain a higher rate when the utility's avoided costs increase, and ratepayers are not paying more than the utility's avoided costs when prices decrease. Furthermore, the Commission explained that allowing the use of variable energy rates may promote longer contract terms, which would help encourage and support QFs.[214] The Commission concluded that it is consistent with PURPA section 210(b), as well as the obligation imposed by PURPA section 210(a), to revise the PURPA Regulations ''from time to time,'' to provide the states the flexibility to require that QF contracts and other LEOs implement variable avoided cost energy rates in order to prevent payments to QFs in excess of the purchasing electric utility's avoided energy costs. The Commission noted that PURPA section 210(b) prohibits the Commission from requiring QF rates above avoided costs even if, according to some commenters, a fixed avoided cost energy rate above avoided costs would provide greater encouragement to QFs than a variable avoided cost energy rate.[215]

116. The Commission described the discrimination claims as based on the incorrect assumption that electric utilities have not been required to lower their energy rates as prices have declined. The Commission found, to the contrary, that utilities typically charge their customers cost-based rates, and, as their fuel and purchased power costs have declined, they typically have been required to provide corresponding reductions in the energy portion of their rates to their customers. The Commission explained that requiring QF avoided cost energy rates to likewise change as purchasing electric utilities' avoided energy costs change does not create a discriminatory difference, but rather puts QF rates on par with utility rates.[216]

117. The Commission explained that it was not changing the requirement that QF avoided cost energy rates be set at the purchasing utility's full avoided energy costs. Rather, the Commission allowed the states the option to now choose to require QF avoided cost energy rates that vary with the purchasing utility's avoided costs of energy, rather than QF avoided cost energy rates that are fixed for the life of the QF's contract or LEO, to ensure the rates comply with PURPA.[217]

i. Requests for Rehearing

118. Solar Energy Industries argue that, by revoking the long-standing regulations that provide a QF with the right to elect to be paid a long-term energy rate in a contract for long-term energy delivery, the Commission is actively discouraging the development of QFs in contravention of the statutory direction to encourage the development of such facilities.[218] Solar Energy Industries describe as inaccurate the Commission's claim that this revocation is necessary to protect the consumers of electric utilities because inaccurate administratively-determined avoided costs can be fully mitigated when a state adopts the Commission's new competitive bidding framework.[219]

119. Solar Energy Industries request that the Commission clarify several portions of the final rule. First, Solar Energy Industries request that the Commission clarify that the circumstances that do not allow QFs to have nondiscriminatory access to buyers other than the host utility are largely the same today as in 1980 when the Commission first implemented its PURPA Regulations.[220] Second, Solar Energy Industries request that the Commission clarify that states must ensure that QFs receive comparable avoided cost calculations and rates, terms, and conditions.[221] Solar Energy Industries contend, for example, that utilizing a 20-year depreciation schedule for an avoided unit to calculate the long-run marginal cost rate and then offering a QF a two-year contract fails to ensure compatibility. Third, Solar Energy Industries request that the Commission clarify that it supports and renews its commitment to pursue enforcement actions when states discriminate against QFs.[222]

120. Northwest Coalition asserts that the final rule's change of the requirement that QFs be offered fixed prices for energy is arbitrary, capricious, and not in accordance with law. Northwest Coalition argues that, in a ''reversal'' of 40 years of precedent since enactment of PURPA, the final rule unlawfully ''guts'' the bedrock requirement that QFs be offered fixed energy rates, which have long been recognized as necessary for the development of QFs.[223] Northwest Coalition adds that the right to secure fixed energy prices supports the continued operation of existing QFs upon the expiration of their existing contracts when substantial interconnection and other capital upgrades must typically be undertaken and that elimination of fixed prices is likely to result in loss of substantial existing QF capacity.[224]

121. Northwest Coalition claims that, despite the final rule's assertion that nothing in PURPA requires the Commission to ensure financeability of individual QFs, PURPA ''does require the Commission to encourage their development, which we have previously equated with financeability.''[225] Northwest Coalition argues that, under the final rule, QFs could face a world in which there is no minimum contract term, a payment of zero for their capacity, and an avoided cost energy price based on highly volatile and unpredictable short-term markets. Northwest Coalition contends that rendering many QFs not financeable or financeable only at extreme interest rates discourages QFs, which is contrary to what PURPA requires.[226]

122. EPSA argues that, although the Commission cannot, in the name of remedying discrimination, require QF

[213] Order No. 872, 172 FERC ¶ 61,041 at P 295.

[214] *Id.* P 296.

[215] *Id.*

[216] *Id.* P 302.

[217] *Id.* P 303.

[218] Solar Energy Industries Request for Rehearing and/or Clarification at 10.

[219] *Id.* at 10–11.

[220] *Id.* at 42.

[221] *Id.* at 43.

[222] *Id.* at 43–44.

[223] Northwest Coalition Request for Rehearing at 8 (citing Order No. 872, 172 FERC ¶ 61,041 at P 232).

[224] *Id.*

[225] *Id.* at 9–10 (citing Order No. 872, 172 FERC ¶ 61,041 (Glick, Comm'r, dissenting in part, at P 13)).

[226] *Id.* at 11.

rates that exceed avoided cost, allowing states to eliminate the fixed rate energy contract option does not result in QF rates that are non-discriminatory to the maximum extent permitted by the avoided cost cap.[227] EPSA reiterates that the statutory requirement in PURPA section 210(b)(1) that QF rates ''shall not discriminate against'' QFs is more restrictive than the FPA's prohibition against ''unduly discriminatory'' rates.[228] EPSA asserts that this more restrictive requirement does not leave room for avoided cost rates that discriminate against QFs relative to purchasing electric utilities, even if the Commission finds the discrimination to be justified (*i.e.,* not undue).[229] EPSA argues that, subject to compliance with the avoided cost cap, the Commission cannot allow states to set discriminatory QF rates, even if the Commission determines those discriminatory rates are justified by differences between QFs and utilities or other policy goals, such as minimizing the burden of forecasting error on consumers.[230]

123. EPSA claims that, in the final rule, the Commission does not adequately address these arguments, which it had raised in its NOPR comments.[231] EPSA contends that the Commission erred in relying on the idea that variable energy rate/fixed capacity rate contracts are standard in the electric industry because PURPA requires that avoided cost rates not discriminate against QFs relative to purchasing electric utilities, not that such rates conform to standard industry practices.[232] EPSA describes the Commission's argument that eliminating fixed energy price contracts is not discriminatory as unsupported because of its assumptions about how fuel and purchased power adjustment clauses operate. EPSA reasons that a franchised utility's rates will be set based on costs they actually incur to produce electricity for their customers and that such costs would be the same energy costs that are used in determining the electric utilities' avoided costs that will, in turn, set the as-available avoided cost rates to be charged by QFs.[233] In particular, EPSA claims that the Commission appears to assume that fuel and purchase power adjustment clauses will necessarily reflect short-term fluctuations in fuel and other energy-based costs, while, in a number of jurisdictions, these clauses also cover costs incurred under long-term contracts, including long-term fuel supply contracts, long-term power purchase agreements, and equivalent financial instruments.[234] EPSA argues that remedying alleged discrimination requires providing QFs with a degree of insulation from market volatility comparable to that afforded to utility investments with effectively guaranteed cost recovery in retail rates, which EPSA argues the fixed energy rate contract option accomplishes.[235]

124. EPSA asserts that it was legally incorrect to claim that a QF rate equal to the purchasing utility's avoided cost at the time of delivery by definition could not be discriminatory because the Commission's regulations and precedent leave no room for claims that, for purposes of PURPA's avoided cost cap, there is a single measure of avoided cost.[236] EPSA claims that the Commission cannot avoid ensuring that QF rates are non-discriminatory on the basis that such rates are consistent with one measure of avoided costs if setting QF rates based on another permissible measure of avoided costs would eliminate some or all of the discrimination.[237]

125. Public Interest Organizations argue that the Commission allowed states to set rates that discriminate against QFs in contravention of PURPA.[238] Public Interest Organizations maintain that allowing avoided costs to be set at short-run prices discriminates against QFs and does not reflect utilities' avoided costs because utilities incur long-term energy supply costs that exceed short run costs. Public Interest Organizations assert that the Commission incorrectly defined discrimination as comparing the standard across the electric industry instead of how a specific purchasing electric utility treats similar generation. Public Interest Organizations contend that the Commission assumes without evidence that contracts whose energy prices are linked to short-term prices in a competitive market at the time of delivery is ''standard'' in long term contracts. Public Interest Organizations argue that, on the contrary, non-QF renewable generators are paid long-term fixed prices, including a fixed energy rate.[239]

126. Public Interest Organizations claim that the Commission interpreted the statutory term ''discriminate'' incorrectly.[240] Public Interest Organizations assert that, in the final rule, the Commission permitted states to deny QFs fixed energy pricing, ''even if alternative energy the utility would acquire from its own generation or non-QF power producers would be at fixed costs, based on the industry 'standard' followed by other utilities to limit the price for all alternative energy (owned and third party) to the short run market price.'' [241] Public Interest Organizations contend that, while discrimination is generally defined as a ''difference between the subject entity and a single similar entity that is more favorably treated,'' [242] under PURPA, discrimination is not defined based on the industry standard but rather is defined ''on how the specific purchasing utility treats QFs compared to how it treats one or more similarly situated non-QFs, including the utility's own generation.'' [243]

127. Public Interest Organizations argue that the Commission lacked evidence to support its assertion that short-term rates are not discriminatory because they are the industry norm.[244] Public Interest Organizations contend that the Commission lacks evidence to assert that the electric industry standard entails variable energy prices in long term supply contracts, given that ''utilities make long-term investments for energy resources, enter long-term contracts for fuel for their own generation, [and] enter long term power purchase agreements with long-run energy prices (or blended energy and capacity prices).'' [245] Public Interest Organizations claim that the Commission lacked evidence to assert that that utilities recovering cost-based rates must exclude long-term commitment costs such as rate-based energy resources, fuel contracts, and power purchase contracts when the long term energy portion of those costs, such as power purchase agreement prices, later exceed short run energy costs like the hourly LMP of the delivered energy.[246] Public Interest Organizations assert that the rate-based generation of

[227] EPSA Request for Rehearing at 5.

[228] *Id.* at 6.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Id.* at 6–7.

[233] *Id.* at 7–8.

[234] *Id.* at 8–9.

[235] *Id.* at 9–10.

[236] *Id.* at 16.

[237] *Id.* at 17.

[238] Public Interest Organizations Request for Rehearing at 9, 92.

[239] *Id.* at 92–93.

[240] *Id.* at 10, 92.

[241] *Id.* at 94–95.

[242] *Id.* at 94 (citing *FTC* v. *Burton,* 363 U.S. 536, 550 (1960); *Burton* v. *District of Columbia,* 153 F. Supp. 3d 13, 67 (D.D.C. 2015)).

[243] *Id.* (citing 16 U.S.C. 824a–3(b)).

[244] *Id.* at 10, 95.

[245] *Id.* at 95–96 & n.280 (citing National Association of Regulatory Utility Commissioners, Electric Utility Cost Allocation Manual, at 49–59 (July 1992)).

[246] *Id.* at 96–97.

Alliant Energy, upon whose data the Commission relied, receives ''advanced ratemaking principles'' that fix favorable rate treatment despite intervals when the short run price is less than the energy price assumed when long-term fixed price recovery for those the energy resources were approved. Public Interest Organizations contend that a QF displacing such utility investments causes the utility to avoid the long-term fixed cost of the utility investment rather than the short-term day ahead or market hub price at the time energy is generated from it.[247]

128. Public Interest Organizations argue that, contrary to the Commission's assertions that long-term utility energy cost commitments may be disallowed or modified due to short run energy price when the energy is delivered, rate recovery is usually required for the cost of supply contracts regardless of whether the contract price later appears too high compared to prices when the power is delivered. Public Interest Organizations therefore reason that non-QF energy supply that utilities own themselves or purchase from another source are not limited to short run energy market prices.[248]

129. Public Interest Organizations similarly assert that the Commission selectively quoted *Town of Norwood* v. *FERC* for the proposition that long-term non-QF energy supply is limited to short-run market price at the time of delivery. Public Interest Organizations instead describe *Town of Norwood* as concerning a wholesale supply contract from a supplier's mix of resources to serve a retail utility instead of a power purchase agreement from a single generator comparable to a QF contract. Public Interest Organizations contend that the rate in *Town of Norwood* contained both energy pricing in two blocks ''with the first priced at fixed embedded costs and charged based on a ratchetted demand and energy use, and the second block based on long run marginal costs.'' [249]

130. Public Interest Organizations describe the Commission's justifications for its determination that Order No. 872 does not enable discrimination as poorly reasoned.[250] Public Interest Organizations argue that treating QFs without discrimination does not require subjecting them to cost-of-service ratemaking in violation of PURPA but rather should be the same as how the utility determines costs for other purposes. Public Interest Organizations claim that the Commission's argument that it is not discriminating against QFs when it subjects them to short run energy prices because they still receive full avoided costs is circular.[251]

131. Northwest Coalition asserts that the final rule authorizes a discriminatory framework by eliminating the certainty of a predictable revenue stream afforded by fixed prices. Northwest Coalition argues that electric utilities can still rate-base long-term investments, thereby ensuring that they can recover their capital investments plus an authorized return, and then also recover their actual operating costs under traditional cost-of-service ratemaking. Northwest Coalition contends that, in contrast, the final rule's new framework authorizing variable energy pricing deprives QFs of even a reasonable ability to forecast avoided cost prices from which they must recover their investment, much less guarantee such recovery provided to the typical utility. Northwest Coalition asserts that this outcome places QFs on unequal footing and ensures that utilities continue to dominate the generation market. Northwest Coalition argues that, in sum, the new regime is discriminatory because it permits utilities to make acquisition decisions based on long-term cost forecasts, which contain inherent forecast risk, but ties QFs to unpredictable future changes in markets.[252]

132. Northwest Coalition contends that the final rule fails to address the critical point that utilities obtain virtually guaranteed cost recovery and virtually absolute certainty that they will recover their costs plus a profit, whereas QFs now do not even receive certainty as to the prices they can rely upon if they are able to perform successfully under their contracts. Northwest Coalition claims that the discrimination is the failure to put QFs on reasonably equal footing to utilities by providing QFs with the certainty of the right to beat the utility's long-term marginal cost of generation, which typically is the same long-term cost estimate used to justify the utility's own rate-base acquisitions.[253]

133. Northwest Coalition argues that, although the discriminatory policy in *Environmental Action* [254] regarded transmission access and not price certainty, the same principle applies equally here. Northwest Coalition asserts that the Commission's ''effort to place QFs on an essentially equal competitive footing with competing suppliers, . . . by giving such suppliers the access it denies to QFs would effect an administrative repeal of this congressional choice; by definition, this is not in the public interest.'' [255] Northwest Coalition contends that, in this case, the Commission's alleged effort to place QFs on equal footing with incumbent utilities by giving such utilities the certainty of return on investment that will be denied to QFs is plainly discriminatory.[256] Northwest Coalition adds that this interpretation of the anti-discrimination requirement is even supported by the Montana Public Service Commission in the context of price certainty and allocation of forecast risk, even though that state agency generally supported the Commission's proposed rule.[257]

ii. Commission Determination

134. We disagree with the arguments raised on rehearing. To begin, it is incorrect to state that the final rule eliminated fixed rates for QFs. The final rule gave states the flexibility, if they choose to take advantage of this flexibility, to require that the avoided cost *energy* rates in QF contracts vary depending on avoided energy costs at the time of delivery. In the final rule, as described above, the Commission retained the QF's right for capacity rates to be fixed, which together with the flexibility adopted in the final rule to allow states to set avoided cost energy rates using competitive market forces should provide a more transparent way of determining avoided costs. Those capacity rates would still need to meet the standards of 18 CFR 292.304(e), which together with more transparent energy rates determined pursuant to competitive market prices and the existing PURPA Regulations, encourages the development of QFs.[258]

135. Further, in response to EPSA's and Public Interest Organizations' arguments that the final rule does not accurately describe how merchant generators are financed and protect QFs against volatility in fuel prices, the variable energy rate/fixed capacity rate construct is common among merchant generators for power sales agreements that include the sale of capacity, thus

[247] *Id.* at 96.

[248] *Id.* at 97 (citing *FPC* v. *Sierra Pac. Power Co.,* 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956)).

[249] *Id.* at 97–98 (citing *Town of Norwood* v. *FERC,* 962 F.2d 20, 21, 24 (D.C. Cir. 1992)).

[250] *Id.* at 10, 98.

[251] *Id.* at 98–99.

[252] Northwest Coalition Request for Rehearing at 12.

[253] *Id.* at 13.

[254] *Id.* at 14 (citing *Envtl. Action* v. *FERC,* 939 F.2d 1057, 1061–62 (D.C. Cir. 1991) (*Environmental Action*)).

[255] *Id.* (citing *Environmental Action,* 939 F.2d at 1062).

[256] *Id.*

[257] *Id.* at 14–15.

[258] *See supra* PP 42–43.

demonstrating that other types of non-utility generation are able to raise useful financing under such an arrangement.[259]

136. We also disagree with arguments raised on rehearing regarding discrimination. We reiterate our holding in the final rule that PURPA does not require, and indeed prohibits, subjecting QFs to the same rate structures and procedures as utilities.[260] Congress made this point clear when it enacted PURPA. ''The conferees recognize that *cogenerators and small power producers are different from electric utilities,* not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise *is not guaranteed to be recoverable.*'' [261] And the Supreme Court relied on this legislative history to conclude that ''The legislative history confirms, moreover, that Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities.'' [262]

137. Moreover, EPSA, Northwest Coalition, Public Interest Organizations, and Solar Energy Industries miss the mark when they argue that it would be discriminatory to permit states to require variable energy rates in QF contracts if the energy the utility otherwise would acquire from its own generation or non-QF power producers would be at a fixed cost. These entities assert that, to prevent such discrimination, the Commission must require fixed energy rates in order to ensure comparable terms and conditions in QF contracts. However, in the unlikely event that all of a purchasing utility's other, non-QF resources happen to be long-term purchases with fixed capacity and energy rates, such a utility's avoided capacity and energy costs would not vary significantly over time. In that case, a variable energy rate set at the utility's avoided costs at the time of delivery would be based on the utility's essentially unchanging avoided costs and thus would not change significantly over time.[263]

138. We find that Public Interest Organizations and Solar Energy Industries conflate the variable rate issue with the contract length issue in asserting that the final rule discriminates against QFs. Although the Commission changed the extent to which a QF is entitled to a fixed avoided cost energy rate, the Commission did not change the requirement that a capacity rate should account for longer-term costs (*i.e.,* longer than as-available) associated with providing the capability to delivery energy.[264] A QF contract or LEO with a variable energy rate should reflect a purchasing electric utility's avoided energy costs estimated at the time of delivery. It is irrelevant for calculating a purchasing electric utility's avoided *energy* costs whether a purchasing electric utility makes purchases of long-term *capacity* in non-QF bilateral agreements because a QF remains entitled to a fixed capacity rate. In the final rule, as described above, states must take into account the existing factors for setting fixed avoided cost capacity rates, QFs are able to require that avoided cost capacity rates in their contracts and LEOs be fixed, and QFs may continue to bring enforcement petitions before the Commission if states are failing to take into account those factors when setting avoided cost capacity rates. In response to Solar Energy Industries' request that the Commission clarify its intent to pursue enforcement against states in setting avoided cost rates, if a QF believes that its fixed capacity rate in a contract does not fully reflect the long-term capacity avoided costs of the purchasing utility because of the length of the QF contract, that QF may pursue a claim under the statutory provisions for the enforcement of PURPA.

139. Solar Energy Industries request that the Commission clarify that where QFs continue to lack nondiscriminatory access to buyers other than the host utility, the circumstances have not changed since 1980.[265] It is not apparent what Solar Energy Industries asks the Commission to clarify. But to the extent that this is a criticism of the final rule, the final rule continues to require that state determinations of avoided costs reflect the purchasing utility's avoided costs and that QFs have the right to sell to directly *and* indirectly interconnected utilities.[266]

140. We disagree with Public Interest Organizations' and Northwest Coalition's assertions that the variable rate option overemphasizes the avoided cost rate cap and underemphasizes the prohibition on discrimination against the QF and the requirement to encourage QF development.[267] PURPA specifically states that ''[n]o such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.'' [268] Thus, the Commission's actions to better ensure that it has not prescribed a rule requiring that the rates paid to QFs not exceed the purchasing utility's avoided costs reflect Congress's priorities in enacting PURPA and give meaning to all provisions of the statute.[269]

141. We disagree with Northwest Coalition that the final rule discriminates against QFs by failing to put them on a competitive footing with utilities in violation of *Environmental Action.*[270] In that case, the D.C. Circuit discussed PURPA's prohibition on discriminating against QFs in connection with PURPA's mandatory purchase obligation. The D.C. Circuit stated that ''[a] QF may force a sale only at the purchasing utility's avoided cost . . . . If the QF is less efficient (*i.e.,* has higher costs) than its competitors, its guaranteed ability to sell power only at a price below its cost will not cause its competitors any loss of sleep.'' [271] But, in contrast, if a ''QF is more efficient [than the purchasing electric utility], then the preference it receives is not a threat to, but only a redundant (legal) guarantee of, the competitive (economic) outcome. In fact, the principal effect of the preference seems

[259] Order No. 872, 172 FERC ¶ 61,041 at PP 35–41, 336–45.

[260] *Id.* PP 85–88 (citing *API,* 461 U.S. at 414; Conf. Rep. at 97–98).

[261] Conf. Rep. at 97–98 (emphasis added).

[262] *API,* 461 U.S. at 414.

[263] We note that this situation of the variable energy avoided cost rate not changing significantly over time would also address rehearing arguments that the final rule impedes QF financeability.

[264] *See Windham Solar,* 157 FERC ¶ 61,134, at P 4 (2016) (''[S]ection 292.304(d)(2) of the Commission's regulations addresses the option to sell energy or capacity pursuant to a legally enforceable obligation over a specified term'' and ''provides (*at the QF's option*) for pricing based on either avoided costs calculated at the time of delivery or at the time the obligation is incurred.'').

[265] Solar Energy Industries Request for Rehearing and/or Clarification at 42.

[266] *See* 18 CFR 292.303(a)(1)–(2), (d) (QFs have right to sell to directly and indirectly interconnected utilities).

[267] *See* Northwest Coalition Request for Rehearing at 19; Public Interest Organizations Request for Rehearing at 44–46.

[268] 16 U.S.C. 824a–3(b).

[269] *See In re W. States Wholesale Nat. Gas Antitrust Litig.,* 715 F.3d 716, 731 (9th Cir. 2013) (*Western States Wholesale Natural Gas Antitrust Litigation*) (''[S]tatutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part.''), *aff'd sub nom. Oneok, Inc.* v. *Learjet, Inc.,* 575 U.S. 373 (2015); *Brazos Elec. Power Co-op.* v. *FERC,* 205 F.3d 235, 250 (5th Cir. 2000) (*Brazos*) (''[I]f PURPA speaks clearly on the precise issue in question, that plain meaning must govern; however, if PURPA's application to a particular issue is ambiguous, FERC's interpretation will be upheld so long as it is a 'permissible construction' of the statute.'').

[270] Northwest Coalition Request for Rehearing at 13–14 (citing *Environmental Action,* 939 F.2d at 1061–62).

[271] *Environmental Action,* 939 F.2d at 1061.

to be to ensure that large power producers do not discriminate against QFs.'' [272] Thus the court confirmed that QFs are not guaranteed to recover their costs and they must take the risk of being unable to make a profit selling at the purchasing utility's avoided costs. Contrary to Northwest Coalition's assertions, this case hardly suggests that fixed energy avoided cost rates are necessary to place QFs on a competitive footing with utilities or that therefore the Commission must provide QFs the same rate structure or rate recovery as a utility.

142. Public Interest Organizations cite Commission and federal district court decisions to argue that the Commission's final rule results in discrimination.[273] But those cases do not address how PURPA's nondiscrimination standard relates to the avoided cost cap, and Order No. 872 provides that QFs are still entitled to a fixed avoided cost capacity rate.[274] Similarly, Congress and the Supreme Court both recognized that PURPA treats QFs differently from purchasing utilities, rendering QFs not similarly situated to non-QF resources.[275]

143. We also disagree with Public Interest Organizations that the final rule's reference to *Town of Norwood* does not justify use of variable energy rates. The Commission cited *Town of Norwood* for the proposition that ''variable energy rate/fixed capacity rate construct is . . . the standard rate structure used throughout the electric industry for power sales agreements that include the sale of capacity.'' [276] The D.C. Circuit in *Town of Norwood* explained that the rate construct at issue in that case had separate fixed demand and variable energy charges.[277] The final rule does not state that this rate construct necessarily represented a particular generator's agreement nor did it need to do so to justify granting states flexibility to use fixed capacity/variable energy avoided cost rates: PURPA is only concerned with the purchasing electric utility's avoided costs.[278] Indeed, the rate construct in *Town of Norwood* was a marginal cost rate structure, which resembles the definition of avoided costs under PURPA. Therefore, the Commission properly referenced the utility rate structure in *Town of Norwood* for the proposition that a purchasing utility has a fixed capacity/variable energy rate structure.

144. Furthermore, PURPA gives the Commission (and the states) discretion to implement all the requirements applicable to QF rates in a manner that gives all the requirements meaning. The Commission's interpretation in the final rule is a reasonable one that gives effect to all relevant statutory provisions by encouraging QF development and preventing discrimination against QFs, while respecting the avoided cost rate cap.[279] In contrast, petitioners' interpretations do not give appropriate effect to all provisions of the statute because they fail to give full effect to the requirement that QF rates cannot exceed the avoided cost rate cap. Together with the greater transparency the final rule permits with respect to competitive market prices and competitive solicitations and greater clarity with regard to LEOs, the final rule has implemented all provisions of the statute consistent with Congress's intent in passing PURPA.

c. Effect of Variable Energy Rates on Financing

145. In the final rule, the Commission agreed with commenters that PURPA does not guarantee QFs a rate that, in turn, guarantees financing. The Commission stated that, although PURPA requires the Commission to adopt rules that encourage the development of QFs, PURPA does not provide a guarantee that any particular QF will be developed or profitable.[280]

146. Notwithstanding that PURPA does not guarantee QF financeability, the Commission stated its belief that the variable avoided cost energy rate option implemented by the final rule will still allow QFs to obtain financing.[281]

147. The Commission reiterated that it is not eliminating fixed rate pricing for QFs. The Commission explained that, under the final rule, QFs will be able to require that avoided cost capacity rates in their contracts and LEOs be fixed. The Commission further explained that capacity costs, as relevant here, include the cost of constructing the capacity being avoided by purchasing utilities as a consequence of their purchases from QFs. The Commission stated that a combination of fixed avoided cost capacity rates and variable avoided cost energy rates can provide important revenue streams that can support the financing of QFs.[282]

148. Furthermore, the Commission found that merely because QFs have had access to fixed avoided cost energy rates does not mean that QFs must have access to such rates to obtain future financing. The Commission explained that, up to now, QFs have had the right under the PURPA Regulations to both fixed capacity and fixed energy rates, and we understand that most QFs executing long-term contracts have exercised this right. The Commission described commenters insisting that the Commission cannot allow states the option to impose variable avoided cost energy rates without evidence that QFs have obtained financing under such contract structures as attempting to

[272] *Environmental Action,* 939 F.2d at 1061–62.

[273] Public Interest Organizations Request for Rehearing at 94 & n.279 (''Under PURPA, Congress provided that discrimination is determined based on how the specific purchasing utility treats QFs compared to how it treats one or more similarly situated non-QFs, including the utility's own generation.'').

[274] *See, e.g., Morgantown Energy Assocs.* v. *Pub. Serv. Comm'n of W. Virginia,* No. 2:12–CV–6327, 2013 WL 5462386, at *25 (S.D. W. Va. Sept. 30, 2013) (discrimination under PURPA is measured ''with respect to a similarly situated non-QF''); *Pioneer Wind Park I, LLC,* 145 FERC ¶ 61,215, at P 37 (2013) (curtailment of QFs compared to utility resources is discriminatory under PURPA); *Entergy Servs. Inc. Gen. Coal.* v. *Entergy Servs., Inc.,* 103 FERC ¶ 61,125, at PP 27–29 (2003) (finding utility discriminated against QFs compared to other independent generators when it imposed certain fees on QFs but not on other generators)).

[275] *See API,* 461 at 413 (emphasis added) (''[T]he full-avoided-cost rule plainly satisfies the nondiscrimination requirement. . . . [W]e would be reluctant to infer that Congress intended the terms 'just and reasonable,' which are frequently associated with cost-of-service utility ratemaking, . . . to adopt a cost-of-service approach in the *very different context of cogeneration and small power production by nontraditional facilities.* The legislative history confirms, moreover, that Congress did not intend to impose traditional ratemaking concepts on sales by qualifying facilities to utilities.''); Conf. Rep. at 97–98 (emphasis added) (''The conferees recognize that *cogenerators and small power producers are different from electric utilities,* not being guaranteed a rate of return on their activities generally or on the activities vis-a-vis the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.'').

[276] Order No. 872, 172 FERC ¶ 61,041 at P 38 (citing *Town of Norwood,* 962 F.2d at 21, 24).

[277] *Town of Norwood,* 962 F.2d at 21.

[278] 16 U.S.C. 824a–3(b) (emphasis added) (''No such rule prescribed under subsection (a) shall provide for a rate which exceeds the incremental cost *to the electric utility* of alternative electric energy.''); *see also* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,866 (''If the Commission required electric utilities to base their rates for purchases from a qualifying facility on the high capital or capacity cost of a base load unit and, in addition, provided that the rate for the avoided energy should be based on the high energy cost associated with a peaking unit, the electric utilities' purchased power expenses would exceed the incremental cost of alternative electric energy, contrary to the limitation set forth in the last sentence of section 210(b).'').

[279] *Cf. Western States Wholesale Natural Gas Antitrust Litigation,* 715 F.3d at 731 (''[S]tatutory provisions should not be read in isolation, and the meaning of a statutory provision must be consistent with the structure of the statute of which it is a part.''); *Brazos,* 205 F.3d at 250 (''[I]f PURPA speaks clearly on the precise issue in question, that plain meaning must govern; however, if PURPA's application to a particular issue is ambiguous, FERC's interpretation will be upheld so long as it is a 'permissible construction' of the statute.'').

[280] Order No. 872, 172 FERC ¶ 61,041 at P 335.

[281] *Id.* P 336.

[282] *Id.* at P 337.

impose a standard that could never be satisfied.[283]

149. In response, the Commission cited to ample evidence demonstrating that generation projects that are similar to QFs (*i.e.,* independent power producers) with fixed capacity rate-variable energy rate contracts are financeable.[284]

150. The Commission found that the record showed that, even without the right to require long-term fixed energy rates, non-QF independent power producers have been able to obtain financing for large amounts of generation capacity, including from renewables. Based on this data, the Commission found that the right to require counterparties to pay fixed energy rates is not essential for the financing of independent power generation capacity.[285]

151. The Commission acknowledged that a number of different financing mechanisms were used for this independent generation capacity, not all of which may be available to QFs. Nevertheless, the Commission understood that a standard rate structure employed in the electric industry is a fixed capacity rate-variable energy rate structure and that many independent power production facilities have been financed based on this structure.[286] Accordingly, the Commission found that record evidence and historical data regarding the financing and construction of significant amounts of independent power production facilities supports the Commission's conclusion that a fixed capacity rate-variable energy rate structure—which will apply in those states choosing the variable avoided cost energy rate option—also will support financing of QFs.

152. The Commission did not find compelling the concerns expressed by some commenters that a fixed capacity rate-variable energy rate construct may not work for solar and wind resources, which have high fixed capacity costs and minimal variable energy costs.[287] Similarly, the Commission was not persuaded by comments that point out that energy rates in typical independent power production contracts are designed to recover the cost of a facility's fuel, whereas variable energy rates would provide no such guarantee.[288]

153. The Commission found that the record demonstrated that the amount of renewable resources being developed outside of PURPA greatly exceeds the amount of renewable resources developed as QFs. The Commission reasoned that the fact that renewable resources were able to develop outside of PURPA showed that they were able to obtain financing despite lacking the legal right to fixed energy rates.[289]

154. The Commission also disagreed with those commenters who asserted that the Commission should ''require[] the variable energy component to be structured in a way that removes market risk from the QF.'' [290] The Commission found that this argument is contrary to one of the fundamental premises of PURPA, which is that QFs must accept the market risk associated with their projects by being paid no more than the purchasing utility's avoided cost, thereby preventing utility retail customers from subsidizing QFs.[291] The Commission described concerns regarding the alleged mismatch between avoided costs and the costs of renewable technologies as collateral attacks on the requirements of PURPA itself, not our proposed implementation of it.

155. The Commission acknowledged those comments explaining that hedging tools increase project expense and may not be available to all QFs.[292] However, the Commission stated that it never intended to suggest that hedging is cost-free or that it would be appropriate for all QFs.

156. The Commission found that testimony that Public Interest Organizations cited from the Technical Conference, which indicated that Southern Company has negotiated non-QF renewable contracts with fixed energy rates rather than variable energy rates, did not support the contention that the Commission must provide for fixed avoided cost energy rates for QF contracts and other LEOs.[293]

157. In the NOPR comments, certain commenters expressed concern that, when a purchasing electric utility is not avoiding the construction or purchase of capacity as a consequence of entering into a contract with a QF, under the NOPR's proposed rules a state could limit the QF's contract rate to variable energy payments.[294] The Commission found that, in that event, the only costs being avoided by the purchasing electric utility would be the incremental costs of purchasing or producing energy at the time the energy is delivered.[295] The Commission stated that nothing in PURPA or the legislative history of PURPA suggests that the Commission should set QF rates so as to facilitate the financing of new QF capacity in locations where no new capacity is needed.

158. The Commission recognized that there is some evidence that variable avoided cost energy rates in contracts and LEOs could result in longer-term contracts.[296] The Commission did not find that the variable avoided cost energy rate provision in the final rule will necessarily lead to longer term contracts and LEOs in every state, nor did its decision to adopt this provision rely on such a finding.[297] However, the

[283] *See id.* P 338 (citing Solar Energy Industries Comments, Docket No. RM19–15–000, at 28 (Dec. 3, 2019); NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 29, 46 (Dec. 3, 2019); Harvard Electricity Law Comments, Docket No. RM19–15–000, at 22, 25–27 (Dec. 3, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 6–7, 33–35 (Dec. 3, 2019)).

[284] *Id.* P 339.

[285] *Id.* P 340.

[286] *Id.* P 341 (citing American Public Power Association, *How New Generation is Funded* (Aug. 29, 2018), *https://www.publicpower.org/blog/how-new-generation-funded* (''Beginning in 2015, merchant generation [in RTOs/ISOs markets] began to increase dramatically from prior years, amounting to 19.3 percent of new capacity in 2015, 7.2 percent in 2016, and 29.1 percent in 2017.''). The Commission noted that, in RTOs and ISOs with capacity markets, merchant generators are compensated through variable energy rates and fixed capacity rates, along with whatever ancillary service revenues they can earn. *Id.* P 341 n.550.

[287] *See id.* P 342 (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 26 (Dec. 3, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 33–34 (Dec. 3, 2019); Solar Energy Industries Comments, Docket No. RM19–15–000, at 30 (Dec. 3, 2019)).

[288] *See id.* (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 42–43 (Dec. 3, 2019)).

[289] *See id.* P 343.

[290] *Id.* P 344 (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 43 (Dec. 3, 2019)).

[291] *See id.* (citing Conf. Rep. at 97–98 (stating that the ''risk in proceeding forward in the [QF] enterprise is not guaranteed to be recoverable''); *API,* 461 U.S. at 416 (holding that QFs ''would retain an incentive to produce energy under the full-avoided-cost rule so long as their marginal costs did not exceed the full avoided cost of the purchasing utility'')).

[292] *Id.* P 345 (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 45–46 (Dec. 3, 2019); Resources for the Future Comments, Docket No. RM19–15–000, at 6–7 (Dec. 2, 2019); Solar Energy Industries Comments, Docket No. RM19–15–000, at 30 (Dec. 3, 2019)).

[293] *Id.* P 346 (citing Public Interest Organizations Comments, Docket No. RM19–15–000, at 33–34 (Dec. 3, 2019) (citing NOPR, 168 FERC ¶ 61,184 at P 70 n.114)).

[294] *Id.* P 347 (citing CARE Comments, Docket No. RM19–15–000, at 4 n.7 (Dec. 3, 2019); EPSA Comments, Docket No. RM19–15–000, at 12 (Dec. 3, 2019)).

[295] *Id.* (citing *City of Ketchikan,* 94 FERC ¶ 61,293, at 62,061 (2001) (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'')).

[296] *Id.* P 349 (citing NOPR, 168 FERC ¶ 61,184 at 5 n.5; Idaho Commission Comments, Docket No. RM19–15–000, at 4 (Dec. 3, 2019) (allowing states to set variable QF energy avoided costs ''would allow states to consider longer term contracts without putting ratepayers at risk'')).

[297] *Id.* The Commission did not find that variable avoided cost energy rates would be appropriate

Continued

Commission found that the record supports the conclusion that the variable avoided cost energy rate provision could lead to longer term contracts in at least some states and that likelihood provides support for the conclusion that QFs will be able to obtain financing for their projects under this provision if their costs are indeed below the purchasing utility's avoided costs.[298]

i. Requests for Rehearing

159. Public Interest Organizations argue that the Commission ignored evidence showing that allowing states to eliminate fixed energy rate contracts discourages QF development.[299] Public Interest Organizations assert that the Commission ignored evidence that fixed energy rates are important to QF development. Similarly, Public Interest Organizations claim that the Commission ignored evidence that (1) allowing states to adopt variable energy rate contracts will violate PURPA and (2) states allowing only variable energy rate QF contracts have experienced little or no renewable QF development and QF development fell in states that switched from fixed price contracts to variable price contracts.[300] For support, Public Interest Organizations point to the following: (1) Alabama offers standard contracts with only QF rates that vary based on month and time of day received and in 2018 Alabama's cumulative solar capacity was less than 300 MW; (2) Georgia Power's standard offer for solar QF contracts offered only a variable hourly avoided energy cost rate and there are about nine solar participants in this program with a total of less than 500 kW capacity; (3) Wisconsin utilities offer only short term variable pricing at LMP and no QFs have been developed in response, in contrast to neighboring states with fixed price contracts and substantial QF development; and (4) QF development related to fixed rate contracts in Idaho stopped after the Idaho Commission required variable energy rate contracts that reset every two years.[301]

160. Public Interest Organizations argue that large, non-QF development and nuclear plant power purchase agreements also rely on fixed price contracts. Public Interest Organizations maintain that, even if non-QFs relied on variable- instead of fixed-energy price contracts, the Commission has not shown that renewable projects that are QFs can be developed under similar contract terms. Public Interest Organizations represent that renewable QFs have only been developed where contracts provide long-term price certainty (*e.g.,* in Idaho, QF development ceased when states provide only variable energy pricing (even with fixed capacity rates), which is contrary to the Commission's unfounded assertion that QF development would increase with variable rates).[302]

161. Public Interest Organizations argue that the Commission relies on speculation that QFs could be developed without fixed energy rates and that the Commission lacks evidence to argue that long-term price certainty is not material to QFs' ability to obtain financing. Public Interest Organizations assert that the Commission's citation to testimony from Southern Company about a hypothetical bilateral contract with an independent natural gas power producer does not show how renewable generators that could qualify as QFs using different financing structures, using different fuels, and at much smaller capacities could be developed. Public Interest Organizations contend that the Commission could point to no renewable QF that could be developed without long-term energy price certainty. Public Interest Organizations similarly assert that the Commission misconstrued testimony from Solar Energy Industries in suggesting that a fixed energy price was unnecessary to encourage QF development.[303]

162. Public Interest Organizations argue that, contrary to the Commission's assertions, there is no evidence that bilateral energy transactions to hedge energy price risk as used in large gas plant transactions are sufficient without fixed energy rates for lenders to finance new wind and solar QF development. Public Interest Organizations claim that the Commission has no evidence that financial hedge products exist for QFs for a sufficient period of time and at a reasonable price to permit financing.[304] Public Interest Organizations assert that, because the Commission has provided no evidence that any QFs, renewable projects the size of QFs, or non-QF renewables were developed without fixed price energy contracts, the Commission's assertions that new generation was developed without PURPA's avoided cost provisions are irrelevant.[305]

163. Public Interest Organizations argue that the Commission ignored evidence showing the fixed capacity rates alone will not encourage renewable energy development.[306] Public Interest Organizations claim that the Commission ignored evidence showing that, in vertically integrated markets like the Southeast, several utilities have eliminated or dramatically lowered capacity payments to QFs and that QFs cannot use financing arrangements available to non-QFs, such as independent natural gas generators, to be viable. Public Interest Organizations assert that, because the capacity price for a QF may be zero, no QFs were effectively developed after Dominion Energy South Carolina's capacity rates were set at zero and QF development is minimal in Alabama due to Alabama Power's zero price capacity rates. Therefore, Public Interest Organizations maintain that the Commission has no evidence to support its contention that a fixed capacity rate should be sufficient to recover QF capacity costs and enable QF financing.[307]

164. Public Interest Organizations argue that renewable QFs have different financing needs than non-QF independent natural gas generators and that the Commission lacked evidence to support applying the variable energy/fixed capacity rate construct to QFs.[308] Specifically, Public Interest Organizations represent that ''wind and solar QFs have higher capital costs, lower operating costs, and provide energy intermittently—characteristics that may present different financing challenges as compared to non-QF natural gas fired capacity.'' [309] Public Interest Organizations state that even RTO/ISO capacity markets, which they note many QFs do not have access to, ''are implicitly biased in favor of resources with low capital costs, such as natural gas plants, and may be ''ill-suited to finance'' renewable resources with high-fixed costs and near-zero operating costs.'' [310]

only if they cause states to require longer term contracts, and the Commission did not adopt the suggestion made by certain commenters that the Commission order states to require longer contract terms. *See id.* P 349 n.566 (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 47–48 (Dec. 3, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 6–7 (Dec. 3, 2019); sPower Comments, Docket No. RM19–15–000, at 11 (Dec. 3, 2019)).

[298] *Id.* P 349.

[299] Public Interest Organizations Request for Rehearing at 9, 72.

[300] *Id.* at 73–74.

[301] *Id.* at 74–75.

[302] *Id.* at 75–76.

[303] *Id.* at 76–78.

[304] *Id.* at 78.

[305] *Id.* at 78–79.

[306] *Id.* at 9, 78–79.

[307] *Id.* at 79–82.

[308] *Id.* at 82–83.

[309] *Id.* at 83 (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 17–19 (Dec. 3, 2019)).

[310] *Id.* (citing Harvard Electricity Law Comments, Docket No. RM19–15–000, at 17–19 (Dec. 3, 2019)).

165. Solar Energy Industries contend that, while securing financing based on an as-available energy rate and a fixed capacity rate may be a rare possibility in a few locations across the country, there is no evidence in the record that financing is generally available in such circumstances.[311] Solar Energy Industries claim that, therefore, long-term contracts are necessary to finance new non-utility generation because capital providers will not finance a project without a reasonable expectation of the revenue the project expects to generate over its useful life.[312] Solar Energy Industries conclude that, if the purchasing electric utility does not offer the QF a forecasted energy rate over the life of a long-term contract and the QF is not otherwise able to compete for a long-term contract through a competitive bidding program, then the QF will not be able to obtain financing in the capital markets.[313]

166. Solar Energy Industries further argue that there is no credible evidence in the record that even merchant generation projects are financed on variable energy rate contracts.[314] Solar Energy Industries provide examples where such generators have sought longer-term contracts as a means to support capital market financing.[315] Solar Energy Industries further argue that merchant natural gas generators have relatively low capital costs and are thus able to rely on the fuel products markets to mitigate the risk of variable energy pricing, whereas fuel-less QFs do not have a similar ability, and thus bear the entire risk of volatile market prices.[316] Solar Energy Industries provide examples of industry studies that they claim have consistently shown that only very small portions of new capacity additions have been financed with variable energy rates.[317]

167. Solar Energy Industries also assert that the Commission acted arbitrarily and capriciously in failing to consider the fact that many states do not offer QFs a fixed price for capacity that is sufficient to support financing.[318] Solar Energy Industries argue that, when purchasing electric utilities do not provide for fixed capacity payments over the term of the QF contract, the Commission should not provide a state flexibility to terminate the QF's right to elect a long-term energy rate in a long-term contract.[319] Solar Energy Industries contend that it would be arbitrary and capricious, for example, to allow New Mexico the flexibility to terminate the QF's right to elect a long-term energy rate because Public Service Company of New Mexico (PNM) does not compensate QFs for capacity despite the fact that PNM has announced it is replacing all of the capacity from its San Juan Generating Station with renewables.[320]

168. Finally, Solar Energy Industries claim that the final rule's reliance on the prospects for QFs' ability to leverage the use of financial products (*i.e.,* a hedge) when offered a variable energy rate contract is without any factual basis, adding that, even when hedges are made available, many hedge providers decline to work with small projects because they are not cost effective and have higher risk profiles.[321]

169. Northwest Coalition argues that the Commission's assumption that QFs will be able to secure financing without fixed energy prices is not supported by sufficient evidence and ignores extensive evidence to the contrary. Northwest Coalition asserts that the Commission's conclusion that QFs can be financed using contracts with variable energy rates is without evidentiary support and arbitrarily ignores or misconstrues evidence from different sources demonstrating that exposing generation projects to unpredictable market risks makes financing QFs impossible. Northwest Coalition contends that, although the Commission relies on evidence that non-QF renewable energy projects have grown in recent years, it cites no underlying contract terms and ignores that these projects have largely been built on the strength of fixed price contracts. Northwest Coalition claims that the Commission takes evidence out of context and ignores real-world evidence that attempts to develop generation based on short-term prices have failed[322] and that short-term prices do not represent utility avoided costs for long-term energy.[323]

170. Northwest Coalition argues that the Commission relies on arbitrary reasoning to support the decision to reverse 40 years of precedent, holding that fixed-price contracts are necessary to encourage QFs and support financing of QFs, to authorize states to deprive QFs of fixed energy prices. Northwest Coalition asserts that the Commission failed to respond to legitimate objections raised by commenters opposing the proposal, ignores evidence that QFs require a substantial minimum term to support financing, and fails to establish any minimum contract term, despite well-established precedent requiring contract terms long enough to support financing and substantial evidence that states have undermined PURPA by imposing unreasonably short contract terms.[324]

171. Northwest Coalition claims that there is no guarantee that the long-term avoided capacity payment will be sufficient to support a QF's financing and permitting avoided cost energy payments to vary with volatile short-term market prices forces QFs to bear the risks of market volatility.[325]

ii. Commission Determination

172. We disagree with the arguments raised on rehearing. First, in enacting PURPA, Congress made clear that QFs' ''risk in proceeding forward in the cogeneration or small power production enterprise *is not guaranteed to be recoverable.*'' [326] The Commission determined, based on record evidence described in the final rule and below, that significant amounts of generation capacity, including renewable resource capacity, have obtained financing without a regulatorily-required fixed energy rate. But to the extent that a state determines that a variable energy rate is required to ensure that the QF's rate does not exceed avoided costs, then PURPA prevents the Commission from requiring that the state award the QF with a fixed energy rate to ensure that the QF obtains financing.

173. We also reiterate that the Final Rule did not eliminate fixed rates for QFs. The final rule gives states the flexibility, if they choose to take advantage of this flexibility, to require that the avoided cost energy rates in QF contracts vary depending on the purchasing utility's avoided energy costs at the time of delivery. However, in the final rule, the Commission did not alter QFs' right to require capacity rates to be fixed for the length of the QF's contract. Those capacity rates would still need to meet the standards of 18 CFR 292.304(e). Furthermore,

[311] Solar Energy Industries Request for Rehearing and/or Clarification at 9, 12.

[312] *Id.* at 9.

[313] *Id.* at 10.

[314] *Id.* at 12.

[315] *Id.* at 12–13.

[316] *Id.* at 14.

[317] *Id.* at 14–15 (citing *Power Plants are Not Built on Spec,* 2014 Update, American Public Power Association (Oct. 2014), *https://hepg.hks.harvard.edu/files/hepg/files/94_2014_power_plant_study.pdf?m=1523366757*).

[318] *Id.* at 16.

[319] *Id.*

[320] *Id.* at 16–17.

[321] *Id.* at 18.

[322] Northwest Coalition Request for Rehearing at 4–5.

[323] *Id.* at 5 (citing *Transmission Access Pol'y Grp.* v. *FERC,* 225 F.3d 667, 688 (D.C. Cir. 2000)).

[324] *Id.* (citing *PPL Wallingford Energy LLC* v. *FERC,* 419 F.3d 1194, 1198 (D.C. Cir. 2005) (*PPL Wallingford*); *Ne. Md. Waste Disposal Auth.* v. *EPA,* 358 F.3d 936, 949 (D.C. Cir. 2004)).

[325] *Id.* at 16–17.

[326] Conf. Rep. at 97–98 (emphasis added).

because those rates must continue to be set at a purchasing utility's full avoided costs, a particular QF's inability to be developed under that rate does not mean that rate violates PURPA.

174. Further, as stated in the final rule, the variable energy rate/fixed capacity rate construct is common among merchant generators for power sales agreements that include the sale of capacity, which demonstrates that other types of non-utility generation are able to raise useful financing under such an arrangement.[327] As Finadvice, a commenter with experience in project finance observed in its NOPR comments, given the mandatory purchase obligation,

> QFs utilizing a variety of standard hedging and risk management tools, provide sufficient comfort to facilitate the financing of variable priced PPAs. Having a fixed capacity rate, as proposed by the Commission will help attract capital and reduce the cost of financing in this regard, but is not a necessary prerequisite.[328]

175. Moreover, many QFs do share significant characteristics with other types of independent, non-utility generation; thus, it is reasonable to assume that they would be able to raise useful financing under such a financing arrangement.[329] It is not necessary to prove that all potential QFs would be able to raise useful financing under such an arrangement, particularly where a state has determined that mandating variable as-available QF energy rates is necessary to respect the statutory avoided cost cap on QF rates.[330]

176. While independent non-QFs are not subject to the same limits as QFs (*i.e.,* avoided cost caps, 80 MW limit), these resources have been developed, likely with financing, despite lacking the encouragement provided by PURPA (*i.e.,* mandatory purchase obligation, interconnection rights, exemption from state and federal regulations). While the Commission has indicated that hedging and other financial instruments can be helpful for QFs to obtain financing, the Commission did not suggest that all QFs need such instruments to obtain financing.[331]

177. We are not persuaded by Public Interest Organizations' argument that states' use of variable energy rates is a dispositive cause of a drop in QF development in particular states; it is possible that such a decrease in QF development was due to a variety of reasons, such as non-PURPA-related permitting, or PURPA-related reasons that preceded the final rule, such as the avoided capacity costs equaling zero, which has been permissible under Commission precedent.[332] While we do not in this proceeding invalidate any state actions taken thus far, the final rule and this order provide greater emphasis that QFs are entitled to a fixed capacity rate if the purchasing utility's avoided capacity costs exceed zero. If a QF believes that a state is not implementing these rules, then that QF may seek relief in the appropriate forum, which could include any one or more of the following: (1) Initiating or participating in proceedings before the relevant state commission or governing body; (2) filing for judicial review of any state regulatory proceeding in state court (under PURPA section 210(g)); or, alternatively, (3) filing a petition for enforcement against the state at the Commission and, if the Commission declines to act, later filing a petition against the state in U.S. district court (under PURPA section 210(h)(2)(B)).[333]

d. Requested Clarification of the Final Rule

178. If the Commission does not grant rehearing, Solar Energy Industries request that the Commission clarify that such ''flexibility'' offered by revised 18 CFR 292.304(d) is not available to any state unless the purchasing electric utility (1) has separately-stated avoided energy and capacity rates on-file and (2) is complying with the data reporting requirements of 18 CFR 292.302.[334]

i. Commission Determination

179. We grant Solar Energy Industries' request for clarification that a state may only use variable rates to set avoided energy costs if the utility has fulfilled its obligations to disclose avoided cost data under 18 CFR 292.302. We do not find the disclosure of such information unreasonable as the Commission's PURPA Regulations already require its disclosure.[335] In addition, although electric utilities are required to disclose this data generally, it is especially important when a state has selected the fixed capacity/variable energy rate construct to ensure that QFs have this data from the purchasing electric utility to provide transparency with regard to a utility's avoided costs, *i.e.,* to understand what a utility's cost are to generate itself or purchase from another source. Particularly in the context of a state selecting a variable energy rate that can change over the term of a QF contract, ensuring that QFs have access to such avoided cost data encourages QF development.[336]

180. We deny Solar Energy Industries' additional request that a utility must have separately-stated avoided energy and capacity rates on-file in order for a state to set variable energy rates in QF contracts. Solar Energy Industries has not shown how having such rates on file necessarily encourages the development of QFs and, as explained below, likely would be inconsistent with the authority that PURPA grants the states.[337] Under PURPA, states are permitted to determine avoided cost rates differently among themselves (*i.e.,* through adjudication, rulemaking, or legislation).[338] Requiring each utility to

[327] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 30–31, 35–41, 336–345.

[328] Finadvice Comments, Docket No. RM19–15–000, at 2 (Dec. 3, 2019); *see also* Ohio Commission Energy Advocate Comments, Docket No. RM19–15–000, at 3–4 (Dec. 3, 2019 (''[O]rganized wholesale markets such as PJM have successfully attracted new supplies and ensured resource adequacy through a combination of fixed capacity rates and variable energy rates such as the Commission is proposing here. Fixing both the energy and the capacity components of the QF power sales contract is not necessary to attract new resources or to appropriately compensate qualifying facilities.'').

[329] *See* Order No. 872, 172 FERC ¶ 61,041 at P 340.

[330] *Cf. Environmental Action,* 939 F.2d at 1064 (''[I]t is within the scope of the agency's expertise to make such a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.'').

[331] *See* Order No. 872, 172 FERC ¶ 61,041 at P 345 (footnote omitted) (''[T]he Commission never intended to suggest that hedging is cost-free or that it would be appropriate for all QFs. The commenters all agree that hedging is available for at least some QFs. For such QFs, hedging can help provide energy rate certainty if such certainty is required for financing. To the extent that certainty is required, then the cost of hedging is a part of the cost of financing the project that PURPA requires QFs to bear.'').

[332] Public Interest Organizations Request for Rehearing at 73–74.

[333] *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978,* 23 FERC ¶ 61,304.

[334] Solar Energy Industries Request for Rehearing and/or Clarification at 11.

[335] *See* 18 CFR 292.302.

[336] *See* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,868 (''[I]n order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility. This return will be determined in part by the price at which the qualifying facility can sell its electric output. Under 292.304 of these rules, the rate at which a utility must purchase that output is based on the utility's avoided costs, taking into account the factors set forth in paragraph (e) of that section. Section 292.302 of these rules is intended by the Commission to assist those needing data from which avoided costs can be derived.'').

[337] While we do not require this here, states may choose to require that rates are on file.

[338] *See FERC* v. *Miss.,* 456 U.S. at 751 (''[A] state commission may comply with the statutory requirements [of PURPA section 210] by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.'').

have a stated rate on file (beyond standard rates [339]) may interfere with states' rights to determine a rate and the flexibility provided in Order No. 872 to set such rates. However, as noted above, we are requiring the disclosure of the data that would allow QFs to review any rate that is set by a state, and the disclosure of such data should encourage the development of QFs.

5. Consideration of Competitive Solicitations To Determine Avoided Costs

181. In the NOPR, the Commission proposed to revise the PURPA Regulations in 18 CFR 292.304 to add subsection (b)(8). In combination with new subsection (e)(1), this subsection would permit a state the flexibility to set avoided cost energy and/or capacity rates using competitive solicitations (*i.e.,* requests for proposals or RFPs), conducted pursuant to appropriate procedures.[340]

182. The Commission recognized that one way to enable the industry to move toward more competitive QF pricing is to allow states to establish QF avoided cost rates through a competitive solicitation process. The Commission previously has explored this issue. In 1988, the Commission issued a notice of proposed rulemaking proposing to adopt regulations that would allow bidding procedures to be used in establishing rates for purchases from QFs.[341] That rulemaking proceeding, along with several related proceedings, ultimately was withdrawn as overtaken by events in the industry.[342]

183. Since then, in 2014, the Commission held, with respect to a particular competitive solicitation, that an electric utility's obligation to purchase power from a QF under a LEO could not be curtailed based on a failure of the QF to win an only occasionally-held competitive solicitation.[343] In a separate proceeding involving a different competitive solicitation, the Commission declined to initiate an enforcement action where the state competitive solicitation was an alternative to a PURPA program.[344]

184. Given this precedent, in the NOPR, the Commission proposed to amend its regulations to clarify that a state could establish QF avoided cost rates through an appropriate competitive solicitation process. Consistent with its general approach of giving states flexibility in the manner in which they determine avoided costs, the Commission did not propose in the NOPR to prescribe detailed criteria governing the use of competitive solicitations as tools to determine rates to be paid to QFs, as well as to determine other contract terms. The Commission stated that states arguably may be in the best position to consider their particular local circumstances, including questions of need, resulting economic impacts, amounts to be purchased through auctions, and related issues.[345]

185. Nevertheless, in considering what constitutes proper design and administration of a competitive solicitation, in the NOPR, the Commission found it was appropriate to establish certain minimum criteria governing the process by which competitive solicitations are to be conducted in order for a competitive solicitation to be used to set QF rates. In that regard, the Commission noted that it has addressed competitive solicitations in prior orders in a number of contexts that provide potential guidance to states and others. For example, the Commission's policy for the establishment of negotiated rates for merchant transmission projects,[346] the Bidding NOPR, and the *Hydrodynamics* case [347] all suggest factors that could be considered in establishing an appropriate competitive solicitation that is conducted in a transparent and non-discriminatory manner.[348]

186. As proposed in the NOPR, these factors included, among others: (a) An open and transparent process; (b) solicitations should be open to all sources to satisfy the purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; [349] (c) solicitations conducted at regular intervals; (d) oversight by an independent administrator; and (e) certification as fulfilling the above criteria by the state regulatory authority or nonregulated electric utility. The Commission proposed that a state may use a competitive solicitation to set avoided cost energy and capacity rates, provided that such competitive solicitation process is conducted pursuant to procedures ensuring the solicitation is transparent and non-discriminatory. The Commission proposed that such a competitive solicitation must be conducted in a process that includes, but is not limited to, the factors identified above which would be set forth in proposed subsection (b)(8).[350]

187. In addition, the Commission sought comment on whether it should provide further guidance on whether, and under what circumstances, a competitive solicitation can be used as a utility's exclusive vehicle for acquiring QF capacity.[351]

188. In the final rule, the Commission adopted the NOPR proposal to revise the PURPA Regulations to explicitly permit a state the flexibility to set avoided energy and/or capacity rates using competitive solicitations (*i.e.,* RFPs) conducted pursuant to appropriate procedures in a transparent and non-discriminatory manner. The Commission stated that the primary

[339] *See* 18 CFR 292.304(c).

[340] NOPR, 168 FERC ¶ 61,184 at P 82.

[341] *Regulations Governing Bidding Programs,* 53 FR 9324 (Mar.22, 1988), FERC Stats. & Regs. ¶ 32,455 (1988) (cross-referenced at 42 FERC ¶ 61,323) (*Bidding NOPR*); *see also Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities,* 53 FR 9331 (Mar.22, 1988), FERC Stats. & Regs. ¶ 32,457 (1988) (cross-referenced at 42 FERC ¶ 61,324) (*ADFAC NOPR*).

[342] *See Regulations Governing Bidding Programs,* 64 FERC ¶ 61,364 at 63,491–92 (1993) (terminating *Bidding NOPR* proceeding); *see also Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities,* 84 FERC ¶ 61,265 (1998) (terminating *ADFAC NOPR* proceeding).

[343] *See, e.g., Hydrodynamics, Inc.,* 146 FERC ¶ 61,193, at PP 31–35 (2014) (*Hydrodynamics*). Competitive solicitation processes have been used more recently in a number of states, including Georgia, North Carolina, and Colorado. Georgia's competitive solicitation process is described at Ga. Comp. R. & Regs. 515–3–4.04(3) (2018). North Carolina's competitive solicitation process is described at 4 N.C. Admin. Code 11.R8–71 (2018). Colorado's competitive solicitation process is described at *sPower Development Co., LLC* v. *Colorado Pub. Utils. Comm'n,* 2018 WL 1014142 (D. Colo. Feb. 22, 2018).

[344] *Winding Creek Solar LLC,* 151 FERC ¶ 61,103, *reconsideration denied,* 153 FERC ¶ 61,027 (2015). *But see Winding Creek Solar LLC* v. *Peterman,* 932 F.3d 861 (9th Cir. 2019).

[345] NOPR, 168 FERC ¶ 61,184 at P 86.

[346] *Id.* P 87 (citing *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects,* 142 FERC ¶ 61,038 (2013)).

[347] *Id.* (citing *Hydrodynamics,* 146 FERC ¶ 61,193 at P 32 n.70 (citing *Bidding NOPR,* FERC Stats. & Regs. ¶ 32,455 at 32,030–42)). The Commission noted that, while QFs not awarded a contract pursuant to an competitive solicitation would retain their existing PURPA right to sell energy as available to the electric utility, if the state has concluded that such QF capacity puts tendered after an competitive solicitation was held are ''not needed,'' the capacity rate may be zero because an electric utility is not required to pay a capacity rate for such puts if they are not needed. *Id.* P 87 n.135 (citing *Hydrodynamics,* 146 FERC ¶ 61,193 at P 35 (referencing *City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'')).

[348] *Id.*

[349] *Id.* (citing 18 CFR 292.304(e); *Windham Solar,* 157 FERC ¶ 61,134 at PP 5–6).

[350] *Id.*

[351] *Id.* P 88. The Commission proposed that, even if a competitive solicitation were used as an exclusive vehicle for an electric utility to obtain QF capacity, QFs that do not receive an award in the competitive solicitation would be entitled to sell energy to the electric utility at an as-available avoided cost energy rate. *Id.* P 88 n.137.

feature of a transparent and non-discriminatory competitive solicitation is that a utility's capacity needs are open for bidding to all capacity providers, including QF and non-QF resources, on a level playing field. The Commission found that this level playing field ensures that any QF's capacity rates that result from the competitive solicitation are just and reasonable and non-discriminatory avoided cost rates.[352]

189. Consistent with its general approach of giving states flexibility in the manner in which they determine avoided costs, the Commission did not prescribe detailed criteria governing the use of competitive solicitations as tools to determine rates to be paid to QFs and to determine other contract terms. The Commission found that states are in arguably the best position to consider their particular local circumstances, including questions of need, resulting economic impacts, amounts to be purchased through auctions, and related issues.[353]

190. However, as in the NOPR, the Commission in the final rule found it appropriate to establish certain minimum criteria governing the process by which competitive solicitations are to be conducted in order for a competitive solicitation to be used to set QF rates. The Commission found that, in order to use the results of a competitive solicitation to set avoided cost rates, the competitive solicitation must be conducted in a transparent and non-discriminatory manner. Such a competitive solicitation must be conducted in a process that includes, but is not limited to, the following factors: (i) The solicitation process is an open and transparent process that includes, but is not limited to, providing equally to all potential bidders substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality safeguards; (ii) solicitations must be open to all sources, to satisfy that purchasing electric utility's capacity needs, taking into account the required operating characteristics of the needed capacity; (iii) solicitations are conducted at regular intervals; (iv) solicitations are subject to oversight by an independent administrator; and (v) solicitations are certified as fulfilling the above criteria by the relevant state regulatory authority or nonregulated electric utility through a post-solicitation report.[354]

191. The Commission affirmed that such competitive solicitations must be conducted in a process that includes, but is not limited to, the factors identified above that will be set forth in 18 CFR 292.304(b)(8). The Commission explained that the final rule does not undo any competitive solicitations conducted prior to the effective date of the final rule that may not have met these criteria. The Commission described the final rule as applying only to competitive solicitations conducted after the effective date of the final rule.[355] The Commission also stated that it will presume that any future competitive solicitation that does not comply with the factors adopted in the final rule does not comply with the Commission's regulations implementing PURPA.[356]

192. The Commission explained that, more generally, it supports the use of competitive solicitations as a means to foster competition in the procurement of generation and to encourage the development of QFs in a way that most accurately reflects a purchasing utility's avoided costs. The Commission further explained that allowing QFs to compete to provide capacity and energy needs, through a properly administered competitive solicitation, may help ensure an accurate determination of the purchasing electric utility's avoided cost and therefore result in prices meeting the PURPA's statutory requirements. The Commission found that it is reasonable for states to choose to require QFs to be responsive to price signals as to where and when capacity is needed. The Commission expressed its belief that a properly administered competitive solicitation can help provide such price signals.[357]

193. The Commission also clarified that, if a utility acquires all of its capacity through properly conducted competitive solicitations (using the factors described above) and does not add capacity through self-building and purchasing power from other sources outside of such solicitations, the competitive solicitations could be the exclusive vehicle for the purchasing electric utility to pay avoided capacity costs from a QF. In this situation, using properly conducted competitive solicitations as the exclusive vehicle to determine the purchasing electric utility's avoided cost capacity rates would allow QFs a chance to compete to provide the utility's capacity needs on a level playing field with the utility. The Commission clarified that it is up to the states to determine whether to require that a utility's total planned self-build and power purchase options must compete in the competitive solicitations and declined to direct such a requirement.[358]

194. The Commission determined that, if a state decides to require utility self-build and power purchase options to participate in competitive solicitations, then a QF that does not obtain an award in a competitive solicitation would have no right to an avoided cost capacity rate more than zero because the utility's full capacity needs would have been met by the competitive solicitation.[359] However, the Commission determined that QFs would continue to have the right to put energy to the utility at the as-available avoided cost energy rate because the purchasing utility will still be able to avoid incurring the cost of generating energy even when it does not need new capacity.[360]

195. The Commission also determined that, if the state does not require utility self-build and purchase options to participate in competitive solicitations, then QFs that lose in a competitive solicitation still may have the right to avoided cost capacity rates more than zero if the state determines that the utility still has capacity needs after the competitive solicitation that otherwise could be met through the utility's self-build or purchase options.[361]

196. The Commission affirmed that, when capacity is not needed, the avoided capacity cost rate can be zero.[362] The Commission described how competitive solicitations conducted pursuant to the rules adopted in the final rule that are held whenever capacity is needed provide QFs a level playing field on which to compete to sell capacity. The Commission explained that this approach further shields purchasing electric utilities from situations like those explained by Xcel, where QFs could simply sit out the competitive solicitation process (or participate but not have their bids accepted), but then seek to sell capacity

[352] Order No. 872, 172 FERC ¶ 61,041 at P 411.

[353] *Id.* P 412.

[354] *Id.* P 427.

[355] *Id.* P 414.

[356] *Id.* P 428.

[357] *Id.* P 416.

[358] *Id.* P 421.

[359] The Commission stated that this would be consistent with *City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

[360] Order No. 872, 172 FERC ¶ 61,041 at P 422.

[361] *Id.* P 423.

[362] *City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'').

to the purchasing electric utility and to receive a separate higher administratively-determined avoided cost rate including an avoided cost capacity rate, and even potentially displace non-QF competitive solicitation winners.[363] The Commission found that this approach benefits ratepayers because allowing QFs to compete in properly conducted, competitive solicitations that are held whenever capacity is needed allows the purchasing utility to obtain needed capacity efficiently. The Commission clarified, however, that the competitive solicitation is not to be a means to determine a QF's right to put as-available energy to the utility. Rather, the competitive solicitation can be the means to determine what, if any, rate the QF will be paid for capacity.[364]

197. The Commission clarified that competitive solicitations must also be conducted in accordance with the *Allegheny* principles under which the Commission evaluates a competitive solicitation: (1) Transparency, a requirement that the solicitation process be open and fair; (2) definition, a requirement that the product, or products, sought through the competitive solicitation be precisely defined; (3) evaluation, a requirement that the evaluation criteria be standardized and applied equally to all bids and bidders; and (4) oversight, a requirement that an independent third party design the solicitation, administer bidding, and evaluate bids prior to selection.[365]

198. The Commission also revised the proposed language in 18 CFR 292.304(d)(8)(i) to clarify that participants must be provided with substantial and meaningful information regarding transmission constraints, levels of congestion, and interconnections, subject to appropriate confidentiality safeguards. The Commission found that it is important that all participants in the competitive solicitation have access to these data as a necessary predicate for a nondiscriminatory competitive solicitation process and that requiring that this information be provided will help ensure that a competitive solicitation is open and transparent.[366]

199. The Commission also clarified that the requirement that the competitive solicitation process be open and transparent includes that the electric utility provide the state commission, and make available for public inspection, a post-solicitation report that: (1) Identifies the winning bidders; (2) includes a copy of any reports issued by the independent evaluator; and (3) demonstrates that the solicitation program was implemented without undue preference for the interests of the purchasing utility or its affiliates. The Commission found this post-solicitation report requirement to be consistent with the requirement that competitive solicitations be open and transparent, not only to ensure that utilities are not discriminating against QFs, but also to help all stakeholders and the public at large better understand the utility's competitive solicitation processes and thus to be confident in the fairness of the process and of the results.[367]

200. The Commission declined to be overly prescriptive as to what constitutes an ''independent administrator,'' responsible for administering the competitive solicitation. The Commission clarified that the independent administrator must be an entity independent from the purchasing electric utility in order to help ensure fairness. Whether called an independent administrator or a third-party consultant, the Commission stated that the substantive requirement is that the competitive solicitation not be administered by the purchasing electric utility itself or its affiliates, but by a separate, unbiased, and unaffiliated entity not subject to being influenced by the purchasing utility.[368]

201. The Commission declined to add any additional requirements for competitive solicitations, given that states may be in the best position to consider their particular local circumstances. The Commission found that the guidelines adopted in the final rule, in conjunction with the *Allegheny* principles and other clarifications, provide an adequate framework for competitive solicitations to be conducted efficiently, transparently and in a nondiscriminatory manner.[369]

202. Regarding facilities not designed primarily to sell electricity to the purchasing electric utility, such as waste-to-power small power production facilities and cogeneration facilities, the Commission found that an exemption from competitive solicitation processes is unnecessary. The Commission did not exempt small power production facilities from the competitive solicitation process and was not persuaded that such an exemption is appropriate given that exempting large classes of small power producers could frustrate the price discovery function of the competitive solicitation. The Commission clarified, however, that QFs with capacity of 100 kW or less already are entitled to standard rates regardless of whether they compete in a competitive solicitation, and the final rule did not change that regulation.[370]

i. Requests for Rehearing

203. Northwest Coalition argues that allowing states to use competitive solicitations to be the exclusive means of securing a long-term PPA to sell energy and/or capacity is arbitrary, capricious, and not in accordance with law.[371]

204. Northwest Coalition notes that PURPA section 210(a) requires that the Commission's rules must ''encourage'' QFs and must ''require electric utilities to offer to . . . purchase electric energy from such facilities.'' [372] Northwest Coalition argues that, while the term ''electric energy'' is not defined in the statute, the phrase's context within the statutory scheme unambiguously confirms that electric energy includes both energy and capacity, meaning that the Commission's rules must require utilities to purchase energy and capacity made available by QFs.[373] Northwest Coalition asserts that, following the enactment of PURPA, the Commission interpreted this language in Order No. 69 to mean that the statutory phrase ''electric energy'' must include both energy and capacity.[374] Northwest Coalition contends that the final rule does not provide any basis to change the Commission's longstanding interpretation of PURPA section 210(a) that requires electric utilities to purchase all energy and capacity made available by QFs.[375]

205. Northwest Coalition relies on the U.S. Court of Appeals for the Ninth Circuit's invalidation of the California Commission's Re-Mat competitive solicitation program, which found that under the Re-Mat program, ''a utility could purchase less energy than a QF makes available, an outcome forbidden by PURPA.'' [376] Northwest Coalition argues that, because the same problem exists with the final rule's exclusive use of competitive solicitations to offer to buy capacity from QFs, allowing states

[363] *See* Xcel Comments, Docket No. RM19–15–000, at 2–3, 9–10 (Dec. 3, 2019).

[364] Order No. 872, 172 FERC ¶ 61,041 at P 424.

[365] *Allegheny Energy,* 108 FERC ¶ 61,082 at P 18.

[366] Order No. 872, 172 FERC ¶ 61,041 at P 431.

[367] *Id.* P 432.

[368] *Id.* P 435.

[369] *Id.* P 437.

[370] *See* 18 CFR 292.304(c).

[371] Northwest Coalition Request for Rehearing at 39.

[372] *Id.* at 40 (citing 16 U.S.C. 824a–3(a)(2)).

[373] *Id.*

[374] *Id.* at 40–41.

[375] *Id.* at 41.

[376] *Id.* at 41–42 (citing *Winding Creek Solar LLC* v. *Peterman,* 932 F.3d at 865).

to refuse to require electric utilities to offer to purchase capacity from QFs violates the statutory requirement that utilities offer to purchase all capacity made available from QFs.[377]

206. Northwest Coalition asserts that PURPA section 210(a) requires that the Commission design its rules implementing the statutory must-purchase obligation in such a manner that those rules will *encourage* the development of QFs, adding that allowing utilities to evade the mandatory purchase obligation through the exclusive use of competitive solicitations that utility-owned resources commonly win is inconsistent with statutory requirements.[378]

207. Northwest Coalition contends that the final rule arbitrarily fails to acknowledge the Commission's own precedent and therefore does not constitute reasoned decision making.[379] Northwest Coalition points to *Hydrodynamics,* in which the Commission rejected the ''Montana Rule,'' which imposed a ''competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates.'' [380] Northwest Coalition also points to *Windham Solar LLC,* in which the Commission confirmed that it has held ''a state regulation *to be inconsistent with PURPA* and the PURPA regulations 'to the extent that it offers the competitive solicitation process as the only means by which a QF . . . can obtain long term avoided cost rates.' '' [381] Northwest Coalition argues that, under Commission precedent, ''regardless of whether a QF has participated in a request for proposal, that QF has the right to obtain a legally enforceable obligation.'' [382] Northwest Coalition claims that the final rule's reasoning for allowing states to use competitive solicitations as a substitute for long-term PURPA contracts does not acknowledge these precedents or explain how the use of competitive solicitations could still comply with the statute.[383] Northwest Coalition argues that, aside from generally averring it expects competitive solicitations will be fair with the newly adopted criteria, the final rule does not cite evidence suggesting that competitive solicitations will provide an adequate mechanism for QFs to sell energy and capacity or any other basis to overrule Commission precedent and therefore is arbitrary and capricious.[384]

208. Northwest Coalition asserts that the final rule relies on insufficient evidence to conclude that exclusive use of competitive solicitations will encourage QFs.[385] First, Northwest Coalition contends that the Commission's decision fails to address multiple commenters' concerns with inherent bias in utility-run competitive solicitations and the difficulty and complexity of designing competitive solicitations that are fair to independent bidders, especially in regions with vertically integrated utility structures like the Pacific Northwest.[386] Northwest Coalition argues that, given the evidence submitted concerning competitive solicitations in the Northwest, the Commission is required to conduct a more meaningful investigation and inquiry into the subject before it could rationally conclude that it has now developed bidding criteria that would suffice to justify denial of an LEO to any QF.[387]

209. Northwest Coalition claims that the Commission fails to explain why it rejected more restrictive criteria proposed by parties but not included in the final rule. As an example, Northwest Coalition points to the Commission's failure to discuss in the final rule its additional proposed criteria for any RFP process to overcome inherent utility-ownership bias: (1) Require that the RFP include no utility-ownership options; or (2) if utility-owned generation may result, the RFP must be (i) administered and scored (not just overseen by an independent evaluator) by a qualified independent party, not the utility, (ii) any utility or affiliate ownership bid must be capped at its bid price and not allowed traditional cost plus ratemaking treatment, and (iii) the product sought, minimum bidding criteria, and detailed scoring criteria must be made known to all parties at the same time, *i.e.,* the utility or affiliate may not have an informational advantage in the RFP. Northwest Coalition asserts that, while the final rule adopted a requirement for independent third-party design and administration of the RFP, it rejected the rest of its proposals without discussion.[388]

210. Northwest Coalition contends that the final rule also ignores the lack of reasonable enforcement for the proposed exclusive use of competitive solicitations.[389] Northwest Coalition argues that the final rule established a process that only allows QF advocates to challenge competitive solicitations after the fact, when it is too late to correct the harm caused by the utility's reliance on the competitive solicitation process as a basis to refuse to contract with QFs in the interim.[390]

211. Northwest Coalition asserts that the final rule relies on insufficient evidence that small QFs and those primarily engaged in a business other than power production (*e.g.,* irrigation districts and waste-to-power facilities) can succeed in the type of all-source competitive solicitation identified in the final rule.[391] Northwest Coalition contends that the final rule summarily declines to adopt any exceptions other than a statement that 100 kW and smaller QFs can still obtain standard rates [392] without a meaningful explanation, which fails to encourage such QFs, in contravention of PURPA.[393]

212. Mr. Mattson asserts that a QF should not have to compete in a competitive solicitation with coal and natural gas generators where the utility is selling their excess energy.[394] Mr. Mattson alleges that requiring a QF to accept the competitive solicitation process to sell its capacity is a violation of the ''constitutional law right to contract.'' [395] Mr. Mattson argues that QFs should have the right to a capacity payment if a capacity reduction will occur and the right to sell their capacity in the market.[396]

213. Public Interest Organizations contend that the competitive solicitation provisions are arbitrary and capricious, unless the Commission clarifies that the solicitation only sets the full avoided energy costs for QFs when the utility procures all energy through solicitation.[397] Public Interest Organizations claim that the final rule does not require a state or non-regulated utility which uses a competitive solicitation process to determine the price for QF energy and/or capacity rates to also determine that the price

[377] *Id.* at 42.

[378] *Id.*

[379] *Id.*

[380] *Id.* at 43 (citing *Hydrodynamics,* 146 FERC ¶ 61,193 at P 33).

[381] *Id.* (citing *Windham Solar,* 156 FERC ¶ 61,042, at P 5 (2016) (*Windham Solar*)).

[382] *Id.* (citing *Windham Solar,* 156 FERC ¶ 61,042 at P 5).

[383] *Id.* at 43–44.

[384] *Id.* at 44.

[385] *Id.*

[386] *Id.* (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 13–25, 66–67 (Dec. 3, 2019)).

[387] *Id.* at 44–45.

[388] *Id.* at 45.

[389] *Id.* at 46.

[390] *Id.*

[391] *Id.*

[392] *Id.* (citing Order No. 872, 172 FERC ¶ 61,041 at P 440).

[393] *Id.* at 46–47.

[394] Mr. Mattson Motion for Time, Reconsideration, and Request Answers at 1.

[395] *Id.* at 1.

[396] *Id.* at 1.

[397] Public Interest Organizations Rehearing Request at 10.

reflects the utility's avoided cost.[398] Public Interest Organizations assert that 18 CFR 292.304(b)(8) not only requires that a utility procure all capacity through competitive solicitations to satisfy its capacity requirement but also assumes that such competitive solicitation results reflect the full avoided energy cost without similarly requiring the purchasing electric utility to acquire all energy requirements through competitive solicitation.[399] Public Interest Organizations allege that QFs are discriminated against in circumstances in which the competitive solicitation price is lower than the cost of energy produced or acquired by the utility outside the solicitation process.[400] Public Interest Organizations argue that, while the final rule appears to agree that out-of-market acquisitions preclude competitive solicitation from setting the avoided cost price, the regulation only imposes limitations on the use of competitive solicitations in the capacity context.[401]

ii. Commission Determination

214. We find no merit in the competitive solicitation arguments on rehearing. As an initial matter, we emphasize that the competitive solicitation framework adopted in the final rule: (1) Harmonizes the Commission's precedent on competitive solicitations; (2) establishes transparent and non-discriminatory procedural protections for and encourages the development of QFs; and (3) provides price discovery that may better determine a purchasing utility's avoided cost rates.

215. We disagree with Northwest Coalition's arguments that the final rule goes against Commission precedent in *Hydrodynamics* and *Windham Solar* and essentially eliminates the mandatory purchase obligation for QF capacity. In those cases, the Commission found the states' decisions inconsistent with PURPA because the competitive solicitations were not regularly held.[402] In contrast, the Commission in the final rule found that a properly run solicitation must be held at regular intervals, in which a utility's capacity needs are open for bidding to all capacity providers, including QF and non-QF resources, which is a level playing field for QFs to provide capacity.

216. If a state does not require utility self-build and purchase options to participate in competitive solicitations, then QFs that lose still may have the right to avoided cost capacity rates more than zero if the state determines that the utility still has capacity needs.[403] The Commission has already determined, and affirmed in the final rule, that capacity rates can be zero.[404] The possibility of a zero capacity rate does not mean that the Commission has determined that utilities have no obligation to purchase capacity from QFs. It just means that, under our precedent, if a purchasing utility avoids no capacity costs due to the QF purchase, then the avoided cost for capacity will be zero. As we mentioned above, Northwest Coalition has conflated avoided energy costs with long-term power purchase agreements. Long-term avoided costs necessarily represent a utility's avoided capacity costs, and the Commission described how competitive solicitations could be ''exclusive'' means for obtaining a capacity rate, not an energy rate.

217. Under the final rule, even if a QF loses a competitive solicitation where the state requires utility self-build and purchase options to participate, it is still entitled to an energy rate outside of the competitive solicitation and would receive a capacity rate of zero, which is already permitted under Commission precedent where the purchasing utility's avoided cost capacity value is zero.[405] The final rule, which largely adopted the NOPR, also provides procedural protections that the Commission has already indicated are prerequisites to competitive solicitations while allowing for a competitive solicitation, under certain conditions, to be a state's exclusive vehicle for setting QF capacity rates.[406] The final rule therefore merely harmonizes, rather than overrules, that prior precedent.

218. We also disagree with Northwest Coalition's argument that the final rule does not encourage QFs. Using competitive solicitations encourages the development of QFs by providing them a price both consistent with a competitive market and more accurately reflecting a purchasing utility's avoided costs of capacity. The procedural protections the Commission has adopted for conducting competitive solicitations protect QFs from auctions that only benefit the utility's self-build because the QF is still entitled to a capacity rate that may exceed zero if the utility's self-build is not included in the competitive solicitation. Furthermore, the competitive solicitation regulation helps ensure that states can set QF rates no higher than avoided costs while guaranteeing QFs' rights to sell capacity and energy.[407] In addition, while a competitive solicitation may be the exclusive forum for establishing avoided cost capacity rates, once a state has determined that the competitive solicitation set avoided capacity costs (even if they equal zero), there is no infringement on QFs' rights, and the rule does not allow a utility to evade its purchase obligation.

219. We also disagree with Northwest Coalition's argument that the Commission fails to address multiple commenters' concerns about inherent bias in utility-run competitive solicitations, especially in regions with vertically integrated utility structures like the Pacific Northwest. The final rule described practices that cannot be used and incorporated into the Commission's regulations a requirement for independent administration and review to prevent the exercise of any utility bias. The Commission will not assume that failure to hold an acceptable competitive solicitation in the past will prevent the establishment of an acceptable solicitation in the future given the guard rails for independent administration and review the Commission has now required through the final rule. Indeed, the new rules are designed to ensure that future

[398] *Id.* at 100.

[399] *Id.*

[400] *Id.*

[401] *Id.* at 101.

[402] In *Hydrodynamics,* which the Commission quoted in *Windham Solar,* the Commission found relevant the fact that the Montana Commission's competitive solicitation were not held at regular intervals. *See Hydrodynamics,* 146 FERC ¶ 61,193 at P 32 (emphasis added) (''[W]e find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly *where, as here, such competitive solicitations are not regularly held.*''); *id.* P 33 (emphasis added) (''The Montana Rule creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation *where no competitive solicitation is held.*''); *Windham Solar,* 156 FERC ¶ 61,042 at P 5 (citing *Hydrodynamics,* 146 FERC ¶ 61,193 at PP 32–33).

[403] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 421–23.

[404] *See City of Ketchikan,* 94 FERC at 62,061.

[405] *See supra* PP 194–196; *see also* Order No. 872, 172 FERC ¶ 61,041 at P 421 (''The Commission clarifies that, if a utility acquires all of its capacity through properly conducted competitive solicitations (using the factors described above), and does not add capacity through self-building and purchasing power from other sources outside of such solicitations, the competitive solicitations could be the exclusive vehicle for the purchasing electric utility to pay avoided capacity costs from a QF. In this situation, using properly conducted competitive solicitations as the exclusive vehicle to determine the purchasing electric utility's avoided cost capacity rates would allow QFs a chance to compete to provide the utility's capacity needs on a level playing field with the utility.'').

[406] *See* Order No. 872, 172 FERC ¶ 61,041 at P 363 (describing NOPR as citing *Hydrodynamics,* 146 FERC ¶ 61,193 at PP 31–35).

[407] *See id.* P 416.

competitive solicitations are not biased in favor of the purchasing utility. Northwest Coalition's concerns that this new competitive solicitation framework will leave QFs without a contract while they challenge the process or results of a competitive solicitation is misplaced. This framework is not meaningfully different from administrative determinations of avoided costs, wherein a QF might not receive a contract until it has exhausted administrative or judicial processes.

220. Northwest Coalition argues that the Commission failed to explain why it rejected more restrictive criteria proposed by parties, including some of Northwest Coalition's own suggestions. The Commission weighed and considered all proposed criteria in determining which criteria to adopt. We explain below why the Commission did not adopt Northwest Coalition's proposed criteria.

221. First, Northwest Coalition proposed that the Commission require that the competitive solicitation include no utility-ownership options. The Commission did not adopt this criterion because precluding utility ownership from competitive solicitations or limiting how a utility could bid does not provide the price discovery benefit of competitive solicitations.

222. Second, Northwest Coalition proposed that, if utility-owned generation may result from the competitive solicitation, the competitive solicitation must be (1) administered and scored (not just overseen by an independent evaluator) by a qualified independent party, not the utility, (2) any utility or affiliate ownership bid must be capped at its bid price and not allowed traditional cost plus ratemaking treatment, and (3) the product sought, minimum bidding criteria, and detailed scoring criteria must be made known to all parties at the same time (*i.e.,* the utility or affiliate may not have an informational advantage in the RFP).[408]

223. With regard to Northwest Coalition's proposed criterion for an independent administrator, as noted above, the Commission ''decline[d] to be overly prescriptive as to what constitutes an 'independent administrator.' '' [409] Although this finding in the final rule had to do with whether the Commission required an ''independent administrator'' or a ''third party consultant,'' the Commission stated that the ''substantive requirement of this factor is that the competitive solicitation not be administered by the purchasing electric utility itself or its affiliates, but rather by a separate, unbiased, and unaffiliated entity not subject to being influenced by the purchasing utility.'' [410] We continue to believe that we should not be overly prescriptive, but expect states to design competitive solicitations that meet these criteria in a transparent and non-discriminatory manner. To that end, we grant Northwest Coalition's request that a competitive solicitation should be administered and scored by an independent entity. We conclude that this requirement is consistent with our efforts to ensure a fair competitive solicitation and the criteria we established in the final rule pursuant to the *Allegheny* factors.[411]

224. Regarding Northwest Coalition's proposal that any utility or affiliate ownership bid must be capped at its bid price and not allowed traditional cost-plus ratemaking treatment, we decline to adopt this criterion on rehearing. The Commission does not have any jurisdiction to dictate how electric utility retail rates should be set. Instead, it is the responsibility of retail regulators to establish the retail rates associated with an award to a utility resulting from a competitive solicitation. And to the extent that Northwest Coalition is arguing that QFs are entitled to cost plus ratemaking, Congress has already determined that QFs are not entitled to the same rate recovery as purchasing utilities. With regard to Northwest Coalition's proposal that the product sought, minimum bidding criteria, and detailed scoring criteria must be made known to all parties at the same time, we find that these requests should already be addressed in the factors adopted by the Commission here, including the first factor, that the process be open and transparent, and the fifth factor, which includes the requirement of a post-solicitation report.[412] We note that our inclusion of the *Allegheny* principles also addresses the concerns underlying this proposal.

225. We disagree with Northwest Coalition's argument that the final rule ignores the lack of reasonable enforcement. If a QF believes that it was improperly excluded from a competitive solicitation or lost a competitive solicitation that did not meet the criteria in the final rule, the QF may bring an enforcement action to the Commission or other appropriate fora. Further, the final rule more clearly establishes how states must run their auctions, and we do not presume at this juncture that states will fail to follow these new rules. If the Commission or a court finds that a competitive solicitation violates these criteria, then a remedy may be warranted, for example a court may decide to require a state to provide a specific rate to a QF or re-run the competitive solicitation pursuant to those criteria.

226. We also disagree with Northwest Coalition's argument that the final rule relies on insufficient evidence that small QFs and those primarily engaged in a business other than power production (*e.g.,* irrigation districts and waste-to-power facilities) can succeed in the type of all-source competitive solicitation identified in the rule. We find that it may be difficult to define which entities could qualify for this exemption and that this exemption may defeat the price discovery benefits of including these entities in competitive solicitations. We believe that a fairly administered competitive solicitation is a more accurate reflection of a purchasing electric utility's avoided energy and capacity costs. Moreover, in addition to the requirement to provide standard rates for QFs 100 kW and below, states already have discretion to set that standard rate threshold above 100 kW. Removing their discretion to determine which entities must participate in competitive solicitations may undermine the price discovery benefit of competitive solicitations.

227. We disagree with Public Interest Organizations' claim that the final rule does not address its argument that Nevada's competitive solicitation process is unfair because it limits to QFs to meet a small, segregated portion of the utility's energy and unmet capacity requirements. The final rule does not apply to competitive solicitations, like the one in Nevada, that occurred prior to the effective date of the final rule. For that reason, the Commission did not address Public Interest Organizations' concerns with the Nevada process in the final rule, nor will we do so here.[413]

[408] Northwest Coalition Request for Rehearing at 45 (citing NIPPC, CREA, REC, OSEIA Comments, Docket No. RM19–15–000 at 67 (Dec. 3, 2019)).

[409] Order No. 872, 172 FERC ¶ 61,041 at P 435.

[410] *Id.*

[411] *See Allegheny Energy,* 108 FERC ¶ 61,082 at P 22 (''[A]n independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.'').

[412] *See* Order No. 872, 172 FERC ¶ 61,041 at P 432 (stating that a report must ''(1) [identify] the winning bidders; (2) [include] a copy of any reports issued by the independent evaluator; and (3) [demonstrate] that the solicitation program was implemented without undue preference for the interests of the purchasing utility or its affiliates'').

[413] *See id.* P 428 (''Without judging the competitive solicitations conducted to date, we find that henceforth any competitive solicitation that does not comply with these factors will be viewed as not transparent and discriminatory, and not a basis for either setting the avoided cost capacity rate that a QF may charge the purchasing electric utility or limiting which generators can receive a capacity

Any future competitive solicitation must meet the criteria outlined in the final rule, including the *Allegheny* principles.[414] We clarify that, if a competitive solicitation is not conducted in accordance with the requirements of the final rule guidelines, then an aggrieved entity may challenge the competitive solicitation before the Commission or in the appropriate fora.

228. A state must still ensure that QFs are entitled to an as-available energy avoided cost rate regardless of whether they win a competitive solicitation for capacity.[415] Such as-available avoided cost energy rates could be determined as a result of the competitive solicitation, a competitive market price, or the avoided cost regulations in 18 CFR 292.304(e) that pre-date the final rule.

229. We reject Mr. Mattson's argument that the competitive solicitation framework infringes on a ''constitutional law right to contract.'' [416] Regardless of the outcome of a competitive solicitation, the PURPA Regulations continue to permit QFs to negotiate agreements with electric utilities that differ from those required by PURPA.[417] Similarly, the Commission's requirement in the final rule that a QF may receive a capacity rate of zero if the QF loses a competitive solicitation following the framework adopted in the final rule and in which a utility's self-build participated is consistent with the Commission's precedent.[418] The final rule only governs the maximum rate for a sale made pursuant to the mandatory purchase obligation imposed on purchasing utilities by PURPA, but continues to permit a QF to contract voluntarily at a different rate with a purchasing utility.

230. We disagree with Public Interest Organizations' assertion that the competitive solicitation framework fails to ensure that a competitive solicitation pays QFs the full avoided energy costs because it does not require a utility to obtain all its energy needs through a competitive solicitation.[419] The primary purpose of a competitive solicitation is to determine a utility's capacity needs, not its energy needs, which can be purchased separately from capacity. The final rule provides that QFs can continue to sell energy to utilities at the purchasing utility's avoided energy costs outside of the context of a competitive solicitation, even if such solicitations are the exclusive vehicle for acquisition of capacity. The new regulatory text in 18 CFR 292.304(c)(8)(ii) provides that:

> To the extent that the electric utility procures all of its capacity, including capacity resources constructed or otherwise acquired by the electric utility, through a competitive solicitation process conducted pursuant to Paragraph (b)(8)(i) of this section, the electric utility shall be *presumed* to have no avoided capacity costs unless and until it determines to acquire capacity outside of such competitive solicitation process. However, the electric utility shall nevertheless be required to purchase energy from qualifying small power producers and qualifying cogeneration facilities.[420]

231. This regulation provides that the utility presumptively has no avoided capacity costs if all the utility's capacity needs are satisfied through the competitive solicitation. If the utility's avoided energy costs change after a competitive solicitation is conducted, the as-available avoided energy rate for a QF selling outside such a competitive solicitation would necessarily be different than the avoided energy rate determined in the competitive solicitation itself. States must continue to use either competitive market prices or the traditional factors in 18 CFR 292.304(e) to calculate avoided energy costs at the time of delivery for QFs. Under the final rule, where the purchasing electric utility procures all of its capacity, including capacity resources constructed or otherwise acquired by the electric utility, through a competitive solicitation process, the electric utility is presumed to have no avoided capacity costs unless and until it determines to acquire capacity outside of such competitive solicitation process. However, under the final rule, QFs continue to have the opportunity, outside of a regularly held competitive solicitation, to sell energy at a purchasing utility's avoided cost rate.

C. Rebuttable Presumption of Separate Sites

232. In the final rule, the Commission determined that, if a small power production facility seeking QF status is located one mile or less from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be at the same site as those affiliated small power production QFs. If a small power production facility seeking QF status is located 10 miles or more from any affiliated small power production QFs that use the same energy resource, it will be irrebuttably presumed to be at a separate site from those affiliated small power production QFs. If a small power production facility seeking QF status is located more than one mile but less than 10 miles from any affiliated small power production QFs that use the same energy resource, it will be rebuttably presumed to be at a separate site from those affiliated small power production QFs.[421]

233. The Commission adopted the NOPR proposal to allow a small power production facility seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-certification and application for Commission recertification) to preemptively defend against anticipated challenges by identifying factors that affirmatively show that its facility is indeed at a separate site from affiliated small power production QFs that use the same energy resource and that are more than one but less than 10 miles from its facility. The Commission stated that it would allow any interested person or entity to challenge a QF certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification.[422]

234. The Commission also adopted the NOPR's proposed factors, with certain additions.[423]

1. Need for Reform

235. In the final rule, the Commission found that, since the establishment of the one-mile rule in the PURPA Regulations in 1980, the development of large numbers of affiliated renewable resource facilities requires a revision of the one-mile rule. The Commission found that the final rule will reduce the

rate. Phrased differently, we will presume that any future competitive solicitation that does not comply with the factors adopted in this final rule does not comply with the Commission's regulations implementing PURPA.'').

[414] *See id.* P 430.

[415] *See id.* P 422.

[416] Mr. Mattson Motion for Time, Reconsideration, and Request Answers at 1.

[417] *See* 18 CFR 292.301(b)(1).

[418] *See City of Ketchikan,* 94 FERC at 62,061 (''[A]voided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero.'')).

[419] Public Interest Organizations Comments at 99–101.

[420] *See* new 18 CFR 292.304(c)(8)(iii) (emphasis added); *see also* Order No. 872, 172 FERC ¶ 61,041 at P 422 (''QFs would continue to have the right to put energy to the utility at the as-available avoided cost energy rate because the purchasing utility will still be able to avoid incurring the cost of generating energy even when it does not need new capacity.'').

[421] Order No. 872, 172 FERC ¶ 61,041 at P 466.

[422] *Id.* P 467.

[423] *Id.* P 468.

opportunity for developers of small power production facilities to circumvent the current one-mile rule by strategically siting small power production facilities that use the same energy resource slightly more than one mile apart.[424]

a. Requests for Rehearing

236. Public Interest Organizations reiterate that there is little or no evidence of circumvention in the record.[425] Public Interest Organizations argue that a theoretical threat that has failed to materialize in any significant way during 40 years of small power-production facility development sufficiently for the Commission to consider it more than a possibility does not justify the burden imposed by the final rule.[426] Similarly, Solar Energy Industries assert that changing one-mile rule precedent to prevent gaming without any evidence of gaming in the record is arbitrary and capricious and will discourage QF development.[427] Solar Energy Industries contend that the Commission is seeking to reduce the number of QFs that can be constructed in any one territory.[428]

237. Public Interest Organizations argue that, assuming that it is true that some QF developers are indeed making siting decisions based on the one-mile boundary, it will be just as likely that they will make siting decisions based on the ten-mile boundary; therefore, expanding the radius from one mile to 10 miles does nothing to address the purported problem of gaming boundaries.[429] Public Interest Organizations contend that developers will take the boundary into account when making siting decisions, which is not to game the system but rather to play by the rules.[430] Solar Energy Industries agree that facilities that are sited more than one mile apart have not ''gamed'' the one-mile rule; rather, those facilities have complied with the one-mile rule.[431]

b. Commission Determination

238. As the Commission explained in the final rule, the record shows that some large facilities were disaggregating into smaller facilities and strategically spacing themselves slightly more than one mile apart in order to be able to qualify as separate small power production facilities.[432] Because PURPA provides advantages for *small* power production facilities, *i.e.,* no larger than 80 MW, not large facilities that exceed that cap and have disaggregated into smaller facilities under that cap, and based on evidence and examples of QFs separating into several smaller QFs just over one mile apart (in efforts to be considered separate QFs for purposes of the one-mile rule), the Commission determined that reform of the one-mile rule was necessary.

239. The following specific examples demonstrate the need for the Commission to revise the one-mile rule. The Idaho Commission gave the example of a group of five projects that had originally been proposed as a single project greater than 80 MW and not eligible for PURPA. This project was disaggregated into five smaller projects, each separated by one mile, which were then eligible for Idaho's standard published rate contracts at that time. The estimated cost impact of these five projects disaggregating in order to qualify for more favorable standard rate contracts was $10 million per year over the term of the contract.[433] The Idaho Commission also provided a chart showing the wind projects brought before the Idaho Commission in 2009 and 2010, explaining that the circumstances of these projects suggest that they were disaggregated to qualify for the more favorable standard rate or to take advantage of PURPA's must-purchase obligation.[434]

240. Commissioner Paul Kjellander of the Idaho Commission also stated that, within Idaho Power's territory, there were 183 MW of power from four developers that were broken up into 16 projects. He stated that the Oregon Commission approved six PURPA projects that require Idaho Power to take 60 MW of power from six solar projects, adding that the similarities among these six projects include the same operation dates, project size, terms and payment conditions, developer, and solar panel manufacturers. He concluded that this looked like a disaggregated project that stretched the spirit and intent of PURPA.[435]

241. EEI and Xcel argued that the one-mile requirement can be evaded as resources with common ownership, financing, and even operation are located just slightly over one mile from each other to qualify for the 80 MW threshold in the statute. EEI and Xcel provided the example of *Northern Laramie Range Alliance,* in which the applicant filed for QF self-certification of two 48.6 MW projects that were part of a single wind farm with one site permit and that shared a point of interconnection. Because the projects were located more than one mile apart, each project was certified as an individual QF.[436]

242. Furthermore, large power stations based on modular generation technologies like solar photovoltaic (PV) panels and wind turbines can relatively easily be presented as subsets of the component generation modules in order to appear as multiple smaller generation stations, even if they act and operate as one large (*i.e.,* over 80 MW) power station in reality.

243. Based on these concerns and evidence of large facilities disaggregating into small facilities in order to circumvent the one-mile rule and receive QF status, the Commission determined that it would be best to address the circumvention of the one-mile rule by reforming the one-mile rule, not simply addressing this concern on a case-by-case basis.

244. We agree that QF developers may make siting decisions based on the 10-mile boundary just as they may have in the past based on the one-mile

[424] *Id.* P 472.

[425] Public Interest Organizations Request for Rehearing at 128 (citing Order No. 872, 172 FERC ¶ 61,041 at P 471).

[426] *Id.* at 128.

[427] Solar Energy Industries Request for Rehearing and/or Clarification at 5, 26.

[428] *Id.* at 26.

[429] Public Interest Organizations Request for Rehearing at 121.

[430] *Id.* at 122.

[431] Solar Energy Industries Request for Rehearing and/or Clarification at 26.

[432] Order No. 872, 172 FERC ¶ 61,041 at P 470 (citing APPA Comments, Docket No. RM19–15–000, at 21 (Dec. 3, 2019); Center for Growth and Opportunity Comments, Docket No. RM19–15–000, at 5–6 (Dec. 3, 2019); Consumers Energy Comments, Docket No. RM19–15–000, at 4 (Dec. 3, 2019); East River Comments, Docket No. RM19–15–000, at 1–2; EEI Comments, Docket No. RM19–15–000, at 43 (Dec. 3, 2019); ELCON Comments, Docket No. RM19–15–000, at 35 (Dec. 3, 2019); Governor Brad Little, Idaho Comments, Docket No. RM19–15–000, at 1 (Dec. 3, 2019); Idaho Commission Comments, Docket No. RM19–15–000, at 5–7 (Dec. 3, 2019); Idaho Power Comments, Docket No. RM19–15–000, at 13 (Dec. 3, 2019); Missouri River Energy Comments, Docket No. RM19–15–000, at 5 (Dec. 3, 2019); Stephen Moore Comments, Docket No. RM19–15–000, at 2 (Dec. 3, 2019); Northern Laramie Range Alliance Comments, Docket No. RM19–15–000, at 2 (Dec. 3, 2019); NorthWestern Comments, Docket No. RM19–15–000, at 9 (Dec. 3, 2019); NRECA Comments, Docket No. RM19–15–000, at 14–15 (Dec. 3, 2019); Portland General Comments, Docket No. RM19–15–000, at 14 (Dec. 3, 2019)).

[433] Idaho Commission Comments, Docket No. AD16–16–000, at 8–9 (Nov. 7, 2016); *see also* Technical Conference Tr. at 34–35 (Commissioner Paul Kjellander, Idaho Commission).

[434] Idaho Commission Comments, Docket No. AD16–16–000, at 9–11 (Nov. 7, 2016).

[435] Technical Conference Tr. at 35–36 (Commissioner Paul Kjellander, Idaho Commission).

[436] EEI Comments, Docket No. RM19–15–000, at 43 (Dec. 3, 2019) (citing *N. Laramie Range All.,* 138 FERC ¶ 61,171 (2012)); Xcel Comments, Docket No. AD16–16–000, at 11 (Nov. 7, 2016); *see also* EEI Comments, Docket No. RM19–15–000, at 43 (Dec. 3, 2019) (citing *Beaver Creek II,* 160 FERC ¶ 61,052 (2017)); Xcel Comments, Docket No. AD16–16–000, at 11 (Nov. 7, 2016) (citing *DeWind Novus, LLC,* 139 FERC ¶ 61,201 (2012)).

boundary. However, in the final rule, the Commission found that, at 10 miles or more apart, it can be assumed that affiliated small power production facilities are sufficiently far apart that it is reasonable to treat them as irrebuttably at separate sites.[437] In contrast, the Commission found that, for affiliated small power production facilities using the same resource that are more than one mile but less than 10 miles apart, the distinction between same site or separate site was not as clear and thus provided for a rebuttable presumption of separate sites.[438] In adopting these boundaries and accompanying presumptions, the Commission recognized that 10 miles is a more reasonable place to draw the line of irrebuttably separate sites than the previous one-mile boundary, and provided for the ability to rebut the presumption for affiliated small power production facilities in the less clear, grey zone where affiliated facilities are more than one mile apart but less than 10 miles apart.[439]

245. We disagree with Public Interest Organizations and Solar Energy Industries' contentions that taking the boundary into account when making siting decisions is not gaming the system but playing by the rules and that the Commission seeks to reduce the number of QFs that can be constructed in any one territory. We find that disaggregation practices—whereby a facility exceeding the 80 MW cap and therefore unable to take advantage of the benefits of PURPA (such as mandating that the utility buy its output) disaggregates into several smaller facilities for the purpose of fitting within the statutory mandate and receiving the benefits of PURPA—contradict the spirit and purpose of PURPA. PURPA section 210(a) directs the Commission to encourage cogeneration and *small* power production.[440] PURPA defines a *small* power production facility as an eligible facility, which, together with other facilities located at the same site (as determined by the Commission), has a power production capacity no greater than 80 MW.[441] The statute bestows certain advantages on small power production, not on large power production facilities that masquerade as small power production. Disaggregation practices aim to advantage large power production facilities with benefits that they are not eligible to receive. The intention of the new same site determination framework is not to reduce the number of QFs that can be constructed in an area, but to encourage *small* power production facilities as Congress intended under PURPA.

2. Distance Between Facilities

246. In the final rule, the Commission adopted the NOPR proposal that an entity can seek to rebut the presumption of separate sites only for a small power production facility seeking QF status that have an affiliated small power production QF or QFs that are located more than one and less than 10 miles from it.[442] The Commission recognized that it is debatable where to set these thresholds. The Commission stated that PURPA requires that no small power production facility, together with other facilities located ''at the same site,'' exceed 80 MW and Congress has tasked the Commission with defining what constitutes facilities being at the same site for purposes of PURPA. The Commission found that providing set geographic distances will limit unnecessary disputes over whether facilities are at the same site; therefore, the Commission must choose reasonable distances at which small power production facilities will be considered irrebuttably at the same site or irrebuttably at separate sites.[443]

247. The Commission found that there are some affiliated small power production facilities using the same energy resource that are so close together that it is reasonable to treat them as irrebuttably at the same site and that one mile or less is a reasonable distance to treat such facilities as irrebuttably at the same site. The Commission found that there are some small power production facilities that are affiliated and may use the same energy resource but that are sufficiently far apart that it is reasonable to treat them as irrebuttably at separate sites and found that 10 miles or more is a reasonable distance to treat such facilities as irrebuttably at separate sites. For affiliated small power production facilities using the same resource that are more than one mile but less than 10 miles apart, the Commission found that the distinction between the same site or separate site is not as clear; therefore, it is reasonable to treat them as rebuttably at separate sites but to allow interested parties to provide evidence to attempt to rebut that presumption. The Commission found that establishing these reasonable distances, and particularly establishing the ability to rebut the presumption of separate sites for affiliated small power production facilities more than one mile but less than 10 miles apart, better allows the Commission to address the evolving shape and configuration of resources that are being developed as QFs, such as modular solar or wind power plants, and provides for improved administration of PURPA. The Commission therefore determined that the one-mile and 10-mile limits are reasonable inflection points for differentiating between the same site and separate sites.[444]

248. In the final rule, the Commission explained that, with respect to hydroelectric generating facilities, the regulations currently provide that the same energy resources essentially means ''the same impoundment for power generation,'' finding that it is unlikely that hydroelectric generating facilities located more than one mile apart would rely on the same impoundment.[445] The Commission explained that, if that circumstance arises, the applicant could seek waiver, and argue that its facilities should not be considered at the same site.[446]

249. The Commission also noted that it was retaining the waiver provision in 18 CFR 292.204(a)(3), allowing the Commission to waive the method of calculation of the size of the facility for good cause.[447]

a. Requests for Rehearing

250. Public Interest Organizations argue that the Commission does not connect the one-mile and 10-mile rule to the statutory phrase ''located at the same site,'' instead relying on policy arguments that exceed the statutory text and FERC's authority.[448] Public Interest Organizations assert that the Commission ignored relevant data presented by commenters and failed to articulate a satisfactory explanation connecting facts to its ''ten-mile rule'' determination.[449] Public Interest Organizations contend that the decision was arbitrary and capricious because the Commission ignored relevant data and

[437] Order No. 872, 172 FERC ¶ 61,041 at P 491.

[438] *Id.*

[439] *See id.* P 466, 491.

[440] 16 U.S.C. 824a–3(a).

[441] 16 U.S.C. 796(17)(A).

[442] Order No. 872, 172 FERC ¶ 61,041 at P 490.

[443] *Id.* P 491.

[444] *Id.*

[445] *Id.* P 492 n.769 (quoting 18 CFR 292.204(a)(2)(i)).

[446] *Id.* (citing 18 CFR 292.204(a)(3)).

[447] *Id.* P 492 (citing 18 CFR 292.204(a)(3)).

[448] Public Interest Organizations Request for Rehearing at 106.

[449] *Id.* at 124 (citing Solar Energy Industries Comments, Docket No. RM19–15–000, at 62 (Dec. 3, 2019); North Carolina DOJ Comments, Docket No. RM19–15–000, at 3–4 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 17 (Dec. 3, 2019); North Carolina Commission Staff Comments, Docket No. RM19–15–000, at 6 (Dec. 3, 2019); Borrego Solar Comments, Docket No. RM19–15–000, at 3–5 (Dec. 3, 2019)).

failed to articulate a satisfactory explanation connecting the facts presented to its determination.[450] Public Interest Organizations further argue that there is nothing in the record to show that 10 miles is a rational or appropriate threshold for determining whether QFs are at the same site, adding that the record indicates that the new approach will cause regulatory uncertainty and substantial burden on an industry it is supposed to be encouraging.[451] Similarly, Solar Energy Industries argue that the Commission has not offered any justification for the change.[452]

251. Public Interest Organizations contend that the Commission does not explain why there should be any geographic distance at which two facilities are irrebuttably considered to be located at the same site.[453]

252. Public Interest Organizations question whether the same opportunities for waiver provided under the previous bright-line test, which the Commission maintained in the final rule, will apply for facilities within one mile of each other.[454] Public Interest Organizations argue that, if a facility received a waiver in the past, there is no guarantee that they would receive one again under the final rule.[455] Public Interest Organizations assert that the inability for an applicant to show that a small power production facility should not be treated as located at the same site as other affiliated facilities using the same resource within one mile discourages QF development.[456]

253. Public Interest Organizations raise concerns about how the final rule will apply to hydroelectric facilities, asserting that the previous one-mile rule did not penalize hydroelectric facilities that were located in close proximity but should not be deemed to be at the same site.[457] Public Interest Organizations state that, under the previous one-mile rule, hydroelectric facilities were considered to be located at the same site whenever they use water from the same impoundment.[458] Public Interest Organizations further state that the final rule creates a new rule that a hydroelectric facility will be considered to be located at the same site as the one for which certification is sought if the facility is ''located within one mile of the facility for which qualification or recertification is sought and use[s] water from the same impoundment for power generation.'' [459] Public Interest Organizations add that a footnote in the final rule states that ''[f]or hydroelectric generating facilities, the regulations currently provide that the same energy resources essentially means ''the same impoundment for power generation.'' [460] Public Interest Organizations state that it appears that the Commission in practice would consider a hydroelectric facility to be located at the same site whenever it uses the same impoundment as the facility for which qualification is sought, is located within one mile, or both, which would conflict with the text of the final rule and limit QF development.[461]

254. Northwest Coalition, Public Interest Organizations, and Solar Energy Industries reiterate NOPR comments that the new rebuttable presumption will increase the ''exclusion zone'' around a QF's electrical generating equipment from approximately three square miles to over 300 square miles—a 100% increase.[462] Public Interest Organizations argue that a 100-fold increase in the area in which a party that owns a small power production facility will find it very difficult or impossible to develop another facility is the definition of discouraging small power production facilities.[463]

b. Commission Determination

255. We disagree with Public Interest Organizations' arguments that the Commission did not provide an explanation for the ''10-mile rule'' beyond policy arguments and did not adequately connect the ''10-mile rule'' to the statutory determination of ''located at the same site.'' PURPA requires that no small power production facility, together with other facilities located ''at the same site,'' exceed 80 MW, and Congress has tasked the Commission with defining what constitutes facilities being at the same site for purposes of PURPA.[464] The Commission explained that, just as there are some facilities that may be so close that it is reasonable to irrebuttably treat them as a single facility (those one mile or less apart), there are some facilities that are sufficiently far apart that it is reasonable to treat them as irrebuttably separate facilities.[465] The Commission believed that the latter distance is 10 miles or more apart.[466] The statute allows the Commission to determine the meaning of ''same site.'' [467] Pursuant to this discretion, the Commission chose to pick a distance as an inflection point beyond which it is safe to irrebuttably presume separate sites.

256. In response to arguments that the 10-mile demarcation is arbitrary and that nothing in the record supports it as a rational or appropriate threshold,[468] we note that PURPA requires that no small power production facility, together with other facilities located ''at the same site,'' exceed 80 MW. In the final rule, the Commission aimed to protect that statutory requirement by ensuring that facilities that, together with other affiliated facilities located ''at the same site,'' exceeded 80 MW did not receive the benefits that Congress intended only small facilities 80 MW and under to receive. The Commission therefore found that 10 miles is qualitatively a large enough distance to serve as the inflection point beyond which it is safe to irrebuttably presume separate sites, while allowing entities to seek to rebut such presumption between one mile and 10 miles.[469] Ten miles need not be the only possible choice under the statute in order for it to be considered reasonable; what matters is that the choice made in the exercise of the Commission's discretion does not run afoul of the statue and is reasonable rather than arbitrary and capricious.[470]

[450] *Id.* (citing *Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Inst. Col,* 463 U.S. at 43).

[451] *Id.* at 125.

[452] Solar Energy Industries Request for Rehearing and/or Clarification at 29.

[453] Public Interest Organizations Request for Rehearing at 120.

[454] *Id.* at 106–07.

[455] *Id.* at 132.

[456] *Id.* at 107.

[457] *Id.* at 107–08 & n.312.

[458] *Id.* at 108 n.312.

[459] *Id.* at 107–09 & n.312.

[460] *Id.* at 108–09 n.312 (citing Order No. 872, 172 FERC ¶ 61,041 at P 492 n.769).

[461] *Id.*

[462] Northwest Coalition Request for Rehearing at 54 (citing Order No. 872, 172 FERC ¶ 61,041 at P 483); Public Interest Organizations Request for Rehearing at 109; Solar Energy Industries Request for Rehearing and/or Clarification at 27, 29.

[463] Public Interest Organizations Request for Rehearing at 109–10.

[464] 16 U.S.C. 796(17)(A)(ii).

[465] Order No. 872, 172 FERC ¶ 61,041 at P 491. *See also id.* P 466.

[466] *Id.* P 491. *See also id.* P 466.

[467] 16 U.S.C. 796(17)(A)(ii).

[468] Public Interest Organizations state that ''[t]here is nothing in the record to show that [10] miles is a rational or appropriate threshold for determining whether QFs are at the 'same site.' '' We correct Public Interest Organizations' statement by noting that affiliated small power production facilities 10 miles or more apart are irrebuttably presumed to be at separate sites and facilities between one mile and 10 miles are rebuttably presumed to also be separate sites. Order No. 872, 172 FERC ¶ 61,041 at P 466.

[469] *Id.* P 491.

[470] *See CP Kelco Oy* v. *United States,* 37 ITRD 1093 (Ct. Int'l Trade 2015) (''[T]his threshold is a line in the sand: Commerce might have picked a different number to effectuate the statute's purpose, with reasonable results . . . Yet because the agency's choice does not run afoul of the statute and is not arbitrary, the court will defer to Commerce despite the possibility of alternatives.''). *See also U.S. Steel Grp.* v. *United States,* 96 F.3d 1352, 1362 (Fed. Cir. 1996) (''So long as the Commission's analysis does not violate any statute and is not otherwise arbitrary and capricious, the Commission may perform its duties in the way it believes most suitable.''); *Mid Continent Nail Corp.* v. *United States,* 34 C.I.T. 512, 520–21 (2010)

257. We find no merit in Public Interest Organizations' arguments that the final rule does not explain why there should be any geographic distance at which two facilities are irrebuttably considered located at the same site. PURPA requires that no small power production facility, together with other facilities located ''at the same site,'' exceed 80 MW. As the Commission explained in the final rule, there are some affiliated small power production facilities using the same energy resource that are so close together that it is reasonable to treat them as irrebuttably at the same site. Consistent with long standing practice, the Commission has found that one mile or less is a reasonable distance to treat such affiliated facilities as irrebuttably at the same site.[471] Additionally, in response to Public Interest Organizations, we reiterate that the final rule retains the waiver provision in 18 CFR 292.204(a)(3), which allow the Commission to waive the method of calculation of the size of the facility for good cause.[472]

258. In response to Public Interest Organizations' concerns that it is unclear what the waiver provision will mean now that the one-mile rule is irrebuttable, or whether those who previously obtained a waiver will get it again if they recertify, we note that the Commission has always determined whether to grant waivers on a case-by-case basis. The Commission will continue to apply the waiver provision consistent with the Commission's waiver precedent. For example, in *Windfarms, Ltd.,* the Commission granted waiver of the one-mile rule, finding that three clusters of wind turbine generators were at three separate and distinct sites when they ''had sufficiently distinct and identifiable topographical and energy resource-related characteristics.''[473] In contrast, in *Pinellas County,* the Commission declined to grant waiver of the one-mile rule because a new generator was within 600 to 700 feet of the existing generator.[474]

259. We disagree with Public Interest Organizations that the final rule establishes a new rule that hydroelectric facilities are at the same site if they are located within one mile of the facility for which qualification is sought *and* at the same impoundment. The final rule did not change the prior requirement that hydroelectric facilities are at the same site if they are located within one mile of the facility for which qualification is sought *and* at the same impoundment.[475] The only change that the Commission made in the final rule was to create a rebuttable presumption of separate sites for affiliated small power production facilities located more than one mile but less than 10 miles apart. Footnote 769 of the final rule, noted by Public Interest Organizations, explains that it is unlikely that hydroelectric generating facilities located more than one mile apart would be located on the same impoundment. We clarify that, if a hydroelectric generating facility is more than a mile apart (but less than 10 miles apart) from an affiliated facility, yet on the same impoundment, the rebuttable presumption would be that they are at separate sites. We further clarify that, although the second sentence of footnote 769 suggested that a hydroelectric generating facility in this circumstance was free to seek waiver (most likely in order to eliminate any uncertainty as to its status), it would be unlikely that any such a facility would, in practice, need to request such waiver.

260. In the final rule, the Commission addressed Northwest Coalition, Public Interest Organizations, and Solar Energy Industries' contention that the new rule causes a 100-times increase to the ''exclusion zone'' around a QF's electrical generating equipment and a 100-fold increase in the area in which a party who owns a small power production facility will find it very difficult or impossible to develop another facility is almost the definition of discouraging small power production facilities.[476] We reiterate that the rule providing for a rebuttable presumption for affiliated small power production QFs located more than one but less than 10 miles apart is necessary to address allegations of improper circumvention of the one-mile rule that had been presented to the Commission.[477] Furthermore, we disagree with characterizing a rebuttable presumption of *separate* sites between one mile and 10 miles as an ''exclusion'' zone for development purposes. While QF developers understandably may prefer that any attempts to rebut be prohibited, our disagreement with their preference (and our establishment of a presumption of separate sites between one mile and 10 miles, albeit a rebuttable presumption) can hardly be equated with enacting a development exclusion zone.

3. Factors

261. In the final rule, the Commission adopted the physical and ownership factors proposed in the NOPR with a few modifications. First, the Commission modified the NOPR proposal by changing terminology relating to the determination of whether facilities are separate facilities to focus not on whether they are *separate facilities,* but rather to mirror the statutory language referring to ''*the same site.*'' Accordingly, the Commission adopted these factors as relevant indicia of whether affiliated small power production facilities are ''at the same site.'' Second, the Commission modified the NOPR proposal to identify the following additional physical factors as indicia that small power production facilities should be considered located at the same site: (1) Evidence of shared control systems; (2) common permitting and land leasing; and (3) shared step-up transformers.[478]

(finding, in response to contentions that the Commission's definitions of statutory terms were ''seemingly random values,'' that the numbers in the Commission's definitions did not violate the statute and were not otherwise arbitrary and capricious where the they are applied reasonably). *Cf. Int'l Soc. for Krishna Consciousness, Inc.* v. *McAvey,* 450 F. Supp. 1265, 1269 (S.D.N.Y. 1978) (''choosing any fixed number would seem arbitrary, yet necessary in order to strike a balance between the competing interests.''); *AFPA* v. *FERC,* 550 F.3d at 1183 (permitting Commission to establish rebuttable presumption via rulemaking rather than case-by-case adjudication in PURPA section 210(m) context).

[471] Order No. 872, 172 FERC ¶ 61,041 at P 491.

[472] *Id.* P 492 (citing 18 CFR 292.204(a)(3)).

[473] *Windfarms, Ltd.,* 13 FERC ¶ 61,017 (1980).

[474] *Pinellas County, Florida,* 50 FERC ¶ 61,269 (1990).

[475] *See El Dorado Cty. Water Agency,* 24 FERC ¶ 61,280, at 61,577 (1983) (*El Dorado*) (''Under the rule, hydroelectric facilities using the same impoundment as a water source and located within one mile of each other are considered part of the same site.''); *Small Power Production and Cogeneration Facilities—Qualifying Status,* Order No. 70, 45 FR 17995 (Mar. 20, 1980), FERC Stats. & Regs. ¶ 30,134, at 30,943 (1980) (cross-referenced at 10 FERC ¶ 61,230) (''Hydroelectric facilities . . . are considered to be located at the same site only if the facilities use water from the same impoundment for power generation. The Commission views this *additional* provision for hydroelectric facilities as necessary because *use of the one-mile rule alone* might discourage the development of facilities on separate waterways which are within one mile of each other.'') (cross-referenced at 10 FERC ¶ 61,230), *orders on reh'g,* Order No. 70–A, FERC Stats. & Regs. ¶ 30,159 (cross-referenced at 11 FERC ¶ 61,119) *and* FERC Stats. & Regs. ¶ 30,160 (cross-referenced at 11 FERC ¶ 61,166), *order on reh'g,* Order No. 70–B, FERC Stats. & Regs. ¶ 30,176 (cross-referenced at 12 FERC ¶ 61,128), *order on reh'g,* FERC Stats. & Regs. ¶ 30,192 (1980) (cross-referenced at 12 FERC ¶ 61,306), *amending regulations,* Order No. 70–D, FERC Stats. & Regs. ¶ 30,234 (cross-referenced at 14 FERC ¶ 61,076), *amending regulations,* Order No. 70–E, FERC Stats. & Regs. ¶ 30,274 (1981) (cross-referenced at 15 FERC ¶ 61,281) (emphasis added).

[476] *See* Order No. 872, 172 FERC ¶ 61,041 at P 495.

[477] *Id.*

[478] *Id.* P 508.

262. Specifically, the Commission adopted the following factors as examples of the factors the Commission may consider in deciding whether small power production facilities that are owned by the same person(s) or its affiliates are located ''at the same site'': (1) *Physical characteristics,* including such common characteristics as infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and (2) *ownership/other characteristics,* including such characteristics as whether the facilities in question are owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.[479]

263. The Commission adopted the NOPR proposal to allow a small power production facility seeking QF status to provide further information in its certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) to preemptively defend against rebuttal by identifying factors that affirmatively show that its facility is indeed at a separate site from affiliated small power production QFs more than one but less than 10 miles away from it. The Commission stated that any party challenging a QF certification (both self-certification and application for Commission certification) or recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification would, in its protest, be allowed to correspondingly identify factors to show that the small power production facility seeking QF status and affiliated small power production QFs more than one but less than 10 miles from that facility are actually at the same site.[480]

264. The Commission emphasized that, as a general matter, no one factor is dispositive. The Commission stated that it will conduct a case-by-case analysis, weighing the evidence for and against, and the more compelling the showing that affiliated small power production QFs should be considered to be at the same site as the small power production facility seeking QF status in a specific case, the more likely the Commission will be to find that the facilities involved in that case are indeed located ''at the same site.''[481]

a. Requests for Rehearing

265. Solar Energy Industries assert that in adopting the physical and ownership characteristics as proposed in the NOPR, the Commission stepped beyond the statutory bounds that limit the Commission to determining whether a facility is located ''at the same site'' as any other facilities,[482] instead imposing a separate facilities analysis. Solar Energy Industries argue that the Commission has previously recognized that ''[t]he critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project.''[483] Solar Energy Industries contend that the Commission erred in concluding that ownership and other characteristics are germane to the ''same site'' determination.[484] Solar Energy Industries claim that Congress did not authorize the Commission to analyze factors that have nothing to do with physical commonality or surrounding geographical terrain as part of the same site determination.[485]

266. Similarly, Public Interest Organizations assert that the Commission's definition of ''at the same site'' is ''beyond the meaning that the statute can bear.''[486] Public Interest Organizations argue that the American Heritage Dictionary defines ''site'' as ''[t]he place where a structure or group of structures was, is, or is to be located.''[487] Public Interest Organizations contend that the statute limits multiple QF facilities to the 80 MW cap only if those facilities are located at the same physical place.[488] Public Interest Organizations claim that whether affiliated generators using the same energy resource and which are located between one mile and 10 miles are located at separate sites depends on various non-exclusive and non-dispositive factors, many of which have no relationship to whether the two facilities are located in the same physical place.[489]

267. Public Interest Organizations argue that the reasonable meaning of the phrase does not permit the Commission's definition that introduces numerous extraneous factors, such as corporate structure, financing, offtake entities, number of energy sources or ''motive forces,'' shared use of offsite engineering services or maintenance contractors, or construction timelines.[490] Solar Energy Industries assert that the employment of common contractors, such as grading and electrical contractors, has nothing to do with whether two otherwise distinct generation facilities are located at the ''same site,'' instead having more to do with the availability of experienced, qualified contractors in a given region.[491] Solar Energy Industries contend that many QFs are developed in rural regions where there are often a limited number of qualified maintenance providers and a commonality of such engagement should not be a factor in the Commission's ''same site'' analysis. Solar Energy Industries add that the fact that two facilities are constructed by the same entity within a period of 12 months is also irrelevant for a ''same site'' determination given that there are a limited number of qualified construction firms within each region.[492] Solar Energy Industries claim that portfolios of QFs in multiple states (and which thus are unquestionably at separate sites) are frequently financed (and re-financed) as part of a common investment portfolio for passive investment vehicles that do not exercise day-to-day control over the QF; therefore, they should not determine whether two facilities with separate ownership structures should not be

[479] *Id.* P 509.

[480] *Id.* P 510.

[481] *Id.* P 511.

[482] Solar Energy Industries Request for Rehearing and/or Clarification at 30.

[483] *Id.* at 26, 31–32 (citing *El Dorado,* 24 FERC at 61,578).

[484] *Id.* at 31.

[485] *Id.* at 30–31.

[486] Public Interest Organizations Request for Rehearing at 103 (citing *MCI Telecommunications Corp.* v. *Am. Tel. & Tel. Co.,* 512 U.S. 218, 229 (1994)).

[487] *Id.* (citing The American Heritage Dictionary of the English Language 55 (3d ed. 1992)).

[488] *Id.* at 103–04.

[489] *Id.* at 105.

[490] *Id.* at 104 (citing *Summit Petroleum Corp.* v. *U.S. EPA,* 690 F.3d 733, 742 (6th Cir. 2012)).

[491] Solar Energy Industries Request for Rehearing and/or Clarification at 31.

[492] *Id.*

consolidated for purposes of the 80 MW size limitation.[493]

268. Public Interest Organizations argue that there are significant problems with the factors list that render the factors unreasonable, arbitrary, and capricious.[494] Public Interest Organizations assert that the failed to respond to the flaws raised regarding the factors identified by the Commission for consideration under the rebuttable presumption, instead summarily adopting these factors.[495] Public Interest Organizations state that commenters identified the list of ''physical characteristics,'' particularly ''control facilities,'' ''access and easements,'' ''collector systems or facilities,'' and ''property leases,'' as ''far too broad and unclear,'' and subject to varying interpretations.[496] Public Interest Organizations contend that factors listed under ''ownership and other characteristics,'' such as control and maintenance, are even more problematic.[497] Public Interest Organizations argue that, in certain geographic regions, there are often a limited number of solar maintenance companies, creating the opportunity for frivolous challenges to QF certifications and recertifications.[498] Public Interest Organizations point to Southeast Public Interest Organizations' comments that

> ''[l]ikewise, the sale of electricity to a common utility, the financing of a project through a mutual lender, the construction of a facility through a mutual contractor, the timing of contract execution, and the timing of facilities being placed into service are all factors listed in the NOPR which do not provide relevant evidence as to common ownership requiring facilities to be considered a single unit. The use of these factors will likely prejudice solar facilities constructed nearby each other that used common associates, contractors, or partnering organizations or entities.''[499]

269. Public Interest Organizations assert that, rather than grappling with the data and information presented by commenters on these factors, the final rule simply summarizes the critiques and then summarily concludes that these factors shall be adopted in the final rule.[500] Public Interest Organizations argue that the lack of response to these criticisms and failure to articulate a rationale for why the factors are appropriate for making a same site determination render the Commission's determination arbitrary and capricious.[501]

270. Solar Energy Industries contend that, by going beyond the same site limitation, the Commission is discouraging the development of these resources.[502] Solar Energy Industries assert that the Commission's failure to provide support for the expansion of its authority beyond that granted by Congress is arbitrary, capricious, and not consistent with reasoned decision-making.[503]

271. Solar Energy Industries seek rehearing of the Commission's determination in Paragraph 508 and ask the Commission to rescind dicta and associated regulations allowing for review, evaluation, or consideration of physical and operational characteristics that are not germane to whether a facility, ''together with any other facilities located at the same site,'' has a power production capacity greater than 80 MW.[504] Solar Energy Industries argue that, if the Commission does not grant reconsideration, a QF could be subject to challenge throughout the facility's entire useful life based on overly broad factors that are not related to preventing a QF from ''gaming'' the same-site determination and development of other QFs long after a QF starts operation.[505]

272. Public Interest Organizations add that, although the final rule allows applicants to ''preemptively defend against rebuttal by identifying factors that affirmatively show that its facility is indeed at a separate site,'' it does not provide guidance on what these factors are, which creates uncertainty.[506]

b. Commission Determination

273. PURPA defines small power production facilities as those facilities that have ''a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.''[507] Congress notably did not specify that ''site'' may only encompass consideration of physical or geographic factors; in fact, Congress expressly delegated the determination of ''site'' to the Commission.[508] When the Commission adopted the PURPA Regulations in 1980, it determined that the capacity of all facilities within one mile of each other *and which use the same energy resource* and *are owned by the same person,* be added together.[509] Thus, for 40 years the PURPA Regulations implementing ''same site'' have included examination not only of geography or distance, but also ownership and resource. The final rule's inclusion of physical and ownership factors is a continuation of the Commission's past practice and is not, as Solar Energy Industries contend, an expansion of the Commission's authority. We therefore decline to rescind the list of example factors, as requested by Solar Energy Industries.

274. Solar Energy Industries' reliance on *El Dorado* is misplaced. In *El Dorado,* a protester argued that three hydroelectric facilities located more than one mile from each other should nevertheless be treated as a single hydroelectric project, noting that the three facilities were aggregated together as a single project for the purposes of receiving a hydroelectric license. The Commission found that, because the three facilities were located more than a mile from each other, under the then-current regulations, the facilities were located at three distinct sites, despite having been aggregated together for the purpose of receiving a hydroelectric license. The sentence Solar Energy Industries quotes, ''the critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project,'' explains that the requirements for certification as a small power production facility are not the same requirements to receive a hydroelectric license.[510] The Commission did not address which kind of considerations may go into the same site determination; it merely applied the same site analysis

[493] *Id.*

[494] Public Interest Organizations Request for Rehearing at 111.

[495] *Id.* at 124–25 (citing Order No. 872, 172 FERC ¶ 61,041 at PP 501–09).

[496] *Id.* at 126 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 34 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 17 (Dec. 3, 2019)).

[497] *Id.* (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 34 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 17–18 (Dec. 3, 2019)).

[498] *Id.* (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 35 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 18 (Dec. 3, 2019); North Carolina DOJ Comments, Docket No. RM19–15–000, at 7–8 (Dec. 3, 2019)).

[499] *Id.* at 127 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 35 (Dec. 3, 2019)).

[500] *Id.*

[501] *Id.*

[502] Solar Energy Industries Request for Rehearing and/or Clarification at 26.

[503] *Id.* at 27, 30 (citing *Windfarms, Ltd.,* 13 FERC at 61,032).

[504] *Id.* at 27.

[505] *Id.* at 34.

[506] Public Interest Organizations Request for Rehearing at 110 (citing Order No. 872, 172 FERC ¶ 61,041 at PP 480, 510).

[507] 16 U.S.C. 796(17)(A)(ii).

[508] *Id.*

[509] Order No. 70, FERC Stats. & Regs. ¶ 30,134 at 30,939; *see also* 18 CFR 292.204(a)(1).

[510] *El Dorado,* 24 FERC at 61,577–78.

that existed at the time, distinct from other requirements.

275. We disagree with Solar Energy Industries' contention that, if the Commission does not grant reconsideration of the list of example factors, a QF could be subject to challenge throughout the facility's entire useful life. We note that, prior to the final rule, an interested party could file a petition for declaratory order challenging the QF certification at any time and on any grounds. An interested party may still file a petition for declaratory order with the accompanying filing fee, just as they could prior to the effective date of the final rule. The final rule merely added what already exists for essentially every Commission proceeding, ''no fee'' protests, which will not subject a QF to challenges throughout the facility's entire useful life because any such protest must be filed with 30 days from the date of the filing of the Form No. 556 at the Commission.[511]

276. Moreover, we reiterate that the final rule provided that such protests (and hence, consideration of the factors) may only be filed in response to an initial certification or to a recertification that makes substantive changes to the existing certification,[512] which limits the time periods during which such a protest may be filed. Additionally, once the Commission has affirmatively certified an applicant's QF status in response to a protest opposing a self-certification or self-recertification, or in response to an application for Commission certification or recertification, any later protest to a recertification (self-recertification or application for Commission recertification) making substantive changes to a QF's existing certification must demonstrate changed circumstances from the facts upon which the Commission acted on the certification filing that call into question the continued validity of the earlier certification.[513]

277. We also disagree with Public Interest Organizations' assertion that the Commission failed to respond to the flaws raised regarding the factors, including that the list of ''physical characteristics,'' particularly ''control facilities,'' ''access and easements,'' ''collector systems or facilities,'' and ''property leases,'' was far too broad, unclear, and subject to varying interpretations.[514] In the final rule, the Commission explained that these are *examples* of factors the Commission *may* consider on a case-by-case basis. The factors are not further defined because their application will depend on the context of the individual certification. Likewise, we disagree with Public Interest Organizations' contentions that ''ownership and other characteristics'' is a problematic factor and ''the sale of electricity to a common utility, the financing of a project through a mutual lender, the construction of a facility through a mutual contractor, the timing of contract execution, and the timing of facilities being placed into service'' do not provide relevant evidence of common ownership that requires facilities to be considered a single unit.[515] We reiterate that no single factor is dispositive and the factors are included as examples of facts that the Commission may consider on a case-by-case basis.[516] For example, Public Interest Organizations state that, in certain geographic regions, there are a limited number of solar maintenance companies, and Southeast Public Interest Organizations NOPR Comments stated that, because of the costs and complexity of financing the construction of QFs, developers frequently secure financing for a portfolio of distinct projects that may be hundreds of miles apart, at clearly separate facilities.[517] A protester could indeed assert common maintenance or common financing as evidence that a facility is at the same site as another facility, but the Commission could choose to dismiss a protest based on those factors if the protestor's claims are not sufficient to warrant a ''same site'' finding, particularly if there are no other factors indicating that the facilities are at the same site.

278. Similarly, Public Interest Organizations argues that the Commission must articulate a rationale for why the factors are appropriate for making a same site determination. We believe that, when affiliated facilities are located more than one mile but less than 10 miles from each other and demonstrate these factors, then they *may* reasonably be considered to be located at the same site. We again stress that, in the final rule, the Commission stated that the factors in the list were merely ''examples of the factors the Commission may consider.''[518] The Commission will conduct a case-by-case analysis, weighing the evidence for and against determining whether small power production facilities that are owned by the same person(s) or its affiliates are located ''at the same site.'' The Commission included the example factors in the final rule to provide a guide for the kinds of facts that an applicant seeking QF status or that a protester may assert, and that the Commission may consider in making its determination.

279. In response to Public Interest Organizations' concern that the Commission allows applicants to ''preemptively defend against rebuttal by identifying factors that affirmatively show that its facility is indeed at a separate site'' without identifying these factors, we clarify that the factors that may be used by an applicant to preemptively defend against rebuttal include the example factors identified in that same Paragraph 509 of the final rule which is the subject of the discussion above.[519]

D. QF Certification Process

280. In the final rule, the Commission adopted the NOPR proposal to revise 18 CFR 292.207(a) to allow an interested person or entity to seek to intervene and to file a protest of a self-certification or self-recertification of a QF and not have to file a petition for declaratory order and pay the filing fee for petitions. The Commission found that any increased administrative burden or litigation risk imposed by the new rule is justified by the need to ensure that QFs meet the statutory criteria for QF status.[520] The Commission stated that the ability to intervene and to file a protest of a self-certification or self-recertification of a QF without having to file a petition for declaratory order and pay the filing fee for petitions is effective as of the effective date of the final rule.[521]

281. The Commission agreed with commenters that QF recertifications to implement or address non-substantive changes should not be subject to the new protest rule in order to respect QFs' settled expectations. The Commission therefore found that protests may be filed to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of the final rule,

[511] Order No. 872, 172 FERC ¶ 61,041 at P 554.

[512] *Id.* P 550.

[513] *Id.* P 469.

[514] Public Interest Organizations Request for Rehearing at 126 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 34 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 17 (Dec. 3, 2019)). *See also* Order No. 872, 172 FERC ¶ 61,041 at P 501.

[515] Public Interest Organizations Request for Rehearing at 127 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 35 (Dec. 3, 2019)).

[516] Order No. 872, 172 FERC ¶ 61,041 at P 511.

[517] Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 35 (Dec. 3, 2019).

[518] Order No. 872, 172 FERC ¶ 61,041 at P 509.

[519] *See id.*

[520] *Id.* P 547.

[521] *Id.* P 548.

but only to a recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification and that are filed on or after the effective date of the final rule. The Commission explained that substantive changes that may be subject to a protest may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or five percent of the previously certified capacity of the QF or a change in ownership in which an owner increases its equity interest by at least 10% from the equity interest previously reported. The Commission found that recertifications (both self-recertifications and applications for Commission recertifications) making ''administrative only'' changes should not be subject to a protest pursuant to the final rule.[522]

282. The Commission disagreed with Solar Energy Industries' estimates that compliance with these new requirements would require an additional approximately 90 to 120 hours per year. The Commission noted that 18 CFR 292.207(d) already stated that, if a QF fails to conform with any material facts or representations presented in the certification, the QF status of the facility may no longer be relied upon; hence, it is long-standing practice that a QF must recertify when material facts or representations in the Form No. 556 change.[523]

283. The Commission explained that certifications and recertifications are already subject to protests, albeit in the form of petitions for declaratory order; therefore, dealing with objections to a certification or recertification is not new. The Commission stated that, although the new procedures may result in more protests being filed than the number of petitions that had been filed, the Commission believed that the conditions imposed in the final rule will limit the number of protests filed. The Commission anticipated that most, though not all, of the protests filed pursuant to the new 18 CFR 292.207(a) will relate to the new more-than-one-but-less-than-10-miles rebuttable presumption. The Commission reasoned that such protests will necessarily be limited because not all certifications and recertifications will be subject to the new more-than-one-but-less-than-10-miles rebuttable presumption. The Commission stated that only a small power production facility seeking QF status that has an affiliated small power production QF more than one but less than 10 miles away and that uses the same energy resource would be subject to the rebuttable presumption. The Commission stated that small power production facilities that do not have affiliated small power production facilities will not be affected by the new rebuttable presumption, nor will cogeneration QFs be affected by the new rebuttable presumption. The Commission reiterated that protests may only be made to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of the final rule, and only to a recertification (self-recertification or application for Commission recertification) that makes substantive changes to the existing certification that is filed on or after the effective date of the final rule.[524]

284. The Commission instituted time limits on protests that may be filed under the final rule. The Commission adopted the NOPR proposal that interested parties will have 30 days from the date of the filing of the Form No. 556 (both initial self-certification and self-recertification) at the Commission to file a protest (without paying a fee).[525]

285. The Commission also stated that, even if it indeed takes *some* small power production facilities an additional 90 to 120 hours to comply with the new requirements (which the Commission thought was unlikely), that was not an unreasonable burden to impose to ensure that a generating facility that seeks to be a QF is, in fact, entitled to QF status and is complying with PURPA.[526]

286. The Commission found that, due to the unique nature of rooftop solar PV developers, the recertification requirement for PV developers could be unduly burdensome. Therefore, to lessen the burden on such developers when recertifying, the Commission permitted rooftop solar PV developers an alternative option to file their recertification applications. Rather than require the developer to file for recertification each time the developer adds or removes a rooftop facility, the Commission allowed a rooftop solar PV developer to recertify on a quarterly basis. The Commission stated that the recertification filing would be due within 45 days after the end of the calendar quarter. However, if in any quarter a rooftop solar PV developer either has no changes or only has changes of power production capacity of 1 MW or less, the Commission stated that the rooftop solar PV developer would not be required to recertify until it has accumulated changes greater than 1 MW total over the quarters since its last filing. Additionally, the Commission stated that rooftop solar PV developers, like all small power production facilities, will not be subject to protests when they file recertifications that are ''administrative only'' in nature but would be subject to such protests when they make substantive changes to the existing certification, as detailed above.[527]

287. The Commission limited the ability to file a protest (rather than a petition for declaratory order, with the accompanying filing fee) to within 30 days of the date of the filing of the self-certification or self-recertification. The Commission stated that, if an interested party would like to contest a self-certification or self-recertification later than 30 days after the date of its filing, then the interested party may file a petition for declaratory order with the accompanying filing fee, just as they could prior to the effective date of the final rule.[528]

288. The Commission declined to impose a 60-day deadline after which a failure of the Commission to rule on the protest would result in the protest being denied by operation of law. The Commission stated that self-certification will be effective upon filing and will remain effective after a protest has been filed, until such time as the Commission issues an order revoking certification. The Commission clarified that self-recertifications will likewise remain effective after a protest has been filed, until such time as the Commission issues an order revoking recertification.[529]

289. The Commission noted that the presumption continues to be that a small power production facility seeking QF status that is located more than one but less than 10 miles from any affiliated small power production QFs is at a separate site from those affiliated small power production QFs, explaining that the Commission was simply making this presumption rebuttable.[530]

1. Requests for Rehearing

290. Solar Energy Industries state that the self-certification process was intended to be ''quick and not unduly burdensome'' [531] to avoid the

[522] *Id.* P 550.

[523] *Id.* P 552.

[524] *Id.* P 553.

[525] *Id.* P 554.

[526] *Id.* P 556.

[527] *Id.* P 560.

[528] *Id.* P 563.

[529] *Id.* P 565.

[530] *Id.* P 567.

[531] Solar Energy Industries Request for Rehearing and/or Clarification at 33 (citing *Revisions to Form, Procedures, and Criteria for Certification of*

Continued

''complexity, delays, and uncertainties created by a case-by-case qualification procedure'' that ''would act as an economic disincentive to owners of smaller facilities.'' [532] Solar Energy Industries argue that the new ''[10]-mile rule'' adds unnecessary regulatory burdens on QFs which will have a chilling effect on the development of QFs that is directly counter to PURPA's mandate to encourage QF development. Solar Energy Industries assert that, if the Commission does not reconsider the rebuttable presumption framework, the self-certification process will no longer be quick and will become unduly burdensome for all parties, including the Commission and its staff.[533]

291. Public Interest Organizations state that one of the ways that PURPA directs the Commission to encourage development of small power production facilities is to prescribe rules exempting them from the FPA, PUHCA, and state laws and regulations, as necessary to encourage development.[534] Public Interest Organizations argue that the final rule does the opposite by requiring applicants to list in Form No. 556 all ''affiliated small power production QFs using the same energy resource within one mile,'' as well as ''all affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is less than 10 miles from the electrical generating equipment of the entity seeking small power production QF status.[535] Public Interest Organizations note that multiple commenters argued that this proposal would impose a significant burden,[536] and that the burden is substantial.[537] Public Interest Organizations contend that the basis for the Commission's estimate that the final rule would impose 62 hours of administrative work on every small power production facility over 1 MW with affiliated facilities between one and 10 miles away is not clear.[538] Public Interest Organizations note that Solar Energy Industries extensively raised and documented the expected regulatory burden of the new rule, and refer to Solar Energy Industries' estimate that the new rule would require an additional 90 to 120 hours per year to comply.[539]

292. Public Interest Organizations assert that the Commission's explanation for establishing its new protest procedure is unreasonable and unsupported by the record.[540] Public Interest Organizations note that the new procedures make it far easier and more likely that an interested party will challenge certification. Both Public Interest Organizations and Solar Energy Industries contend that there is no need for this new procedure because any interested person could file a petition for declaratory order challenging certification.[541] Public Interest Organizations and Solar Energy Industries claim that, if petitions for declaratory orders have been standing in for protests until now, they should be able to continue to do so without increasing the regulatory burden on small power production facilities by adding a protest option.[542] Solar Energy Industries add that, while the current $30,000 [543] filing fee for petitions for declaratory order is substantial, it is not nearly as substantial as the increased legal fees that QFs will now have to bear to seek and defend certification.[544]

293. Public Interest Organizations assert that the Commission's new same site determination is contrary to the congressional intent of PURPA because it will discourage small power production facilities.[545] Public Interest Organizations argue that the litigation risk created by the possibility that various interested parties will protest the facility owners' certifications throughout the life of the project any time there is a change in circumstance will effectively establish a 10-mile exclusion zone for a developer around each small power production facility.[546]

294. Solar Energy Industries claim that the rebuttable presumption process and procedure will discourage investment in QFs because it brings a substantially increased litigation risk in each certification and recertification.[547] Solar Energy Industries argue that Congress did not give the Commission authority to undertake a detailed case-specific review to determine if the facility meets the maximum size requirements set forth in the statute.[548] Solar Energy Industries assert that, by authorizing the Commission to determine whether facilities are considered to be located at ''the same site,'' Congress did not intend for the Commission to promulgate regulations that would stymie the development of QFs by discouraging potential financiers, investors, and owners from backing such resources.[549]

295. Northwest Coalition asserts that the application of the final rule's same site determination to existing facilities is arbitrary, capricious, and not in accordance with law.[550] Northwest Coalition argues that the Commission erred by failing to exempt existing facilities from applicability of the new same site determination for determining eligibility as a small power production facility.[551] Northwest Coalition contends that the Commission arbitrarily applied the new rule to any existing facility that makes any substantive change to its certification documents with the Commission, causing owners of facilities financed and constructed in reliance on the former one-mile rule now to face the risk of decertification almost any time a non-ministerial change is made, including sale of a relatively minor stake in ownership of the facility.[552]

296. Northwest Coalition argues that the new rule decreases the marketability of such facilities and upsets investment-backed expectations of their owners, who often invest in a portfolio of resources with the expectation that it can eventually be sold to another owner.[553] Northwest Coalition argues that the new rule will effectively bar the transfer or sale of existing assets that were lawfully qualified under the one-mile rule but cannot qualify under the new same site determination because they consist of more than 80 MW of aggregate capacity within 10 miles.[554] It asserts that this new precedent of the Commission upsetting settled

Qualifying Facility Status for a Small Power Production or Cogeneration Facility, Order No. 732, 130 FERC ¶ 61,214, at P 8 (2010)).

[532] *Id.* at 28 (citing *Revised Regulations Governing Small Power Production and Cogeneration Facilities,* Order No. 671, 114 FERC ¶ 61,102, at P 83, *order on reh'g,* Order No. 671–A, 115 FERC ¶ 61,225 (2006)).

[533] *Id.* at 34.

[534] Public Interest Organizations Request for Rehearing at 116.

[535] *Id.*

[536] *Id.* (citing Order No. 872, 172 FERC ¶ 61,041 at PP 485, 539–42, 577–83).

[537] *Id.* at 127–29.

[538] *Id.* at 117 (citing Order No. 872, 172 FERC ¶ 61,041 at P 587).

[539] *Id.* at 129 (citing Solar Energy Industries Comments, Docket No. RM19–15–000, at 52 (Dec. 3, 2019)).

[540] *Id.* at 122.

[541] *Id.* at 122–23; Solar Energy Industries Request for Rehearing and/or Clarification at 28.

[542] Public Interest Organizations Request for Rehearing at 123.

[543] We note that the current filing fee for a petition for declaratory order is $30,060.

[544] Solar Energy Industries Request for Rehearing and/or Clarification at 28.

[545] Public Interest Organizations Request for Rehearing at 106.

[546] *Id.* at 107, 112.

[547] Solar Energy Industries Request for Rehearing and/or Clarification at 33.

[548] *Id.*

[549] *Id.* at 26.

[550] Northwest Coalition Request for Rehearing at 6.

[551] *Id.* at 53.

[552] *Id.* at 53–55; *see also* Public Interest Organizations Request for Rehearing at 132.

[553] Northwest Coalition Request for Rehearing at 55.

[554] *Id.* at 55.

expectations undermines the predictability needed for long-term investments in generation assets.[555]

297. Public Interest Organizations argue that the final rule could lock in old technology because owners of existing facilities will have an enormous incentive to avoid making changes to their facility to avoid needing to recertify.[556] Public Interest Organizations add that the final rule discourages development of new small power production facilities within 10 miles of existing facilities because the new facilities could potentially trigger revocation of certification for one or more existing facilities.[557]

298. Northwest Coalition and Public Interest Organizations note that, since 1980, facilities located more than one mile apart enjoyed certainty that the rules would not result in them being located at the same site.[558] Public Interest Organizations argue that the Commission arbitrarily and unlawfully ignored serious reliance interests because the Commission did not fully consider it or failed to provide a ''more detailed justification'' for its decision to not respect acknowledged, settled expectations in all cases, despite commenters' lengthy discussion of reliance interest.[559]

299. Public Interest Organizations assert that the Commission's decision not to grant more extensive legacy treatment for existing facilities whose owners have reasonably relied on the longstanding one-mile rule sets a precedent of dramatic regulatory uncertainty that will have a chilling effect on the market.[560] Public Interest Organizations contend that, going forward, entrepreneurs will question whether the Commission will further change the regulatory structure, despite longstanding precedent and reliance interests.[561]

300. Northwest Coalition claims that, the Administrative Procedures Act (APA), pursuant to which the Commission acted, does not authorize retroactive rules; however, the new rebuttable presumption will have the retroactive effect of applying to existing facilities seeking recertification.[562] Northwest Coalition asserts that the failure to exempt existing facilities is a significant change from the Commission's past practice of applying new certification criteria only to new facilities, not existing facilities seeking recertification.[563] Northwest Coalition notes that, when the Commission revised section 292.205(d) of its regulations regarding the new operation and efficiency certification criteria required by the Energy Policy Act of 2005 (EPAct 2005) for cogeneration facilities, those new criteria applied only to ''any cogeneration facility that was either not a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification or an application for Commission certification as a qualifying cogeneration facility under [18 CFR] 292.207 of this chapter prior to February 2, 2006. . . .'' [564] Northwest Coalition further notes that the Commission clarified ''that there is a rebuttable presumption that an existing QF does not become a 'new cogeneration facility' for purposes of the requirements of newly added section 210(n) of PURPA merely because it files for recertification.'' [565] Northwest Coalition also points out that, in Order No. 671, the Commission found that only changes to the facility that lead it to be a whole new facility, ''such as an increase in capacity from 50 MW to 350 MW,'' could trigger the applicability of the new qualification criteria.[566]

301. Northwest Coalition argues that the Commission did not respond to the precedent on this issue that NIPPC, CREA, REC, and Solar Energy Industries provided in their NOPR comments.[567] Northwest Coalition asserts that the Commission's failure to respond to legitimate objections renders its decision arbitrary and capricious.[568]

302. Public Interest Organizations state that several commenters provided data, maps, and information to show that the application of the new ''[10]-mile rule'' to existing projects has potentially widespread implications for states with significant QF development.[569] For example, Public Interest Organizations point out Southeast Public Interest Organizations' comment that the change to the one-mile rule would have implications for nearly every existing QF in North Carolina and map that shows that facilities in compliance with the original one-mile rule are within 10 miles from other QFs and could trigger the new rule on recertification.[570]

303. Public Interest Organizations complain that, although the Commission responded to these concerns by limiting protests to recertifications to instances in which a substantive change is made to an existing certification, it provided no further explanation or rationale as to how the ''substantive change'' limitation would specifically address the concerns raised.[571] Public Interest Organizations add that the Commission failed to consider the valid concerns because the term ''substantive changes'' is vague and undefined and is unlikely to meaningfully limit protests.[572]

304. Solar Energy Industries argue that, if the Commission does not grant rehearing of the ''10-mile rule,'' then the Commission must establish a grandfathering provision for facilities that are already installed.[573] Solar Energy Industries ask the Commission to clarify that all existing facilities will retain their QF status unless a recertification filing is made that changes the maximum net output or qualifying technologies of the QF.[574] Solar Energy Industries assert that, unless there is a change in the output of the facilities or another change in circumstance that has economic consequences to the utility-purchaser, then the facility's status should be beyond challenge.[575] Solar Energy Industries contend that failing to offer grandfathering to existing facilities is arbitrary, capricious, inconsistent with Commission precedent that preserves contractual expectations between parties in the event of regulatory

[555] *Id.* at 55.

[556] Public Interest Organizations Request for Rehearing at 115.

[557] *Id.*

[558] Northwest Coalition Request for Rehearing at 53; Public Interest Organizations Request for Rehearing at 132.

[559] Public Interest Organizations Request for Rehearing at 133 (citing *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[560] *Id.* at 115.

[561] *Id.*

[562] Northwest Coalition Request for Rehearing at 55 (citing *Bowen* v. *Georgetown Univ. Hosp.,* 488 U.S. 204, 208–09 (1988)).

[563] *Id.*

[564] *Id.* at 55–56 (citing 18 CFR 292.205(d)).

[565] *Id.* at 56 (citing Order No. 671, 114 FERC ¶ 61,102 at P 115).

[566] *Id.* (citing Order No. 671, 114 FERC ¶ 61,102 at P 115).

[567] *Id.* (citing NIPPC, CREA, REC, and OSEIA Comments, Docket No. RM19–15–000, at 76 (Dec. 3, 2019)).

[568] *Id.* (citing *PPL Wallingford,* 419 F.3d at 1198).

[569] Public Interest Organizations Request for Rehearing at 130 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 29–33 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 18 (Dec. 3, 2019); North Carolina DOJ Comments, Docket No. RM19–15–000, at 8 (Dec. 3, 2019)).

[570] *Id.* at 130–31 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 31 (Dec. 3, 2019)).

[571] *Id.* at 131.

[572] *Id.* at 131–32.

[573] Solar Energy Industries Request for Rehearing and/or Clarification at 34.

[574] *Id.* at 35.

[575] *Id.*

change, and does not encourage QFs as the statute requires.[576]

305. Solar Energy Industries state that, if the Commission does not grant rehearing and grandfather existing facilities, then they seek clarification that challenges to recertification filings can only be brought ''in circumstance that has economic consequences to the utility-purchaser and its ratepayers.'' [577] Solar Energy Industries argue that, by limiting challenges to existing facilities to situations where there is a change in output of the facilities or other change in circumstances that has economic consequences to the utility-purchaser and its ratepayers, the final rule will more closely align with the direction of the statute.[578]

2. Commission Determination

306. As explained in the final rule (and also above), the record shows that large facilities were disaggregating into smaller facilities and spacing themselves at a distance sufficient to be able to qualify as QFs. PURPA provides advantages for small power production facilities, and the final rule, consistent with the statute, limits those advantages to *small* power production facilities. To that end, the purpose of the new rules regarding the same site determination is to ensure compliance with PURPA.

307. We disagree with Solar Energy Industries' arguments that the ''[10]-mile rule'' adds unnecessary regulatory burdens, making the self-certification process no longer ''quick and not unduly burdensome.'' The changes to the one-mile rule and the corresponding changes to the Form No. 556 are necessary to provide the Commission the information it needs to determine whether a facility qualifies to be a QF, consistent with the standards laid out in the statute. In particular, the new requirement to list affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is less than 10 miles from the electrical generating equipment of the entity seeking small power production QF status, both on initial certification and recertification, is needed to assess whether the applicant facility and other affiliated facilities using the same energy resource are located at the same site and ultimately whether they meet the statutory 80 MW limit. Moreover, the requirement is to list *affiliated* small power production QFs; thus, only facilities with affiliates will be affected by this information requirement—single, unaffiliated QFs will face no additional burden. Similarly, for QF applicants with few affiliated facilities less than 10 miles from the applicant facility, this listing requirement should be only minimally burdensome. The requirement to list affiliates less than 10 miles from the applicant facility would likely require more time when a project owner owns many QFs less than 10 miles from the applicant facility, which will likely be a larger, more sophisticated QF developer that has resources to prepare the form. Even then, it is a necessary burden in order to ensure compliance with PURPA.

308. Additionally, in response to Solar Energy Industries' argument that the final rule adds unnecessary regulatory burden ''on QFs,'' [579] the final rule was responsive to comments on the burden of the proposed rule and, as an example of the Commission taking care to ascertain that the rules are not unduly burdensome, specifically lessened the burden on rooftop solar PV developers.[580]

309. However, in light of Public Interest Organizations' and Solar Energy Industries' renewed assertion that the regulatory burden on QFs is substantial,[581] we modify and clarify our requirements regarding the identification of affiliated small power production QFs, in order to further ensure that the regulatory burden on small power production facilities is within reasonable limits. The new Form No. 556, as revised by the final rule, requires that a facility filing a certification or recertification after the effective date of the final rule identify, in item 8a of the Form No. 556, any affiliated small power production QFs that use the same energy resource and are located less than 10 miles from the electrical generating equipment of the applicant facility, by including in the Form No. 556 each affiliated facility's: (1) Location, including geographic coordinates; (2) root docket number, if any; (3) maximum net power production capacity; and (4) common owners. Section 292.207(d) of the Commission's regulations, which the final rule renumbered to 18 CFR 292.207(f), states that if a QF fails to conform with any material facts or representations presented in the certification the QF status of the facility may no longer be relied upon.[582]

310. As a result, when any of a small power production QF's affiliated facilities less than 10 miles away changes any of the items listed above, the final rule would require a small power production QF to recertify its own Form No. 556 to reflect its affiliated facility's updated information. This represents an expansion from the requirement prior to the final rule that a small power production QF reflect the updated information of its affiliated small power production facilities one mile or less away.[583] Moreover, in order to maintain an up-to-date Form No. 556 and recertify with the correct affiliated facility information, under the final rule a small power production QF would need to monitor continually all of its affiliated small power production QFs that are less than 10 miles away for changes. This also is an expansion from the requirement, prior to the final rule, that a small power production QF monitor its affiliated small power production QFs one mile or less away for changes.[584] We conclude that it may be overly burdensome that a small power production QF monitor continually all of its affiliated facilities less than 10 miles away for changes, and that the small power production QF recertify its own facility whenever an affiliated small power production QF less than 10 miles away changes.

311. We therefore modify the final rule to state that a small power production QF evaluating whether it needs to recertify does *not* need to recertify due to a change in the information it has previously reported regarding its affiliated small power production QFs that are more than one mile but less than 10 miles from its electrical generating equipment, including adding or removing an affiliated small power production QF more than one mile but less than 10 miles away, or if an affiliated small

[576] *Id.*

[577] *Id.* (citing *Zond-PanAero Windsystem Partners I,* 76 FERC ¶ 61,137 (1996)).

[578] *Id.* at 36.

[579] Solar Energy Industries Comments, Docket No. RM19–15–000, at 51 (Dec. 3, 2019).

[580] *See* Order No. 872, 172 FERC ¶ 61,041 at P 560.

[581] Public Interest Organizations Request for Rehearing at 127–29; *see* Solar Energy Industries Request for Rehearing and/or Clarification at 34.

[582] 18 CFR 292.207(d), which the final rule renumbered to 18 CFR 292.207(f).

[583] Item 8a of the Form No. 556 effective prior to the final rule required an applicant to ''[i]dentify any facilities with electrical generating equipment located within 1 mile of the electrical generating equipment of the instant facility . . .'' Section 292.207(d) of the Commission's regulations, which the final rule renumbered to 18 CFR 292.207(f), states that if a QF fails to conform with any material facts or representations presented in the certification the QF status of the facility may no longer be relied upon. While the requirement, prior to the final rule, that a small power production QF update its Form No. 556 with the updated information of its affiliated small power production facilities one mile or less away, is not explicit, we believe that this requirement is the logical result of the intersection of the above.

[584] *See supra* note 583.

power production QF more than one mile but less than 10 miles away and previously reported in item 8a makes a modification, unless that change also impacts any other entries on the evaluating small power production QF's Form No. 556.

312. We will continue to require that a small power production QF, as it was prior to the final rule, recertify its Form No. 556 to update item 8a due to a change at any of its affiliated small power production facilities that use the same energy resource and are located one mile or less from its electrical generating equipment.[585] We will also still require that a small power production QF recertify due to a change in material fact or representation to its own facility.

313. At such time as the small power production QF makes a recertification due to a change in material fact or representation to its own facility or at any of its affiliated small power production facilities that use the same energy resource and are located one mile or less from its electrical generating equipment, we will require that the small power production QF update item 8a for all of its affiliated small power production QFs within 10 miles, including adding or deleting affiliated small power production QFs, and recording changes to previously listed small power production QFs, so that the information in its Form No. 556 is complete, accurate, and up-to-date.[586]

314. We believe that this modification reduces the burden on small power production QFs because they will not be required to continually monitor their affiliated small power production QFs more than one mile but less than 10 miles away for changes, nor will we require a small power production QF that is evaluating whether it must recertify its facility to recertify to update item 8a due to a change at its affiliated small power production facilities more than one mile but less than 10 miles from the evaluating facility's electrical generating equipment.[587] However, the affiliated QF of that evaluating small power production QF will need to recertify if the affiliated QF makes a material change to its information in its Form No. 556. In providing this modification, we reiterate that the rule providing for a rebuttable presumption for affiliated small power production QFs located more than one but less than 10 miles apart is necessary to address allegations of improper circumvention of the one-mile rule that had been presented to the Commission.[588] We emphasize that identifying affiliated facilities, and updating affiliated facility information, are necessary for the Commission to assess whether small power production facilities located more than one but less than 10 miles apart should be considered to be at the same site. However, we note that for affiliated small powder production QFs more than one mile but less than 10 miles apart, the presumption is that they are at separate sites. Therefore, we modify the recertification requirement as to a small power production QF's affiliated small power production QFs more than one mile but less than 10 miles away, because we believe this modification strikes an appropriate balance between the need to address improper circumvention and the need to avoid unduly burdening small power production QFs consistent with the presumption that QFs more than one mile but less than 10 miles apart are located at separate sites.

315. We note that, when a small power production QF makes a material change to its own facility, or when any of its affiliated small power production facilities that use the same energy resource and are one mile or less from of its electrical generating equipment makes a material change, it needs to recertify, at which point it would also be required to update item 8a for all of its affiliated small power production QFs within 10 miles. If any of the changes made are substantive, including substantive changes at any of its affiliates less than 10 miles away, the recertification will be subject to protests.[589]

316. In response to Public Interest Organizations' concerns that existing facilities will lose their certification any time they make a change requiring a recertification, we note that protests may only be made to recertification making substantive changes, and if a substantive change is made, both the entity filing the QF certification and any protesters will be allowed to present evidence supporting their respective positions. The Commission will examine any such evidence presented on a case-by-case basis to determine whether the facility in question does not actually meet the qualifications for QF status under PURPA. For a same site determination, the Commission will examine the relevant factors as discussed above. The Commission will decertify only if, after a review of the evidence, the Commission determines that the facility in question should be considered at the same site with affiliated facilities and their combined power production capacity exceeds 80 MW. The Commission's decision will be based on the evidence of whether the entity continues to comply with PURPA.

317. In response to Public Interest Organizations' assertion that several commenters provided data, maps, and information showing that the application of the new ''[10]-mile rule'' to existing projects has potentially widespread implications for states with significant QF development[590] and argument that litigation risk will effectively establish a 10-mile exclusion zone for a developer around each small power production facility,[591] we note that the Commission anticipated that most protests filed pursuant to the new 18 CFR 292.207(a) will relate to the new more-than-one-but-less-than-10-miles rebuttable presumption.[592] If two facilities are not owned by the same person(s) or its affiliates, then the facilities are definitionally not located at the same site.[593] Thus, protests cannot assert that two facilities are at the same site, unless those facilities are affiliates using the same energy resource (and more than one mile but less than 10 miles apart). Conversely only entities that have affiliates will be subject to protests regarding the same site determination. Single, unaffiliated facilities will not be subject to protests on the new same site determination.[594] Furthermore, facilities with nearby affiliates whose combined capacity does not exceed 80 MW also will not be decertified because of the new same site determination. The only facilities that will have concerns under the new same site determination are those that are affiliated with other facilities using the same energy resource, are relatively near each other, have a total combined capacity with such affiliated facilities exceeding 80 MW, and are considered at

[585] *See supra* note 583.

[586] If a small power production QF that was certified prior to the effective date of this final rule is required to recertify due to a material change to its own facility, then at that time it will be required to identify affiliates less than 10 miles from the applicant facility.

[587] We note that we are maintaining the final rule's alternative option for rooftop solar PV developers to file their recertification applications. *See* Order No. 872, 172 FERC ¶ 61,041 at P 560.

[588] *Id.* P 495.

[589] *Id.* P 550.

[590] Public Interest Organizations Request for Rehearing at 130 (citing Southeast Public Interest Organizations Comments, Docket No. RM19–15–000, at 29–33 (Dec. 3, 2019); SC Solar Alliance Comments, Docket No. RM19–15–000, at 18 (Dec. 3, 2019); North Carolina DOJ Comments, Docket No. RM19–15–000, at 8 (Dec. 3, 2019)).

[591] *Id.* at 107, 112.

[592] Order No. 872, 172 FERC ¶ 61,041 at P 533 & n.877.

[593] *Id.* P 286 n.797.

[594] *See id.* P 553.

the same site by the Commission after a consideration of the evidence.

318. Therefore, assertions that existing QFs risk decertification almost any time they recertify and that the new rule decreases marketability or discourages QF development are overstated. To the extent that the new same site determination decertifies particular QFs, decreases their marketability, or discourages their development, it only does so because such entities do not comply with PURPA. To the extent that large facilities disaggregated in order to qualify as small power production facilities, or strategically built facilities just over one mile apart, in reliance on the old one-mile rule, we note that rules can and do change. In fact, Congress specifically directed the Commission to revise its PURPA rules from time to time.[595] Moreover, we note that the new regulations do not apply to an existing facility unless and until it makes *substantive* changes. When the existing QF makes a substantive change, it is no longer the same facility it was before, and it is only then that the new regulations should apply. Additionally, we note that the facilities more than one but less than 10 miles from affiliated facilities continue to enjoy the presumption that they are at separate sites; only now the presumption is rebuttable.

319. The Commission provided examples of factors it may consider when determining whether affiliated facilities using the same resource and more than one mile but less than 10 miles apart should be considered to be at the same site, and stated that it will make a case-by-case determination on whether such facilities are indeed at the same site.[596] In response to Solar Energy Industries' argument that Congress did not give the Commission authority to undertake a detailed case-specific review, we find that Congress delegated to the Commission the authority to determine the ''same site'' and did not limit the way in which the Commission can do so, nor did Congress specify that the Commission cannot conduct a case-by-case analysis.[597]

320. Regarding Public Interest Organizations and Solar Energy Industries' arguments that there is no need for the new protest procedure because any interested person could file a petition for declaratory order to challenge a certification, we further explain the rationale for implementing the new protest structure. First, allowing protests will bring the certification process more in line with other Commission procedures, where protests to filings do not require a petition for a declaratory order and associated filing fee. Second, while self-certifications themselves are free, prior to the final rule, the only way to protest a self-certification was via paying the fee for a declaratory order, which today is $30,060. Consequently, it was possible for a facility owner to file multiple certifications with minor changes effectively shutting out a protester who could not afford to repeatedly pay the declaratory order fee for every QF submission. Allowing protests equalizes the opportunity for both facility owners and opponents to weigh in on the certification of a facility as a QF.[598]

321. While petitioners are correct that purchasing electric utilities, competitors, and local project opponents now may file protests, we believe that a more robust protest system encourages transparency and allows for better oversight by the Commission, as well as by states and other stakeholders. To the extent that petitioners imply that such entities may file frivolous protests for the purposes of delaying or otherwise hindering QF development or certification, the Commission has limited protests to within 30 days of the date of the filing of an initial certification or of a recertification making a substantive change.[599] For a facility that meets the standards to qualify as a QF, the only effect is the potential for an exchange of filings immediately after the certification is filed and some limited uncertainty while awaiting the Commission's decision. Additionally, we note that quite often QF developers file for certification even before construction of the facility has commenced; in such a case, the potential for some limited uncertainty during the exchange of filings will have minimal impact. The Commission also has determined that self-certifications will be effective upon filing and will remain effective after a protest has been filed, until such time as the Commission issues an order revoking the certification.[600]

322. In response to Public Interest Organizations' argument that the final rule does the opposite of exempting QFs from the FPA, PUHCA, and state laws and regulations, the Commission is not removing or amending the exemptions provided by the regulations implementing PURPA section 210(e).[601]

323. We also disagree with Public Interest Organizations' arguments that ''substantive change'' is vague and does not limit challenges. In the final rule, the Commission explained that ''substantive changes that may be subject to a protest may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5 percent of the previously certified capacity of the QF, or a change in ownership in which an owner increases its equity interest by at least 10% from the equity interest previously reported.'' [602] The Commission provided examples of what it may consider to be a substantive change because it intends to make a case-by-case determination. The Commission will be able to reject a protest to a recertification that the Commission does not believe rises to the level of a substantive change.

324. Regarding Northwest Coalition's argument that the APA does not authorize retroactive rules, we disagree with Northwest Coalition's premise that the new rebuttable presumption for affiliated facilities more than one mile but less than 10 miles apart will have retroactive effect when applied to existing facilities seeking recertification. The new regulations do not apply to an existing facility unless and until it must recertify because of changes to the material facts and representations at its facility or that of an affiliated facility one mile or less away. When the existing QF makes a change to the material facts and circumstances of its certification, it very well may no longer be the same facility it was when originally certified. Due to the change in material facts, the new regulations should apply. Thus, the rule is prospective, and applied only if and when new facts have prompted a recertification.[603]

325. Northwest Coalition argues that the Commission's past practice in developing new certification criteria is to apply the new criteria only to new facilities, not existing facilities seeking

[595] *See* 16 U.S.C. 824a–3(a).

[596] Order No. 872, 172 FERC ¶ 61,041 at P 511.

[597] 16 U.S.C. 796(17)(A).

[598] The Commission notes that if the Commission issues an order in response to a self-certification that is protested, or in response to an application for Commission certification, the order issued by the Commission will continue to be a declaratory order which determines whether or not a project, as described by the applicant and protester, meets the technical and ownership standards for QFs, and serves only to establish eligibility for benefits of PURPA.

[599] Order No. 872, 172 FERC ¶ 61,041 at P 554.

[600] *Id.* P 527.

[601] *Id.* P 514.

[602] *Id.* P 550.

[603] Furthermore, no commenter has explained how and why applying the new rules to new recertifications make them retroactive rules.

recertification.[604] We disagree. Northwest Coalition relies on Commission Order No. 671, which implemented section 210(n) following EPAct 2005. However, Northwest Coalition overlooks that section 210(n) of PURPA required the Commission to issue a rule revising the criteria for *new* cogeneration facilities, and therefore the Commission in Order No. 671 focused on defining what is a new facility.[605] In contrast, here the Commission was *not* implementing 210(n) and therefore was *not* revising the criteria solely for new facilities.

326. For the foregoing reasons, we decline to establish further legacy treatment for existing facilities, as requested. Existing QFs that seek to recertify due to substantive changes will be subject to protests. The Commission can determine, on a case-by-case basis, whether the evidence presented represents a substantive change or whether the change is non-substantive and thus not subject to protests, in which case the Commission will dismiss any protests submitted. We decline to specify, as Solar Energy Industries request, that only changes to the maximum net output or the qualifying technology, or in circumstances that have economic consequences to the utility-purchaser and its ratepayers, will make an existing QF's recertification subject to challenge. We likewise disagree with Solar Energy Industries' contention that failing to offer grandfathering to existing facilities is arbitrary, capricious, and inconsistent with Commission precedent. We continue to believe that conducting a case-by-case analysis is the best way to determine whether the change that prompted recertification is substantive, will avoid arbitrary outcomes, and is necessary to comply with the intent of PURPA to provide advantages only to *small* power production facilities.

E. Corresponding Changes to the FERC Form No. 556

327. In the final rule, the Commission adopted the NOPR proposals regarding changes to the Form No. 556, with some further clarifications and additions. The Commission found that the added information collected through these changes was necessary to implement the changes made to the regulations in the final rule and thus justified the increase in reporting burden.[606]

328. The final rule revised the ''Who Must File'' section to include a ''Recertification'' section which provides the text of revised 18 CFR 292.207(f) (previously 18 CFR 292.207(d)), which states that a QF must file for recertification whenever the QF ''fails to conform with any material facts or representations presented . . . in its submittals to the Commission.'' [607] The Commission stated that this addition does not alter our recertification requirements, and the Commission included it on the Form No. 556 simply to make the Form No. 556 clearer in its application.[608]

329. The Commission stated that the total burden estimates in the ''Paperwork Reduction Act Notice'' section of Form No. 556 would be updated based on the changes in the final rule, to provide the following estimates: 1.5 hours for self-certifications of facilities of 1 MW or less; 1.5 hours for self-certifications of a cogeneration facility over 1 MW; 50 hours for applications for Commission certification of a cogeneration facility; 3.5 hours for self-certifications of small power producers over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 56 hours for an application for Commission certification of a small power production facility over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 9.5 hours for self-certifications of small power producers over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource; 62 hours for an application for Commission certification of a small power production facility over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource.[609]

1. Requests for Rehearing

330. Public Interest Organizations state that the final rule would impose 62 hours of administrative work on every small power production facility over 1 MW with affiliated facilities between one and 10 miles away and the basis for this calculation is not clear.[610]

2. Commission Determination

331. Public Interest Organizations misread the final rule on this point. The final rule provided a total burden estimate of 9.5 hours for *self-certifications* of small power producers over 1 MW with affiliated small power production QFs more than one but less than 10 miles apart that use the same energy resource, but 62 hours for an *application for Commission certification* of a small power production facility over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource.[611] The estimate is not that *every* small power production facility over 1 MW with affiliated facilities between one and 10 miles away will have a total burden of 62 hours, but *only those who chose to apply for Commission certification* (as opposed to use the self-certification process). For those who self-certify, the burden estimate is 9.5 hours.

332. In response to Public Interest Organizations' assertion that the basis for the calculation is not clear, below we explain the calculation. Prior to the final rule, ''[t]he estimated burden for completing the Form No. 556, including gathering and reporting information, [was] as follows: 1.5 hours for self-certification of a small power production facility . . . 50 hours for an application for Commission certification of a small power production facility. . . .'' [612] The Information Collection Section of the final rule showed changes due to the final rule and estimated an additional 8 hours for the category ''self-certifications'' and 12 hours for the category ''applications for Commission certification'' of small power production facilities greater than 1 MW that are more than one but less than 10 miles from affiliated small power production QFs. Therefore, the total burden estimate as provided in the final rule is as follows: 1.5 hours plus 8 hours for a total of 9.5 hours for self-certifications and 50 hours plus 12 hours for a total of 62 hours for applications for Commission certification.

333. In light of the modification to the final rule described in section III.D, we

[604] Northwest Coalition Request for Rehearing at 55.

[605] 16 U.S.C. 824a–3(n).

[606] *See* Order No. 872, 172 FERC ¶ 61,041 at P 584.

[607] 18 CFR 292.207(d), which the final rule renumbered to 292.207(f).

[608] Order No. 872, 172 FERC ¶ 61,041 at P 586.

[609] *See* Order No. 872, 172 FERC ¶ 61,041 at P 587.

[610] Public Interest Organizations Request for Rehearing at 117 (citing Order No. 872, 172 FERC ¶ 61,041 at P 587).

[611] *See* Order No. 872, 172 FERC ¶ 61,041 at P 587. The majority of QFs choose the less burdensome option to self-certify pursuant to 18 CFR 292.207(a), by filing a Form No. 556. An application for Commission certification pursuant to 18 CFR 292.207(b) also requires filing the Form No. 556, but applicants for Commission certification typically additionally prepare a written petition arguing why the Commission should grant QF status.

[612] *Commission Information Collection Activities (FERC–556); Comment Request; Extension,* Docket No. IC19–16–000, at 5 (issued May 15, 2019).

further modify the ''Recertification'' section in page one of the instructions of the Form No. 556, which was added by the final rule. The ''Recertification'' section currently reads ''A QF must file a recertification whenever the qualifying facility 'fails to conform with any material facts or representations presented . . . in its submittals to the Commission.' 18 CFR 292.207(f).'' To this, we will add ''Among other possible changes in material facts that would necessitate recertification, a small power production QF is required to recertify to update item 8a due to a change at an affiliated facility(ies) one mile or less from its electrical generating equipment. A small power production QF is *not* required to recertify due to a change at an affiliated facility(ies) listed in item 8a that is more than one mile but less than 10 miles away from its electrical generating equipment, unless that change also impacts any other entries on the Form 556.''

F. PURPA Section 210(m) Rebuttable Presumption of Nondiscriminatory Access to Markets

334. In the final rule, the Commission acknowledged that, when Order Nos. 688 and 688–A were issued, the Commission decided that small QFs may not have nondiscriminatory access to markets.[613] In Order Nos. 688 and 688–A, based on factors present at that time, the Commission decided to draw the line for small entities at 20 MW.[614] However, as stated in the final rule, energy markets have matured and market participants have gained a better understanding of the mechanics of such markets.[615] In the final rule, the Commission stated that, since Order Nos. 688 and 688–A, the Commission recognized multiple examples of small power production facilities under 20 MW participating in RTO/ISO energy markets.[616] The Commission stated that it had found that the electric utilities in those proceedings rebutted the presumption of no market access and therefore terminated the mandatory purchase obligation.[617]

335. The Commission adopted the proposal to revise 18 CFR 292.309(d) to update the net power production capacity level at which the presumption of nondiscriminatory access to a market attaches for small power production facilities, but not for cogeneration facilities. After reviewing commenters' concerns, the Commission updated the rebuttable presumption from 20 MW to 5 MW, rather than from 20 MW to 1 MW as originally proposed in the NOPR. The Commission explained that small power production facilities with a net power production capacity at or below 5 MW will be presumed *not* to have nondiscriminatory access to markets and, conversely, small power production facilities with a net power production capacity over 5 MW will be presumed to have nondiscriminatory access to markets.

336. The Commission disagreed with commenters who argued that a lack of record evidence existed to support the proposed reduction below 20 MW. The Commission explained that, in Order Nos. 688 and 688–A, the Commission had determined that small QFs may not have nondiscriminatory access to wholesale markets and, therefore, it was reasonable to establish a presumption for small QFs. The Commission explained that, at that time, the Commission had found that it was ''reasonable and administratively workable'' to define ''small'' for purposes of this regulation to be QFs below 20 MW.[618] The Commission noted that a number of commenters, including state entities which are charged with applying PURPA in their jurisdictions, supported revising the definition of small QFs eligible for the presumption in reducing the 20 MW threshold.

337. The Commission again acknowledged that there is no unique number to draw a line for determining what is a small entity.[619] The Commission explained that, in establishing the 20 MW presumption as the line between large and small QFs for purposes of section 210(m), the Commission had looked at other non-QF rulemaking orders in which it had considered what constituted a small entity and those orders showed 20 MW was a reasonable number at which to draw the line.[620] The Commission explained that it had since determined, based on changed circumstances since the issuance of Order Nos. 688 and 688–A, that entities with capacity lower than 20 MW have nondiscriminatory access to the markets and, therefore, a capacity level of 20 MW may no longer be a reasonable place to establish the presumption on what constitutes a smaller entity under our regulations.

338. The Commission explained that it was updating the rebuttable presumption based on industry changes since Order No. 688. The Commission stated that it was reasonable to update the rebuttable presumption as the markets defined in PURPA section 210(m)(1)(A), (B), and (C) evolve because the statute itself does not establish a presumption and the statue requires the Commission to update the rules from time to time to ensure it complies with PURPA.

339. The Commission explained that, over the last 15 years, the RTO/ISO markets have matured and market participants have gained a better understanding of the mechanics of such markets. As a result, the Commission found that it is reasonable to presume that access to the RTO/ISO markets has improved and that it is appropriate to update the presumption for smaller production facilities. The Commission further explained that, as in Order No. 688, it looked to indicia in other orders to determine where the presumption should be set.[621]

340. The Commission found that market rules are inclusive of power producers below 20 MW participating in markets. The Commission explained that, for example, since the issuance of Order No. 688, the Commission has required public utilities to increase the availability of a Fast-Track interconnection process for projects up to 5 MW.[622]

341. The Commission found that, while the existence of Fast-Track interconnection processes does not on its own demonstrate nondiscriminatory access for resources under 20 MW, it does indicate that entities smaller than 20 MW have access to the market. The Commission found that presuming that QFs above 5 MW have such access is

[613] Order No. 688, 117 FERC ¶ 61,078 at P 72; Order No. 688–A, 119 FERC ¶ 61,305 at PP 94–96; *N. States Power Co.,* 151 FERC ¶ 61,110, at PP 31–36 (2015); *PPL Elec. Utilities Corp.,* 145 FERC ¶ 61,053, at PP 21–24 (2013).

[614] Order No. 688, 117 FERC ¶ 61,078 at PP 74, 76; Order No. 688–A, 119 FERC ¶ 61,305 at P 103.

[615] Order No. 872, 172 FERC ¶ 61,041 at P 629.

[616] *Id.* P 624.

[617] *Id.* (citing *Fitchburg Gas and Elec. Light Co.,* 146 FERC ¶ 61,186, at P 33 (2014); *City of Burlington, Vt.,* 145 FERC ¶ 61,121, at P 33 (2013)).

[618] *Id.* PP 626–29 (citing Order No. 688, 117 FERC ¶ 61,078 at PP 74–78 (establishing rebuttable presumption); Order No. 688–A, 119 FERC ¶ 61,305 at P 95 (''There is no perfect bright line that can be drawn and we have reasonably exercised our discretion in adopting a 20 MW or below demarcation for purposes of determining which QFs are unlikely to have nondiscriminatory access to markets.'')).

[619] Order No. 872, 172 FERC ¶ 61,041 at P 627 (citing Order No. 688–A, 119 FERC ¶ 61,305 at P 97 (''Although there is no unique and distinct megawatt size that uniquely determines if a generator is small, in other contexts the Commission has used 20 MW, based on similar considerations to those presented here, to determine the applicability of its rules and policies.'')).

[620] *Id.* PP 628–29 (citing Order No. 688, 117 FERC ¶ 61,078 at P 76; Order No. 688–A, 119 FERC ¶ 61,305 at PP 96–97).

[621] *Id.* P 629.

[622] *Id.* P 630 (citing *Small Generator Interconnection Agreements and Procedures,* Order No. 792, 78 FR 73240 (Dec. 5, 2013), 145 FERC ¶ 61,159, at P 103 (2013), *clarifying,* Order No. 792–A, 146 FERC ¶ 61,214 (2014)).

therefore a reasonable approach to identifying a capacity level at which to update the rebuttable presumption of nondiscriminatory market access.[623]

342. The Commission explained that, since the issuance of Order No. 688 the Commission has required each RTO/ISO to update its tariff to include a participation model for electric storage resources that established a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.[624] The Commission explained that these proposals require RTO/ISOs to revise their tariffs to provide easier access for smaller resources. The Commission determined that requiring markets to accommodate storage resources as low as 100 kW also supports this finding that resources smaller than 20 MW have nondiscriminatory access to those RTO/ISO markets. The Commission stated that it believed that these developments support updating the 20 MW presumption to a lower number.

343. The Commission found that, when these changes are viewed together, their cumulative effect demonstrates that it is reasonable for the Commission to maintain a small entity presumption but update its determination of what is a small entity under this presumption under the PURPA Regulations. The Commission found that the prospect of increased participation of distributed energy resources in energy markets further supports the proposition that wholesale markets are accommodating resources with smaller capacities.[625]

344. The Commission recognized that certain of these precedents would support reducing the presumption below 5 MW and perhaps even lower than 1 MW. The Commission explained that it carefully considered the comments detailing the problems that QFs have had in participating in RTO/ISO markets, problems that necessarily are more acute for smaller QFs at or near the 1 MW threshold proposed in the NOPR.[626] The Commission therefore determined that 5 MW is a more reasonable threshold of non-discriminatory access to RTO/ISO markets.

345. The Commission therefore found it reasonable to update the presumption under these regulations as to what constitutes a small entity that is presumed to have non-discriminatory access to RTO/ISO markets and markets of comparable competitive quality below 20 MW, and that 5 MW represents a reasonable new threshold that accounts for the change of circumstances indicating that 20 MW no longer is appropriate but also accommodates commenters' concerns that a 1 MW threshold would be too low. The Commission acknowledged that ''there is no unique and distinct megawatt size that uniquely determines if a generator is small.''[627] The Commission found that a 5 MW threshold accords with PURPA's mandate to encourage small power production facilities, recognizes the progress made in wholesale markets as discussed above, and balances the competing claims of those seeking a lower threshold and those seeking a higher threshold.[628]

346. The Commission explained that individual small power production QFs that are over 5 MW and less than 20 MW can seek to make the case; however, they do not truly have nondiscriminatory access to a market and should still be entitled to a mandatory purchase obligation.[629]

347. The Commission disagreed with Advanced Energy Economy's argument that the Commission failed to sufficiently justify its change in policy.[630] The Commission noted that, in *FCC* v. *Fox Television,* the court stated that, when an agency makes a change in policy, the agency must show that there are good reasons for the change, ''[b]ut it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.''[631]

348. The Commission clarified that it was maintaining its determination from Order No. 688 that small entities potentially may not have non-discriminatory access for purposes of PURPA section 210(m). The Commission explained that it had determined that using 20 MW as an indicator of what constitutes a small entity is no longer valid. The Commission found that entities below 20 MW increasingly have access to the markets and become familiar with practices and procedures and that markets have since implemented changes to provide easier access to smaller facilities, including small power production QFs, storage facilities, and distributed energy resources. The Commission found that these changes demonstrate a change in facts since the time it issued Order No. 688, which supports updating what constitutes a small entity for purposes of PURPA section 210(m).[632]

349. The Commission explained that, while it found that it is reasonable to update the rebuttable presumption from 20 MW to 5 MW, it recognized commenters' concerns regarding specific barriers to participation in RTO markets that may affect the nondiscriminatory access to those markets of some individual small power production facilities between 5 MW and 20 MW. The Commission explained that, to address these concerns, it was revising 18 CFR 292.309(c)(2)(i)–(vi) to include factors that small power production facilities between 5 MW and 20 MW can point to in seeking to rebut the presumption that they have nondiscriminatory access. The Commission clarified that these factors are in addition to the existing ability, pursuant to 18 CFR 292.309(c), to rebut the presumption of access to the market by demonstrating, *inter alia,* operational characteristics or transmission constraints.[633]

350. The Commission added to 18 CFR 292.309(c) the following factors: (1) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates; (2) the unique circumstances impacting the time/length of interconnection studies/queue to process small power QF interconnection requests; (3) a lack of affiliation with entities that participate in RTO/ISO markets; (4) a predominant purpose other than selling electricity which would warrant the small power QF being treated similarly to cogenerators (*e.g.,* municipal solid waste

[623] *Id.* P 631.

[624] *Id.* P 632 (citing *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Orgs. and Indep. Sys. Operators,* 83 FR 9580 (Mar. 6, 2018), Order No. 841, 162 FERC ¶ 61,127, at P 265 (2018)).

[625] *Id.* P 633 (citing *Elec. Participation in Mkts Operated by Reg'l Transmission Orgs and Indep. Sys. Operators,* 157 FERC ¶ 61,121, at P 129 (2016) (footnote omitted) (''The costs of distributed energy resources have decreased significantly, which when paired with alternative revenue streams and innovative financing solutions, is increasing these resources' potential to compete in and deliver value to the organized wholesale electric markets.'')).

[626] *Id.* P 634 (referencing Allco Comments, Docket No. RM19–15–000, at 17–19 (Dec. 3, 2019); Advanced Energy Economy Comments, Docket No. RM19–15–000, at 10–11 (Dec. 3, 2019); DC Commission Comments, Docket No. RM19–15–000, at 5 (Dec. 3, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 89–90 (Dec. 3, 2019); Solar Energy Industries Comments, Docket No. RM19–15–000, at 45–49 (Dec. 3, 2019)).

[627] Order No. 688–A, 119 FERC ¶ 61,305 at P 97.

[628] Order No. 872, 172 FERC ¶ 61,041 at P 635.

[629] *Id.* P 636.

[630] *Id.* P 639 (referencing Advanced Energy Economy Comments, Docket No. RM19–15–000, at 6 (Dec. 3, 2019) (citing *FCC* v. *Fox Television,* 556 U.S. at 515)).

[631] *FCC* v. *Fox Television,* 556 U.S. at 515.

[632] Order No. 872, 172 FERC ¶ 61,041 at P 638.

[633] *Id.* P 640.

facilities, biogas facilities, run-of-river hydro facilities, and non-powered dams); (5) the QF has certain operational characteristics that effectively prevent the QF's participation in a market; and (6) the QF lacks access to markets due to transmission constraints, including that it is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity. The Commission explained that this list was not intended to be an exhaustive list of the factors that a QF could rely upon in seeking to rebut the presumption. The Commission further explained that these factors, among other indicia of lack of nondiscriminatory access, would be assessed by the Commission on a case-by-case basis when considering a claim that the presumption of nondiscriminatory access to the defined markets should be considered rebutted for a specific QF.[634]

351. The Commission found that the addition of these factors addressed commenters' concern that not all small power production facilities between 5 and 20 MW may have nondiscriminatory access to competitive markets and facilitates the ability of small power production facilities facing barriers to participation in RTO markets to demonstrate their lack of access.[635] The Commission explained, for example, that, while a small power production facility between 5 MW and 20 MW does not need to be physically interconnected to transmission facilities to be considered as having access to the statutorily-defined wholesale electricity markets, there are some small power production facilities between 5 MW and 20 MW that may face additional barriers, such as excessively high costs and pancaked delivery rates, to access wholesale markets.[636]

352. The Commission further explained that, for example, several commenters expressed concern over the resources or administrative burden for some small power QFs that lack the necessary experience or expertise to participate in energy markets. Recognizing these concerns, the Commission added consideration of both the fact that some small power production facilities will face additional difficulties due to costs, administrative burdens, length of the interconnection study process and the size of the queues and the fact that some small power production QFs do not have access to the expertise of affiliated entities.[637]

353. The Commission agreed with commenters that some small power production facilities are similar to cogeneration facilities because their predominant purpose is not power production. The Commission found that, like cogeneration facilities, the sale of electricity from these small power production facilities is a byproduct of another purpose and these facilities might not be as familiar with energy markets and the technical requirements for such sales. The Commission therefore allowed the small subset of small power production facilities that are between 20 MW and 5 MW to rebut the presumption of access to markets when the predominant purpose of the facility is other than selling electricity, and the sale of electricity is simply a byproduct of that purpose. The Commission recognized that, like all QFs over 20 MW, there may be particular small power production facilities with certain operational characteristics or that are located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity.[638]

1. Requests for Rehearing and Clarification

354. Northwest Coalition, Public Interest Organizations, and Solar Energy Industries contend that the Commission erred in revising the rebuttable presumption for QFs between 5 MW and 20 MW, arguing that the Commission failed to demonstrate that QFs between 5 MW and 20 MW have nondiscriminatory access to markets prior to shifting the burden from requiring utilities to demonstrate QFs 20 MW and under have non-discriminatory access to markets to requiring QFs between 5 MW and 20 MW to prove that they do not have access.[639] Public Interest Organizations, Northwest Coalition and Solar Energy Industries argue that, under the terms of section 210(m), a utility must ''set forth the factual basis'' showing that QFs have non-discriminatory access to the market, and the Commission is statutorily required to determine if the record sufficiently demonstrates that QFs have non-discriminatory access to the market before terminating the mandatory purchase obligation.[640] Public Interest Organizations argue that general presumptions that conditions are improving for small QFs to access competitive markets is insufficient justification.[641]

355. Northwest Coalition and Public Interest Organizations assert that there is no evidence that circumstances have changed since Order No. 688, arguing that most QFs 20 MW and under (1) are still connected to lower-voltage distribution facilities that are subject to state regulations instead of Commission-regulated interconnection procedures; and (2) require technical enhancements, face pancaked rates, and additional administrative burdens.[642] Public Interest Organizations contend that the Commission has repeatedly concluded that QFs below 20 MW face obstacles to transmission access in RTO/ISO regions that prevent them from participating in competitive markets.[643] Northwest Coalition and Public Interest Organizations claim that the only two examples of small QFs selling into wholesale markets that the Commission included in the final rule did so with a larger, more experienced company acting on their behalf.[644] Public Interest Organizations and Northwest Coalition contend that there is no evidence that small QFs are actually participating in regional markets, therefore, it is impossible to conclude that small QFs do so regularly.[645]

356. Northwestern Coalition and Public Interest Organizations dispute the Commission's claims that (1) small QFs have gained a better understanding of the markets; (2) changes to interconnection rules indirectly support small QFs' access to markets; and (3) changes in RTO/ISO market rules to accommodate energy storage resources support the Commission's finding that QFs between 5 and 20 MW have non-discriminatory access to markets.[646] Northwestern Coalition and Public Interest Organizations argue that the Commission provided no evidence that

[634] *Id.* P 641.

[635] *Id.* P 642.

[636] *Id.*

[637] *Id.* P 643.

[638] *Id.* P 644.

[639] Public Interest Organizations Request for Rehearing and Clarification at 136–37 (citing 5 U.S.C. 556(d); *Nat'l Min. Ass'n* v. *Babbitt,* 172 F.3d 906, 910 (D.C. Cir. 1999); *United Scenic Artists* v. *NLRB,* 762 F.2d 1027, 1034 (D.C. Cir. 1985)); Northwest Coalition Request for Rehearing at 47–48; Solar Energy Industries Request for Rehearing and/or Clarification at 38–41.

[640] Public Interest Organizations Request for Rehearing at 136 (citing 16 U.S.C. 824a–3(m)(3)).

[641] Solar Energy Industries Request for Rehearing and/or Clarification at 38–39; Public Interest Organizations Request for Rehearing and Clarification at 40.

[642] Public Interest Organizations Request for Rehearing at 138–140.

[643] *Id.* at 138–39.

[644] *Id.* at 140.

[645] *Id.* at 139; Northwest Coalition Request for Rehearing at 49–50.

[646] Northwest Coalition Request for Rehearing at 50; Public Interest Organizations Request for Rehearing at 137–140.

small QFs have gained a better understanding or how that understanding helped them overcome the obstacles small QFs face in accessing markets.[647] Northwestern Coalition and Public Interest Organizations assert that the adoption of fast-track procedures for facilities under 5 MW or accommodations for energy storage resources do nothing to support access by QFs between 5 and 20 MW to markets.[648] Northwest Coalition contends that the Commission also ignored evidence that smaller resources face unique barriers to accessing competitive markets, such as that the standard trading block in wholesale markets is 25 MW, or that requiring transmission be scheduled in 1 MW blocks place a disproportionate burden on small generators.[649]

357. One Energy claims that behind-the-meter distributed energy resources (DERs) are more like cogeneration than small power production because their primary purpose is to directly power homes and business and not to sell energy at wholesale.[650] Therefore, One Energy argues that the final rule was ''unduly discriminatory'' in finding that behind-the-meter DERs between 5 and 20 MW have non-discriminatory access to markets. One Energy asserts that behind-the-meter resources should be exempted from the reduction like cogeneration facilities. Further, One Energy contends that the Commission cited QFs that are similar to cogeneration facilities, such as solid waste facilities and biogas facilities, but did not specifically include behind-the-meter DERs. One Energy argues that at a minimum the Commission should list behind-the-meter DERs like other categories of small power production facilities that are entitled to rebut the presumption of nondiscriminatory market access.[651]

358. One Energy also seeks clarification as to how the new same site determination rules will affect the PURPA section 210(m) presumption that small power production facilities with a net power production capacity at or below 5 MW do not have nondiscriminatory access to markets. One Energy states that it has three behind-the-meter wind projects with three separate off-takers, within one mile of each other. One Energy is concerned that, if one of the off-takers no longer takes service, the Commission would aggregate the formerly behind-the-meter facility with the other facilities within one mile, find that the three together are 15 MW and consequently find that the formerly behind-the-meter facility is not eligible for the below 5 MW presumption.[652]

359. Public Interest Organizations assert that the rebuttable list of factors is only included in 18 CFR 292.309(c) and was not added to 18 CFR 292.309(e) that applies to QFs in ISO–NE, MISO, NYISO and PJM nor in 18 CFR 292.309(f) that applies to QFs in ERCOT. Public Interest Organizations request that, to prevent unnecessary confusion, the Commission incorporate the factors listed in 18 CFR 292.309(c) into both (e) and (f).[653]

2. Commission Determination

360. We disagree with parties' arguments and reaffirm the finding that market conditions have changed since the issuance of Order No. 688. In establishing the original rebuttable presumption of 20 MW in Order No. 688, the Commission relied on the market conditions at that time. As the Commission stated, markets have matured and the markets have provided, and continue to provide, increased access to smaller resources demonstrating the need for the Commission to reconsider its definition of small power production QFs. In the final rule, the Commission updated the relevant definition of a small power production facility for purposes of 292.309 to be 5 MW and, despite the arguments on rehearing, we affirm that finding here.[654]

361. We disagree with arguments that the Commission did not provide sufficient support for its finding that QFs between 5 and 20 MW can be presumed to have non-discriminatory access competitive markets. Specifically, the Commission explained that, since the issuance of Order No. 688, the Commission has required each RTO/ISO to update its tariff to include a participation model for electric storage resources that established a minimum size requirement for participation in the RTO/ISO markets that does not exceed 100 kW.[655] The Commission explained that these proposals require RTO/ISOs to revise their tariffs to provide easier access for smaller resources. The Commission determined that requiring markets to accommodate storage resources as low as 100 kW also supports this finding that resources smaller than 20 MW have nondiscriminatory access to those RTO/ISO markets. Further, that the Commission chose a 5 MW cut-off for eligibility for the fast-track procedures represents an implicit judgment by the Commission that facilities larger than 5 MW do not need such procedures to be able to interconnect to the grid.[656] The Commission stated that it believed that these developments support updating the 20 MW presumption to a lower number.[657]

362. While these factors were a sufficient basis to support the Commission's action, they were by no means an exhaustive recitation of relevant developments in competitive markets since Order Nos. 688. For example, as the Commission noted in another recent rulemaking, all of the RTOs/ISOs have at least one participation model that allows resources as small as 100 kW to participate in their markets.[658] Indeed, even since the final rule, the Commission has continued to provide greater opportunities for small power production facilities to participate in wholesale organized markets.[659]

363. Regarding arguments from Public Interest Organizations and Northwest Coalition that the final rule failed to consider that smaller resources face unique barriers to accessing competitive markets, we disagree. In the final rule, the Commission carefully considered such concerns and amended 18 CFR 292.309(c) to include factors that small power production QFs between 5 and 20 MW can use to rebut the presumption of non-discriminatory access to markets.[660] These factors include (1) specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates; (2) unique circumstances impacting the time/

[647] Northwest Coalition Request for Rehearing at 49; Public Interest Organizations Request for Rehearing at 139.

[648] Northwest Coalition Request for Rehearing at 51–52; Public Interest Organizations Request for Rehearing at 140.

[649] Northwest Coalition Request for Rehearing at 52–53.

[650] One Energy Request for Rehearing and Clarification at 5–7.

[651] *Id.* at 7.

[652] *Id.* at 8–9.

[653] Public Interest Organizations Request for Rehearing at 143–44.

[654] Order No. 872, 172 FERC ¶ 61,041 at PP 629–633.

[655] *Id.* P 632 (citing Order No. 841, 162 FERC ¶ 61,127 at P 265).

[656] *Id.* PP 630–31.

[657] *Id.* P 632.

[658] Order No. 841, 162 FERC ¶ 61,127 at P 272.

[659] *See Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 2222, 172 FERC ¶ 61,247 (2020). While Order No. 2222 will not become effective until after the effective date of the rulemaking in the instant proceeding and applies only to Commission-jurisdictional RTOs/ISOs, we find it appropriate to mention it here to provide another example of the greater opportunities for small power producer participation in organized electric markets.

[660] Order No. 872, 172 FERC ¶ 61,041 at P 640.

length of interconnection studies/queue to process small power QF interconnection requests; (3) lack of affiliation with entities that participate in RTO/ISO markets; (4) predominant purpose other than selling electricity which would warrant the small power QF being treated similarly to cogenerators (*e.g.,* municipal solid waste facilities, biogas facilities, run-of-river hydro facilities, and non-powered dams); (5) having certain operational characteristics that effectively prevent the qualifying facility's participation in a market; and (6) lack of access to markets due to transmission constraints, including that it is located in an area where persistent transmission constraints in effect cause the QF not to have access to markets outside a persistently congested area to sell the QF output or capacity.[661] The Commission adopted the first four of these factors recognizing that some small power production facilities between 5 and 20 MW may lack nondiscriminatory access to markets.[662] The first four factors address concerns that a small power production QF may lack expertise, either directly or within its corporate family, to access markets defined in PURPA section 210(m)(1) or has operational characteristics or is remotely located such that it faces additional transmission obstacles to reach such markets. Additionally, the Commission applied the last two factors on the list, *i.e.,* ''operational characteristics'' and ''transmission constraints,'' which were originally adopted in Order No. 688 for QFs between 20 and 80 MW, to permit QFs between 5 and 20 MW to rebut the presumption that they have non-discriminatory access to markets. This list of factors, we stress, is not exclusive but was adopted in the final rule to address the specific concerns commenters raised in responding to the NOPR.

364. Like the initial regulations implementing PURPA section 210(m), the final rule's revision to the rebuttable presumption merely provides a framework for evaluating whether individual small power production facilities have nondiscriminatory access to the markets defined in PURPA section 210(m); it does not decide that every small power producer QF between 5 MW and 20 MW in fact has nondiscriminatory access. The D.C. Circuit has held that ''[t]he fact that FERC chose to adopt certain rebuttable presumptions via rulemaking, rather than by case-by-case adjudication, does not violate any of the statute's requirements.'' [663] Contrary to Public Interest Organizations' argument,[664] the rebuttable presumption, if applicable, provides the requisite ''factual basis'' for a utility to invoke. Conversely, the corresponding factors for rebutting this presumption, if applicable, provide a ''factual basis'' that a QF may invoke to rebut that presumption.

365. In undertaking this rulemaking, the Commission stated its intent to modify PURPA in light of changed circumstances since it first implemented PURPA section 210(m).[665] During the rulemaking process, the Commission appropriately reviewed the MW level at which to set a presumption of nondiscriminatory market access for small power production qualifying facilities. As discussed above, a variety of factors have led to the increased ability to access wholesale markets by small power production qualifying facilities, and in supporting this trend of an increased ability to access the energy market, the Commission has established policies and procedures such as the fast-track interconnection process, among others, to accommodate and encourage smaller energy resources' participation in organized electricity markets.[666] Thus, as the Commission stated in the final rule, 20 MW is no longer the appropriate threshold to presume nondiscriminatory access to markets for small power production QFs under PURPA section 210(m).[667]

366. In the final rule, as noted above, the Commission addressed commenters' concerns by establishing a list of established specific factors that QFs between 5 and 20 MW can utilize, among others, to rebut nondiscriminatory access.[668] Commenters stated that small power production QFs 20 MW and less are often located on local distribution systems and have additional hurdles to gain transmission access to energy markets. To address this concern, the Commission established the first factor: Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates.[669]

367. In response to commenters' concerns over the potential disproportionate high costs and delays a small power production QF between 5 and 20 MW could face, the Commission added the second factor: The unique circumstances impacting the time or length of interconnection studies or queue to process small power producer QF interconnection requests.[670]

368. Commenters asserted that those QFs between 5 and 20 MW that have larger energy affiliates could access the knowledge and expertise needed to participate in such markets, whereas other QFs could not, which led the Commission to adopt the third factor: A lack of affiliation with entities that participate in RTO/ISO markets.[671]

369. Commenters representing solid waste, biogas, and hydro facilities claimed that some small power production QFs between 5 and 20 MW were more similar to cogeneration QFs than small power production QFs in that their primary purpose was not the sale of electricity. In response, the Commission included the fourth factor: A predominant purpose other than selling electricity, which would warrant the small power QF being treated similarly to cogenerators (*e.g.,* municipal solid waste facilities, biogas facilities, run-of-river hydro facilities, and non-powered dams).[672]

370. As the Commission explained in the final rule (and reiterated above), this is not intended to be an exhaustive list but is intended to provide a framework for the Commission to evaluate small power producer QFs between 5 and 20 MW who wish to rebut the presumption of nondiscriminatory access.[673] Any small power producer QF may use these factors (or other evidence) to rebut the presumption that a specific QF between 5 MW and 20 MW has non-discriminatory access to markets, and the Commission will review each request on a case-by-case basis.

371. One Energy argues that a behind-the-meter DER's primary purpose is to generate electricity for its host and any potential sale is secondary like cogeneration facilities. While not ruling on the validity of this argument with respect to any behind-the-meter DER, we clarify that small power production QFs that are behind-the-meter DERs are permitted to argue that the fourth factor which states ''a predominant purpose other than selling electricity which would warrant the small power QF being treated similarly to cogenerators (*e.g.,* municipal solid waste facilities, biogas facilities, run-of-river hydro facilities, and non-power dams)'' supports their argument that they lack

[661] *Id.* P 641.

[662] *Id.* PP 640, 642.

[663] *AFPA* v. *FERC,* 550 F.3d at 1183.

[664] Public Interest Organizations Request for Rehearing at 136 (citing 16 U.S.C. 824a–3(m)(3)).

[665] *See* NOPR, 168 FERC ¶ 61,184 at P 127.

[666] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 628–33.

[667] *See id.* P 627.

[668] *Id.* PP 641–42.

[669] *Id.*

[670] *Id.* PP 641, 643.

[671] *Id.*

[672] *Id.* PP 641, 644.

[673] *Id.* P 641.

nondiscriminatory access to markets.[674] We will rule on any such arguments on a case-by-case basis taking into account the specific facts of the DER making the argument.

372. We grant Public Interest Organizations request for clarification that the list of factors in section 18 CFR 292.309(c) that small power production facilities between 5 MW and 20 MW can point to in seeking to rebut the presumption that they have nondiscriminatory access was not—but should be—added to 18 CFR 292.309(e) that applies to QFs in ISO–NE, MISO, NYISO, and PJM, and also to 18 CFR 292.309(f) that applies to QFs in ERCOT. In order to avoid confusion, we hereby incorporate the factors listed in 18 CFR 292.309(c) into both (e) and (f).

373. In response to One Energy's request for clarification as to how the new same site determination rules will affect the PURPA section 210(m) presumption, in determining whether a QF is eligible for the rebuttable presumption that a qualifying small power production facility with a capacity at or below 5 MW does not have nondiscriminatory access to the market, the Commission will look primarily at the net certified capacity of each QF. We note that the regulations state that, for the purposes of implementing the rebuttable presumption of nondiscriminatory access, the Commission *will not be bound by* the standards (*i.e.,* the new ten-mile rule) of section 292.204(a)(2). The Commission will review, on a case-by-case basis, any question that involves applying both 18 CFR 292.309 and 292.204 to the same entity. We further note that, while we will look primarily at the net certified capacity of each QF, we may consider, inter alia, the new ''ten-mile rule.''

G. Legally Enforceable Obligation

374. In the final rule, the Commission adopted the NOPR proposal to require QFs to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO.[675] The Commission affirmed that the states have flexibility in determining what constitutes an acceptable showing of commercial viability and financial commitment, albeit subject to the criteria being objective and reasonable. The Commission found that requiring a showing of commercial viability and financial commitment, based on objective and reasonable criteria, would ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning. At the same time, the Commission found, the criteria also ensure that the purchasing utility does not unilaterally and unreasonably decide when its obligation arises. The Commission believed that this struck the right balance for QF developers and purchasing utilities and should encourage development of QFs.[676]

375. The Commission explained that examples of factors a state could reasonably require are that a QF demonstrate that it is in the process of at least some of the following prerequisites: (1) Taking meaningful steps to obtain site control adequate to commence construction of the project at the proposed location and (2) filing an interconnection application with the appropriate entity. The Commission found that the state could also require that the QF show that it has submitted all applications, including filing fees, to obtain all necessary local permitting and zoning approvals. The Commission also clarified that it is appropriate for states to require a QF to demonstrate that it is in the process of obtaining site control or has applied for all local permitting and zoning approvals, rather than requiring a QF to show that it has obtained site control or secured local permitting and zoning. Moreover, the Commission noted that the factors that the state requires must be factors that are within the control of the QF.[677]

376. The Commission clarified that demonstrating the required financial commitment does not require a demonstration of having obtained financing. The Commission explained that requiring QFs to, for example, apply for all relevant permits, take meaningful steps to seek site control, or meet other objective and reasonable milestones in the QF's development can sufficiently demonstrate QF developers' financial commitment to the QFs' development and allows utilities to reasonably rely on the LEO in planning for system resource adequacy.[678]

377. The Commission explained that the intent of these factors is to provide a reasonable balance between providing QFs with objective and transparent milestones up front that are needed to obtain a LEO, allowing states the flexibility to establish factors that address the individual circumstances of each state, and increasing utilities' ability to accurately plan their systems.[679] The Commission further explained that establishing objective and reasonable factors is intended to limit the number of unviable QFs obtaining LEOs and unnecessarily burdening utilities that currently have to plan for QFs that obtain a LEO very early in the process but ultimately are never developed.[680] The Commission explained that, in adopting this provision, the Commission was raising the bar to prevent speculative QFs from obtaining LEOs, with an associated burden on purchasing utilities, but was not establishing a barrier for financially committed developers seeking to develop commercially viable QFs.

378. The Commission disagreed that establishing reasonable, transparent factors is an onerous barrier or will cause a substantial reduction in QFs. The Commission found that the objective and reasonable criteria it had established would protect QFs against onerous requirements for LEOs that hinder financing, such as a requirement for a utility's execution of an interconnection agreement[681] or power purchase agreement,[682] requiring that QFs file a formal complaint with the state commission,[683] limiting LEOs to only those QFs capable of supplying firm power,[684] or requiring the QF to be able to deliver power in 90 days.[685] The Commission found that, by making clear that such conditions are not permitted, and by instead providing objective criteria to clarify when a LEO commences, the LEO provisions it adopted would encourage the development of QFs.

379. The Commission, however, declined to establish specific factors for the states to adopt, to establish a baseline for eligible factors, or to otherwise limit states' flexibility. The Commission found that states are in the best position to determine, in the first instance, what specific factors would

[674] *Id.*

[675] *Id.* P 684.

[676] *Id.*

[677] *Id.* P 685.

[678] *Id.* P 687.

[679] *Id.* P 688.

[680] *Id.*

[681] *Id.* P 689 (citing *FLS,* 157 FERC ¶ 61,211 at P 26 (stating that requiring signed interconnection agreement as prerequisite to LEO is inconsistent with PURPA Regulations)).

[682] *Id.* (citing *Murphy Flat Power, LLC,* 141 FERC ¶ 61,145, at P 24 (2012) (finding that requiring a signed and executed contract with an electric utility as a prerequisite to a LEO is inconsistent with PURPA Regulations)).

[683] *Id.* (citing *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187, at P 40 (2013)).

[684] *Id.* (citing *Exelon Wind 1, L.L.C.* v. *Nelson,* 766 F.3d at 400).

[685] *Id.* (citing *Power Resource Group, Inc.* v. *Public Utility Comm'n of Texas,* 422 F.3d 231 (5th Cir. 2005)).

best suit the specific circumstances of each state so long as they are objective and reasonable and provided the suggested prerequisites above as examples of objective and reasonable factors.[686]

380. The Commission explained that the concept of a LEO was specifically adopted to prevent utilities from circumventing the mandatory purchase requirement under PURPA by refusing to enter into contracts.[687] The Commission stated that it had found that requiring a QF to have a utility-executed contract or interconnection agreement or requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA.[688] The Commission stated that, when reviewing factors to demonstrate commercial viability and financial commitment, states thus should place emphasis on those factors that show that the QF has taken meaningful steps to develop the QF that are within the QF's control to complete, and not on those factors that a utility controls. The Commission explained, for example, that requiring a QF to make a deposit or whether the QF has applied for system impact, interconnection or other needed studies are the types of factors that may show that the QF has taken meaningful steps to develop the QF that are within the QF's control and the type of objective and reasonable standards that states can consider in their implementation.[689]

1. Requests for Rehearing

381. Public Interest Organizations argue that the final rule's provision allowing states to require a showing of commercial viability and financially commitment results in additional barriers to QFs without sufficient safeguards to protect QFs from states' abuses. Public Interest Organizations contend that the Commission erred in failing to justify how these factors are consistent with PURPA's purpose of encouraging QFs. Public Interest Organizations assert that the Commission ignored the evidence that utilities adopt requirements to avoid their mandatory purchase obligation and states often acquiesce. Public Interest Organizations contend that the requirement that the factors be reasonable and objective are insufficient to protect QFs in seeking to establish a LEO and reiterate their request that the Commission establish specific limits on the kind of showing that is required before a LEO is established.[690]

382. Public Interest Organizations argue that the Commission has repeatedly issued declaratory orders showing the unlawfulness of several LEO restrictions adopted by states but has repeatedly declined to initiate enforcement actions. They add that state regulators and courts have dismissed the Commission's declaratory orders as advisory and states have supported utilities' efforts to restrict LEOs. Public Interest Organizations assert that the Commission erred in considering the potential benefits to the utility's planning process of imposing new burdens on QFs. Instead, they contend that Congress directed the Commission to develop rules that would encourage QFs, not impose new burdens on QFs to benefit a utility's planning process.[691]

383. Mr. Mattson argues that requiring financing as a factor to obtain a LEO is problematic because a LEO is needed to obtain financing.[692]

2. Commission Determination

384. We disagree with the arguments raised on rehearing. The Commission created the LEO concept in Order No. 69 and has the authority to refine its contours in a way that continues to encourage QF development. The final rule achieves that result. Therefore, we reaffirm the Commission's finding in the final rule that requiring a showing of commercial viability and financial commitment based on objective and reasonable criteria encourages the development of QFs.[693] It also strikes an appropriate balance between the needs of the QFs and the needs of the purchasing utilities.

385. That the revisions to the LEO eligibility requirements encourage the development of QFs is clear. In the past, purchasing utilities impeded the development of QFs by unilaterally erecting barriers to QFs establishing an obligation, such as by requiring a QF to have entered into an interconnection agreement or a power purchase agreement with the purchasing utility. It would then be up to the purchasing utility to decide whether and when to enter into such an agreement. The Commission changed that dynamic in the final rule by adopting regulations formalizing Commission precedent that takes away from the purchasing utility the unilateral ability to determine when the purchasing utility's obligation arises. Under the final rule, state-established objective and reasonable criteria would clarify when an obligation arises, rather than leave it to the purchasing utility.[694] What is more, the criteria should be such that the ability to meet the criteria is in the hands of the QF and not in the hands of the purchasing utility. For example, it is the QF, and not the purchasing utility, that decides when it will apply for necessary permits or when it will apply for an interconnection agreement.[695] Therefore, providing guidelines for establishing reasonable and objective criteria will prevent purchasing utilities from unilaterally and unreasonably deciding when its obligation to purchase arises and provides guidance to QFs seeking to establish a LEO. Moreover, to meet the needs of the purchasing utility, requiring a showing of commercial viability and financial commitment will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development and, therefore, for which it would be unreasonable for a utility to include in its resource planning.

[686] *Id.* P 690.

[687] *Id.* P 695 (citing *JD Wind 1, LLC,* 129 FERC ¶ 61,148 at P 25, *reh'g denied,* 130 FERC ¶ 61,127 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880); *see also Midwest Renewable Energy Projects, LLC,* 116 FERC ¶ 61,017 (2006)).

[688] *Id.* (citing *FLS,* 157 FERC ¶ 61,211 at P 23 (finding such requirements ''allows a utility to control whether and when a legally enforceable obligation exists—*e.g.,* by delaying the facilities study'')).

[689] *Id.*

[690] Public Interest Organizations Request for Rehearing at 145.

[691] *Id.* at 147–49.

[692] Mr. Mattson Motion for Time, Reconsideration, and Request Answers at 2.

[693] Order No. 872, 172 FERC ¶ 61,041 at P 684.

[694] *Id.* P 690.

[695] *Id.* P 694.

386. The criteria the Commission provided under the final rule are different from the prerequisites that the Commission in the past has found inconsistent with PURPA or that courts have permitted despite such Commission precedent.[696] Objective and reasonable criteria for demonstrating commercial viability and financial commitment to proceed give a better sense to a state and a purchasing utility that a QF is more likely to be built. In comparison, requiring that a utility execute an interconnection agreement[697] or power purchase agreement,[698] a QF file a formal complaint with the state commission,[699] a QF be capable of supplying firm power,[700] or a QF be able to deliver power in 90 days[701] are likely beyond the control of a QF or procedural requirements that do not reveal the likelihood that a QF will be developed and are therefore inappropriate obstacles to QF development.

387. Allowing states to require a showing of commercial viability and financial commitment from QFs will enable utilities and states to know which QFs are more likely to be built, thus enabling them to better plan their systems and accommodate all sources of QF power, and are just and reasonable to the consumers of the electric utility. States are not required to adopt specific criteria, but, as with other PURPA Regulations, the Commission has established the boundaries within which each state can adopt appropriate criteria that address each states' unique characteristics. As explained in the final rule, providing guidance as to how QFs can establish commercial viability and a financial commitment will provide certainty that QF developers can rely upon, thereby encouraging QF development.[702] We believe that providing clear, objective, and reasonable guidelines for establishing a LEO will also reduce disputes between state commissions, utilities, and QF developers.

388. Finally, the final rule explicitly provided that ''obtaining a PPA or financing *cannot* be required to show proof of financial commitment.''[703]

III. Information Collection Statement

389. The Paperwork Reduction Act[704] requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (including reporting, record keeping, and public disclosure requirements) directed to 10 or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in rulemakings (including deletion, revision, or implementation of new requirements).[705] Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the information collection of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

390. With respect to the Form No. 556 information collection (Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility, OMB Control No. 1902–0075), in the final rule, the Commission affirmed that the relevant burdens derive from the change from the Commission's current ''one-mile rule'' for determining whether generation facilities should be considered to be at the same site for purposes of determining qualification as a qualifying small power production facility, to allowing an interested person or other entity challenging a QF certification the opportunity to file a protest, without a fee, to rebut the presumption that affiliated small power production QFs using the same energy resource and located more than one mile and less than 10 miles from the applicant facility are considered to be at separate sites. The Commission stated that it was making the following changes to the Form No. 556 which affect the burden of the information collection:

- Allow an interested person or other entity challenging a QF certification the opportunity to file a protest, without a fee, to an initial certification (both self-certification and application for Commission certification) filed on or after the effective date of the final rule, or to a recertification (self-recertification or application for Commission recertification) that makes substantive changes to the existing certification that is filed on or after the effective date of the final rule.
- Require *all* applicants to report the applicant facility's geographic coordinates, rather than only for applications where there is no street address.
- Change the current requirement to identify *any* affiliated facilities with electrical generating equipment within one mile of the applicant facility's electrical generating equipment to instead require applicants to list only affiliated small power production QFs using the same energy resource one mile or less from the applicant facility.
- Additionally require applicants to list affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is greater than one mile and less than 10 miles from the electrical generating equipment of the applicant facility.
- Require the applicant to list the geographic coordinates of the nearest ''electrical generating equipment'' of both its own facility and the affiliated small power production QF in question based on the definitions adopted in the final rule.
- Provide space for the applicant to explain, if it chooses to do so, why the affiliated small power production QFs using the same energy resource, that are more than one mile and less than 10 miles from the electrical generating equipment of the applicant facility, should be considered to be at separate sites from the applicant's facility, considering the relevant physical and ownership factors identified in the final rule.

The Commission stated that these changes in burden are appropriate because they are necessary to meet the statutory requirements contained in PURPA.

[696] *See id.* P 34 (citing examples of state-established prerequisites to obtaining LEOs that are inconsistent with PURPA Regulations because they hinder QF financing).

[697] *Id.* P 689 (citing *FLS,* 157 FERC ¶ 61,211 at P 26 (stating that requiring signed interconnection agreement as prerequisite to LEO is inconsistent with PURPA Regulations)).

[698] *Id.* (citing *Murphy Flat Power, LLC,* 141 FERC ¶ 61,145 at P 24 (finding that requiring a signed and executed contract with an electric utility as a prerequisite to a LEO is inconsistent with PURPA Regulations)).

[699] *Id.* (citing *Grouse Creek Wind Park, LLC,* 142 FERC ¶ 61,187 at P 40).

[700] *Id.* (citing *Exelon Wind 1, L.L.C.* v. *Nelson,* 766 F.3d at 400 (requiring that only QFs capable of providing firm power are entitled to an LEO)).

[701] *Id.* (citing *Power Resource Group, Inc.* v. *Pub. Util. Comm'n of Texas,* 422 F.3d 231, 237–39 (5th Cir. 2005) (requiring that only QFs capable of delivering power within 90 days are entitled to an LEO)).

[702] *Id.* P 684.

[703] *Id.* P 687 (emphasis added).

[704] 44 U.S.C. 3501–21.

[705] *See* 5 CFR 1320.11.

391. The Commission included the following table (shown below) which provided estimated changes to the burden and cost of the Form No. 556 due to the final rule.[706] (The estimates have not changed from the final rule.)

FERC–556, CHANGES DUE TO FINAL RULE IN DOCKET NOS. RM19–15–000 AND AD16–16–000[707]

Facility type	Filing type	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Increased average burden hours & cost per response ($) (4)	Increased total annual burden hours & total annual cost ($) (3) * (4) = (5)	Increased annual cost per respondent ($) (5) ÷ (1) = (6)
Cogeneration and Small Power Production Facility ≤1 MW[708].	Self-certification	no change (692).	no change (1.25).	no change (865).	no change (1.5 hrs.); $0.	no change (1,297.5 hrs.); $0.	$0
Cogeneration Facility >1 MW	Self-certification	no change (63).	no change (1.25).	no change (78.75).	no change (1.5 hrs.); $0.	no change (118.125 hrs.); $0.	0
Cogeneration Facility >1 MW	Application for FERC certification.	no change (1)	no change (1.25).	no change (1.25).	no change (50 hrs.); $0.	no change (62.5 hrs.); $0.	0
Small Power Production Facility >1 MW, ≤1 Mile from Affiliated Small Power Production QF.	Self-certification	no change (899)[709].	no change (1.25).	no change (1,123.75).	2 hrs.; $166	2,247.5 hrs.; $186,542.5.	207.5
Small Power Production Facility >1 MW, ≤1 Mile from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25).	no change (0)	6 hrs.; $498	no change (0 hrs.); $0.	0
Small Power Production Facility >1 MW, >1 Mile, <10 Miles from Affiliated Small Power Production QF.	Self-certification	no change (900).	no change (1.25).	no change (1,125).	8 hrs.; $664	9,000 hrs.; $747,000.	830
Small Power Production Facility >1 MW, >1 Mile, <10 Miles from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25).	no change (0)	12 hrs.; $996	no change (0 hrs.); $0.	0
Small Power Production Facility >1 MW, ≥10 Miles from Affiliated Small Power Production QF.	Self-certification	no change (899).	no change (1.25).	no change (1,123.75).	2 hrs.; $166	2,247.5 hrs.; $186,542.5.	207.5
Small Power Production Facility >1 MW, ≥10 Miles from Affiliated Small Power Production QF.	Application for FERC certification.	no change (0)	no change (1.25).	no change (0)	6 hrs.; $498	no change (0 hrs.); $0.	0
FERC–556, Total Additional Burden and Cost Due to Final Rule.		no change (3,454).		no change (4,317.5).		13,495 hrs.; $1,120,085.	

A. Request for Rehearing

392. Public Interest Organizations state that Solar Energy Industries questioned the Commission's burden estimate in the NOPR, anticipating that the actual burden will be far higher.[710] Public Interest Organizations assert that the Commission dismissed Solar Energy Industries' estimates that the new rule would require an additional 90 to 120 hours per year to comply[711] without providing additional justification or explanation for the Commission's time and expense estimates, which is arbitrary and capricious.[712]

B. Commission Determination

393. The Commission in the final rule directly addressed Solar Energy Industries comments and explained why it did not agree with Solar Energy Industries' estimates.[713] Additionally, we note that while other commenters agreed that the NOPR's proposals would result in increased administrative

[706] There were no rehearing requests related to the estimated burden changes for the FERC–912 (PURPA Section 210(m) Notification Requirements Applicable to Cogeneration and Small Power Production Facilities; OMB Control No. 1902–0237), so it is not addressed further.

[707] The figures in this table reflect estimated changes to the current OMB-approved inventory for the Form No. 556 (approved by the Office of Management and Budget (OMB) on November 18, 2019). As of October 21, 2020, the Paperwork Reduction Act (PRA) packages for the reporting requirements in the final rule in Docket Nos. RM19–15 and AD16–16 are still pending review at OMB.

Where ''no change'' is indicated, the current figure is included parenthetically for information only. Those parenthetical figures are not included in the final total for column 5.

Commission staff believes that the industry is similarly situated in terms of wages and benefits. Therefore, cost estimates are based on FERC's 2020 average hourly wage (and benefits) of $83.00/hour. (The submittal to and approval of OMB in 2019 for Form No. 556 was based on FERC's 2018 average annual wage hourly rate of $79.00/hour. Because the change from the $79.00 hourly rate to the current $83.00 hourly rate was not due to the final rule, this chart does not depict this increase.)

[708] Not required to file.

[709] In the Form No. 556 approved by OMB in 2019, for the category ''Small Power Production Facility > 1 MW, Self-certification,'' we estimated the number of respondents at 2,698. We have now divided that category into three categories: ''Small Power Production Facility >1 MW, ≤1 Mile from Affiliated Small Power Production QF,'' ''Small Power Production Facility >1 MW, >1 Mile, <10 Miles from Affiliated Small Power Production QF,'' ''Small Power Production Facility >1 MW, ≥10 Miles from Affiliated Small Power Production QF.'' In this column, the numbers 899, 900, and 899 are a distribution of those same estimated 2,698 respondents across the three categories.

[710] Public Interest Organizations Request for Rehearing at 129.

[711] *Id.* (citing Solar Energy Industries Comments, Docket No. RM19–15–000, at 52 (Dec. 3, 2019)).

[712] *Id.* at 129–30.

[713] Order No. 872, 172 FERC ¶ 61,041 at PP 552–56.

burden and expense,[714] Solar Energy Industries was the only commenter to provide a numerical estimate to challenge the Commission's proposed estimates. The Commission nevertheless increased its burden estimates in the final rule in response to the comments received.[715] We also note that Solar Energy Industries did not independently support its estimate of increased burden of 90 to 120 hours. Rather, Solar Energy Industries relied on a separate rulemaking proceeding for a different regulatory program administered by the Commission,[716] and stated, without justification, that it believed the estimates for an ultimately withdrawn portion of that rulemaking (the proposed Connected Entity Information requirement) are a reasonable approximation of the burden that QFs would face in complying with the new requirements in the final rule.[717] While both rulemakings require the disclosure of affiliate information, the withdrawn Connected Entity Information proposal would have also required reporting of certain employee information.[718] Furthermore, the final rule limits the information geographically to require the listing of only those affiliated entities that are less than 10 miles away, whereas the withdrawn Connected Entity Information requirement from the other proceeding would not have limited its information collection geographically.

394. Moreover, we believe that Solar Energy Industries' estimate vastly overstates the regulatory burden. First, the Commission explained in the final rule that 18 CFR 292.207(d) (which the Commission did not alter in the final rule except to renumber as 18 CFR 292.207(f)) already states that if a QF fails to conform with any material facts or representations presented in the certification, the QF status of the facility may no longer be relied upon,[719] and hence it is long-standing practice that a QF must recertify when material facts or representations in the Form No. 556 change.

395. Second, with regard to the new Form No. 556 requirement to identify all affiliated small power production QFs using the same energy resource that are less than 10 miles from the electrical generating equipment of the certifying facility, we note that the final rule expanded the requirement to identify such facilities to less than 10 miles away, but the requirement to identify such facilities less than one mile already existed.

396. Third, we note that not all QFs will be affected by this expanded requirement. Only small power production QFs that have an affiliated small power production QF more than one but less than 10 miles away that uses the same energy resource will be subject to the new requirement to list the affiliated small power production QF. QFs that have no affiliated small power production QFs will not be affected, nor will those whose only affiliates are more than 10 miles away. Moreover, those QFs that have only a few affiliated small power production QFs more than one but less than 10 miles away will only suffer a small increase in burden to list these affiliated facilities. The only facilities that may suffer a more significant burden—from the new requirement to identify affiliated facilities that use the same energy resource more than one and less than 10 miles away—are facilities with multiple facilities close together, and it is precisely this group of facilities from whom the Commission needs this information, in order to determine whether those facilities should be considered to be at the same site.

397. However, in light of Public Interest Organizations' and Solar Energy Industries' renewed assertion that the regulatory burden on QFs is substantial,[720] we modify and clarify our requirements regarding the identification of affiliated small power production QFs, in order to further ensure that the regulatory burden on small power production facilities is within reasonable limits as described in section III.D. Specifically, as explained more fully in section III.D above, we modify the final rule to state that a small power production QF evaluating whether it needs to recertify does not need to recertify due to a change in the information it has previously reported regarding its affiliated small power production QFs that are more than one mile but less than 10 miles from its electrical generating equipment, including adding or removing an affiliated small power production QF more than one mile but less than 10 miles away, or if an affiliated small power production QF more than one mile but less than 10 miles away and previously reported in item 8a makes a modification, unless that change also impacts any other entries on the evaluating small power production QF's Form No. 556.

398. We will continue to require that a small power production QF, as it was prior to the final rule, recertify its Form No. 556 to update item 8a due to a change at any of its affiliated small power production facilities located one mile or less from of its electrical generating equipment.[721] We will also still require that a small power production QF recertify due to a change in material fact or representation to its own facility.

399. At such time as the small power production QF makes a recertification due to a change in material fact or representation to its own facility or at any of its affiliated small power production facilities that use the same energy resource and are located one mile or less from its electrical generating equipment, we will require that the small power production QF update item 8a for all of its affiliated small power production QFs within 10 miles, including adding or deleting affiliated small power production QFs, and recording changes to previously listed small power production QFs, so that the

[714] Ares EIF Management, LLC Comments, Docket No. RM19–15–000, at 6 (Dec. 2, 2019); Borrego Solar Systems, Inc. Comments, Docket No. RM19–15–000, at 4 (Dec. 3, 2019); Consolidated Edison Development, Inc. Comments, Docket No. RM19–15–000, at 5 (Nov. 15, 2019); Public Interest Organizations Comments, Docket No. RM19–15–000, at 97–98 (Dec. 3, 2019); Solar Energy Industries Comments, Docket No. RM19–15–000, at 51–52, 54, 57–58 (Dec. 3, 2019); South Carolina Solar Business Alliance Comments, Docket No. RM19–15–000, at 15–18 (Dec. 3, 2019); Southern Environmental Law Center, et al. Comments, Docket No. RM19–15–000, at 29, 35 (Dec. 3, 2019); sPower Development Company, LLC Comments, Docket No. RM19–15–000, at 14 (Dec. 3, 2019).

[715] For example, in the NOPR, the Commission estimated that a small power production facility greater than 1 MW, but less than one mile from an affiliated facility, that submits a self-certification would not change the annual burden or cost. However, the Commission in the final rule estimated that such a small power production facility would need two additional hours to complete the Form No. 556; thus, the total annual burden hours and cost per response for this category would increase by two hours and by $166. Moreover, in the NOPR, the Commission estimated that a small power production facility greater than 1 MW, and greater than 10 miles from an affiliated facility, that submits an application for Commission certification would not change the annual burden or cost. However, Commission in the final rule estimated that such a small power production facility would need six additional hours to complete the Form No. 556; thus, the total annual burden hours and cost per response for this category would increase by six hours and by $498.

[716] *See Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Order No. 860, 168 FERC ¶ 61,039 (2019) (adopting rules concerning data collection for public utilities with market-based rates).

[717] Solar Energy Industries Comments, Docket No. RM19–15–000, at 57–58 (Dec. 3, 2019).

[718] *See Data Collection for Analytics and Surveillance and Market-Based Rate Purposes,* Notice of Proposed Rulemaking, 156 FERC ¶ 61,045, at P 52 (2016).

[719] 18 CFR 292.207(d), which the final rule renumbered to 18 CFR 292.207(f).

[720] Public Interest Organizations Request for Rehearing at 127–29; *see* Solar Energy Industries Request for Rehearing and/or Clarification at 34.

[721] *See supra* note 583.

information in its Form No. 556 is complete, accurate, and up-to-date.[722]

400. We believe that this modification reduces the burden on small power production QFs because we will not require them to monitor continually their affiliated small power production QFs more than one mile but less than 10 miles away for changes nor will we require a small power production QF that is evaluating whether it must recertify its facility to recertify to update item 8a due to a change at its affiliated small power production facilities more than one mile but less than 10 miles from the evaluating facility's electrical generating equipment.[723] However, the affiliated QF of that evaluating small power production QF will need to recertify if the affiliated QF makes a material change to its information in its Form No. 556. After reviewing the rehearing requests, and implementing the modification described above, we conclude that this requirement strikes an appropriate balance between the need to address improper circumvention and the need to avoid unduly burdening small power production QFs. With the modification described above, we find that our burden estimates, as reported in the final rule, continue to be reasonable, especially now that we have lessened the burden as compared to the final rule by making this change on rehearing. We do not believe that the change we have made today to the Form No. 556 to implement the above modification adds any additional burden to the information collection. We also note that, in retaining the pre-final rule requirement that a small power production recertify information on affiliate small power production facilities one mile or less away,[724] we are not adding any additional burden.

401. Though Public Interest Organizations and Solar Energy Industries questioned the Commission's estimates, the Commission provided ample justification for why the burden and cost estimates would increase as a result of the final rule. In the final rule, the Commission estimated that the annual burden hours and costs for the information collection for the Form No. 556 would increase as a result of the changes to the ''one-mile rule'' in the final rule.[725] The Commission explained that it was implementing new requirements for applicants to report the QF's geographic coordinates, list affiliated small power production QFs using the same energy resource one mile or less from the applicant facility, list affiliated small power production QFs using the same energy resource whose nearest electrical generating equipment is greater than one mile and less than 10 miles from the electrical generating equipment of the applicant facility, and list the geographic coordinates of the nearest ''electrical generating equipment'' of both its own facility and the affiliated small power production QF in question.[726] The Commission also suggested that if applicants anticipate a protest to their certifications, they could provide explanations as to why the affiliated small power production QFs using the same energy resource that are more than one mile and less than 10 miles from the electrical generating equipment of the applicant facility should be considered at separate sites from the applicant's facility.[727]

402. Additionally, the Commission noted that, as a result of the changes to the PURPA Regulations made in the final rule, small power production QFs will have to spend more time identifying any affiliated small power production QFs that are less than one mile, between one and 10 miles, and more than 10 miles, apart. The Commission further expected that there will be an increase in the burden hours and cost due to the new ability of entities to protest without a fee, which will affect initial self-certifications, applications for Commission certification, or recertifications that make substantive changes to an existing certification after the effective date of the final rule.[728]

1. QFs Submitting Self-Certifications

403. Prior to the final rule, the estimated burden for a small power production facility greater than 1 MW filing a self-certification was 1.5 hours.[729]

a. Small Power Production Facility Greater Than 1 MW, and Less Than One Mile From an Affiliated Small Power Production QF

404. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW, and less than one mile from an affiliated facility, two hours in addition to the prior estimated 1.5 hours to fill out the new version of the Form No. 556 for a self-certification.[730] In making this estimate of two additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates.[731] While it would also be required to identify and provide the geographic coordinates for any small power production QFs located less than 10 miles from the applicant facility, the current Form No. 556 already required identifying any facilities located within one mile of the applicant facility. The Commission reasoned that the applicant may need to take some additional time to ascertain that there were no additional facilities located more than one mile from the applicant facility. The Commission therefore reasoned that, for this category, it may take an applicant facility an additional two hours to complete the Form No. 556.[732]

b. Small Power Production Facility Greater Than 1 MW, and More Than One Mile but Less Than 10 Miles From an Affiliated Small Power Production QF

405. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW, and more than one mile but less than 10 miles from an affiliated facility, eight hours in addition to the prior estimated 1.5 hours to fill out the new version of the Form No. 556 for a self-certification.[733] In making this estimate of eight additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates and to identify and provide the geographic coordinates for any small power production QFs located less than 10 miles from the applicant facility. If the applicant chose, it could provide explanations as to why the affiliated small power production QFs using the same energy resource that are more than one mile and less than 10 miles from the electrical generating equipment of the applicant facility should be considered to be at separate sites from the applicant's facility.[734] The Commission

[722] If a small power production QF that was certified prior to the effective date of this final rule is required to recertify due to a material change to its own facility, then at that time it will be required to identify affiliates less than 10 miles from the applicant facility.

[723] We note that we are maintaining the final rule's alternative option for rooftop solar PV developers to file their recertification applications. *See* Order No. 872, 172 FERC ¶ 61,041 at P 560.

[724] *See supra* note 583.

[725] Order No. 872, 172 FERC ¶ 61,041 at P 699.

[726] *Id.* P 698.

[727] *Id.*

[728] *Id.* P 699.

[729] *Commission Information Collection Activities (FERC–556); Comment Request; Extension,* Docket No. IC19–16–000 (issued May 15, 2019).

[730] Order No. 872, 172 FERC ¶ 61,041 at P 699.

[731] *Id.* P 698.

[732] *Id.* P 699.

[733] *Id.*

[734] *Id.* P 698.

therefore reasoned that, for this category, it may take an applicant facility an additional eight hours to complete the Form No. 556.[735]

c. Small Power Production Facility Greater Than 1 MW and 10 Miles or More From an Affiliated Small Power Production QF

406. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW and 10 miles or more from an affiliated facility two hours in addition to the prior estimated 1.5 hours to fill out the new version of the Form No. 556 for a self-certification.[736] In making this estimate of two additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates but would not be required to identify and provide the geographic coordinates for any small power production QFs located more than 10 miles from the applicant facility. The Commission reasoned that the applicant may need to take some additional time to ascertain that there were no additional facilities located less than 10 miles from the applicant facility. The Commission therefore reasoned that, for this category, it may take an applicant facility an additional two hours to complete the Form No. 556.[737]

2. QFs Submitting Applications for Commission Certification

407. Prior to the final rule, the estimated burden for a small power production facility greater than 1 MW filing an application for Commission certification was 50 hours.[738]

a. Small Power Production Facility Greater Than 1 MW, and Less Than One Mile From an Affiliated Small Power Production QF

408. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW, and less than one mile from an affiliated facility, six hours in addition to the prior estimated 50 hours to fill out the new version of the Form No. 556 as part of an application for Commission certification.[739] In making this estimate of six additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates. Also, while the applicant would also be required to identify and provide the geographic coordinates for any small power production QFs located less than 10 miles from the applicant facility, the current Form No. 556 already required identifying any facilities located within one mile of the applicant facility. The Commission reasoned that the applicant may need to take some additional time to ascertain that there were no additional facilities located more than one mile from the applicant facility. Unlike a self-certification, the application for Commission certification also requires the applicant to pay a filing fee, and applicants for a Commission certification generally provide more explanation and a narrative filing. The Commission therefore reasoned that, for this category, it may take an applicant facility an additional six hours to complete the Form No. 556.[740]

b. Small Power Production Facility Greater Than 1 MW, and More Than One Mile but Less Than 10 Miles From an Affiliated Small Power Production QF

409. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW, and more than one mile but less than 10 miles from an affiliated facility, 12 hours in addition to the prior estimated 50 hours to fill out the new version of the Form No. 556 for an application for Commission certification.[741] In making this estimate of 12 additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates and to identify and provide the geographic coordinates for any small power production QFs located less than 10 miles from the applicant facility. If the applicant chose, it could also provide explanations as to why the affiliated small power production QFs using the same energy resource, that are more than one mile and less than 10 miles from the electrical generating equipment of the applicant facility, should be considered to be at separate sites from the applicant's facility.[742] Unlike a self-certification, the application for Commission certification also requires the applicant to pay a filing fee, and applicants for a Commission certification generally provide more explanation and a narrative filing. Therefore, the Commission reasoned that, for this category, it may take an applicant facility an additional 12 hours to complete the Form No. 556.[743]

c. Small Power Production Facility Greater Than 1 MW and 10 Miles or More From an Affiliated Small Power Production QF

410. In the final rule, given the implementation of the new 10-mile rule, the Commission estimated that it would take a small power production facility greater than 1 MW and 10 miles or more from an affiliated facility six hours in addition to the prior estimated 50 hours to fill out the new version of the Form No. 556 for an application for Commission certification.[744] In making this estimate of six additional hours, the Commission took into consideration that the applicant would now be required to additionally provide its geographic coordinates, but the applicant would not be required to identify and provide the geographic coordinates for any small power production QFs located more than 10 miles from the applicant facility. The Commission reasoned that the applicant may need to take some additional time to ascertain that there were no additional facilities located less than 10 miles from the applicant facility. Unlike a self-certification, the application for Commission certification also requires the applicant to pay a filing fee, and applicants for a Commission certification generally provide more explanation and a narrative filing. The Commission reasoned that, for this category, it may take an applicant facility an additional six hours to complete the Form No. 556.[745]

3. Calculations for Additional Burden and Cost

411. Lastly, the Commission explained that it believed that the industry is similarly situated in terms of wages and benefits. Therefore, estimates for the annual cost of additional burden are based on FERC's 2020 average hourly wage (and benefits) of $83.00 per hour.[746] In order to determine the cost per response in the column titled ''Increased Average Burden Hours & Cost Per Response ($) (4),'' the Commission multiplied the number of additional burden hours by the average hourly wage of $83.00 per hour. For

[735] *Id.* P 699.

[736] *Id.*

[737] *Id.*

[738] *Commission Information Collection Activities (FERC–556); Comment Request; Extension,* Docket No. IC19–16–000 (issued May 15, 2019).

[739] Order No. 872, 172 FERC ¶ 61,041 at P 699.

[740] *Id.*

[741] *Id.*

[742] *Id.* P 698.

[743] *Id.* P 699.

[744] *Id.*

[745] *Id.*

[746] *Id.* P 699 n.1050.

example, for small power production facilities greater than 1 MW located less than one mile from affiliated small power production QFs, the Commission determined that the increased average burden hours as a result of the final rule was two hours. The two-hour increase in the average burden hours, multiplied by an average hourly wage of $83.00 per hour, equals $166 cost per response.[747] In order to determine the increased total annual burden hours and total annual cost in the column titled ''Increased Total Annual Burden Hours & Total Annual Cost ($) (3) * (4) = (5),'' the Commission multiplied the numbers in the column titled ''Total Number of Responses (1) * (2) = (3)'' by the numbers in the column titled ''Increased Average Burden Hours & Cost Per Response ($) (4).'' For example, for small power production facilities greater than 1 MW located less than one mile from affiliated small power production QFs, the Commission multiplied the increased average burden hours of two hours by the total number of responses of 1,123.75 for increased total annual burden hours of 2,247.5 hours. The Commission then multiplied the increased cost per response of $166 by the total number of responses of 1,123.75 for an increased total annual cost of $186,542.50.[748]

IV. Environmental Analysis

A. No EIS or EA Is Required

412. In the final rule, the Commission noted that NEPA requires federal agencies to prepare a detailed statement on the environmental impact for ''major Federal actions significantly affecting the quality of the human environment.'' [749] The Council on Environmental Quality's (CEQ) regulations implementing NEPA provide that federal agencies can comply with NEPA by preparing: (a) An Environmental Impact Statement (EIS) for a proposed action significantly affecting the quality of the human environment; [750] or (b) an Environmental Assessment (EA) to determine whether an EIS is required.[751] The CEQ regulations also provide that agencies are not obligated to prepare either an EIS or an EA if they find that a categorical exclusion applies.[752]

413. The Commission found that no EA or EIS was required for the final rule because the rule does not involve a particular project that ''define[s] fairly precisely the scope and limits of the proposed development'' and any potential environmental impacts from the final rule are not reasonably foreseeable.[753] In response to comments on the NOPR that although an EA and later an EIS was prepared for the 1980 initial rules implementing PURPA (Order No. 70), the Commission explained, based on a number of factual differences between the initial rules and the final rule, that a meaningful NEPA analysis could not be prepared for the final rule.[754] The Commission also found that, as a separate and independent alternative ground, that a categorical exclusion applied to the final rule so that an EA or EIS need not be prepared.[755]

1. NEPA Analysis Is Not Required Where Environmental Impacts Are Not Reasonably Foreseeable

414. The Commission explained that the final rule does not propose or authorize, much less define, the scope and limits of any potential energy infrastructure and, as a result, there is no way to determine whether issuance of the rule will significantly affect the quality of the human environment.[756] The Commission also explained that, while courts have held that NEPA requires ''reasonable forecasting,'' ''NEPA does not require a 'crystal ball' inquiry.'' [757] The Commission added that an agency ''is not required to engage in speculative analysis'' or ''to do the impractical, if not enough information is available to permit meaningful consideration'' [758] or to ''foresee the unforeseeable.'' [759] and ''[i]n determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation,' . . . with *reasonable* being the operative word.'' [760] The Commission explained that environmental impacts are not reasonably foreseeable if the impacts would result only through a lengthy causal chain of highly uncertain or unknowable events.[761]

415. The Commission found that any consideration of whether the revised rules could potentially result in significant new environmental impacts due to less QF development and increased development of coal, nuclear, and combined cycle natural gas plants, would be unduly speculative, based on the difficulty in determining which, if any, of the additional flexibilities the final rule provides to the states will be adopted by each state, how state rules would impact QF development going forward and whether any reduction in QF renewables would be replaced by an increased amount of non-QF renewable resources with similar environmental characteristics.[762]

416. The Commission pointed to *Center for Biological Diversity* v. *Ilano,*[763] in which the court held that no NEPA review was required for United States Forest Service designations, pursuant to the Healthy Forests Restoration Act (HFRA), of certain forests as ''landscape-scale areas.'' The Commission explained that the court held that no NEPA review was required for the designations, noting that no specific projects were proposed for any of the landscape-scale areas and that ''[i]n such circumstances, 'any attempt to produce an [EIS] would be little more than a study . . . containing estimates of potential development and attendant environmental consequences.' '' [764] The Commission further explained that the court concluded that ''unless there is a particular project that 'define[s] fairly precisely the scope and limits of the proposed development of the region,' there can be 'no factual predicate for the production of an [EIS] of the type envisioned by NEPA.' '' [765]

[747] *Id.* P 699.

[748] *Id.*

[749] *Id.* P 710 (citing 42 U.S.C. 4332(C)); *see also Regulations Implementing the National Environmental Policy Act,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987) (cross-referenced at 41 FERC ¶ 61,284)).

[750] 40 CFR 1502.4 (2019).

[751] 40 CFR 1508.9.

[752] 40 CFR 1508.4.

[753] Order No. 872, 172 FERC ¶ 61,041 at PP 710, 715.

[754] *Id.* PP 728–36.

[755] *Id.* P 720.

[756] *Id.* P 711.

[757] *Id.* P 716 (citing *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 534 (1978)).

[758] *Id.* (citing *N. Plains Res. Council* v. *Surface Transp. Board,* 668 F.3d 1067, 1078–79 (9th Cir. 2011) (citation omitted)).

[759] *Id.* (citing *Concerned About Trident* v. *Rumsfeld,* 555 F.2d 817, 830 (D.C. Cir. 1976) (citation omitted)).

[760] *Id.* (citing *Sierra Club* v. *U.S. Dep't of Energy,* 867 F.3d 189, 198 (D.C. Cir. 2017) (emphasis in original) (citation omitted)).

[761] *Id.* (citing *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 767 (2004) (''NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause.''); *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 774 (1983) (noting effects may not fall within section 102 of NEPA because ''the causal chain is too attenuated'')).

[762] *Id.* P 717.

[763] *Id.* P 712 (citing *Ctr. for Biological Diversity* v. *Ilano,* 928 F.3d 774 at 780) (9th Cir. 2019).

[764] *Id.*

[765] *Id. See also Northcoast Ent. Ctr.* v. *Glickman,* 136 F.3d 660, 668 (9th Cir. 1998) (citing *Kleppe* v. *Sierra Club,* 427 U.S. 390 (1976) (explaining that NEPA does not require agency to complete environmental analysis where environmental effects are speculative or hypothetical)).

417. The Commission found that the final rule does not fund any particular QFs or issue permits for their construction or operation (neither of which the Commission has jurisdiction to do) and neither the Commission's regulation nor the final rule authorize or prohibit the use of any particular technology or fuel, or mandate or prohibit where QFs should be or are built.[766]

418. The Commission found that the final rule continues to give states wide discretion and that it is impossible to know what the states may choose to do in response to the final rule, whether they will make changes in their current practices or not, and how those state choices would impact QF development and the environment in any particular state, let in any particular locale.[767]

419. The Commission found that the scope of the final rule is even less defined than the landscape-scale area designations at issue in *Center for Biological Diversity* v. *Ilano,* explaining that PURPA applies throughout the entire United States and the revisions implemented by the final rule theoretically could affect future QF development anywhere in the country.[768] The Commission reasoned that, as was the case in *Center for Biological Diversity* v. *Ilano,* any attempt to evaluate the environmental effects of the final rule by necessity would involve hypothesizing the potential development of QFs and the resultant environmental consequences.[769] The Commission found that any attempt by the Commission to estimate the potential environmental effects of the final rule would be considerably more speculative than the estimates of potential development and attendant environmental consequences that the court in *Center for Biological Diversity* held are not required under NEPA. The Commission found that it was not possible to provide any reasonable forecast of the effects of the final rule on future QF development, whether any affected potential QF would be a renewable resource (such as solar or wind) or employ carbon-emitting technology (such as a fossil-fuel-burning cogenerator or a waste-coal-burning small power production facility). The Commission further found that environmental effects on land use, vegetation, water quality, etc. are all dependent on location, which is unknown and could be anywhere in the United States.[770] The Commission therefore concluded that any the potential effects of the final rule on future QF development are so speculative as to render meaningless any environmental analysis of these impacts.[771]

a. Requests for Rehearing

420. Northwest Coalition and Public Interest Organizations allege that the Commission erred in determining that there is no need to prepare an EA or EIS.[772] With respect to the discussion in the final rule of why potential environmental impacts are too speculative, Northwest Coalition asserts, with no explanation, that the Commission provided ''out-of-context quotations from a number of cases.'' [773] Northwest Coalition and Public Interest Organizations argue that the impacts are not too speculative or uncertain for a NEPA analysis because the Commission used the wrong standard to determine impact, asserting that the ''question is whether the proposed rules *may have* a significant impact on the human environment,'' not whether it *will* have an impact.[774] They claim that, because states were prohibited from lawfully denying fixed-price contracts to QFs under previous rules, the Commission must assume that under the new rules the states will eliminate the right to fixed-price contracts and that the development of new QFs will halt, which is the type of analysis that must be done in a NEPA document.[775] Northwest Coalition claims that the final rule does not appear to seriously dispute that the new rules may have a significant effect; instead, it appears to merely conclude the precise impact would be too difficult to pinpoint.

421. Public Interest Organizations similarly argue that the Commission cannot avoid NEPA review by making unsupported claims that environmental impacts are unforeseeable, prior to any NEPA analysis, as the role of NEPA itself is to ''*indicate the extent* to which environmental effects are uncertain or unknown.'' [776] Public Interest Organizations assert that the Commission mistakenly found that any environmental analysis of the final rule would be speculative and would not meaningfully inform the Commission or the public.[777] Public Interest Organizations add that NEPA requires agencies to examine all foreseeable impacts, including cumulative and indirect impacts, when undertaking rule changes that grant states new regulatory authority, which ''plainly includes changes to allow new ways and options for states when exercising their authority.'' [778] Public Interest Organizations contend that NEPA may apply when the agency makes a decision that permits actions by other parties that will have an impact on the environment.[779] Northwest Coalition adds that courts have required a NEPA analysis in cases where the agency proposes rules that will have an impact on future development, even for widespread regulatory changes that do not themselves authorize any discrete project.[780]

422. Public Interest Organizations assert that a NEPA analysis is required when uncertainty may be resolved by collecting further data or the collection of such data may prevent speculation on potential environmental effects.[781] Public Interest Organizations add that the Commission's position that collecting data and analyzing it would be too difficult is an impermissible basis for foregoing an EA or EIS.[782] Public Interest Organizations contend that, when an agency is faced with incomplete or unavailable information, the CEQ regulations require an EIS to include a summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable impacts of a proposed action.[783]

423. Northwest Coalition and Public Interest Organizations argue the Commission is required to prepare an EIS because courts have found an EIS is required where ''substantial questions''

[766] *Id.* P 713.

[767] *Id.* P 714.

[768] *Id.* P 715.

[769] *Id.* P 718.

[770] *Id.*

[771] *Id.* P 719.

[772] Northwest Coalition Request for Rehearing at 56–57; Public Interest Organizations Request for Rehearing at 15–16.

[773] Northwest Coalition Request for Rehearing at 61 n.222.

[774] *Id.* at 58.

[775] *Id.* at 58–59.

[776] Public Interest Organizations Request for Rehearing at 20, 26 (emphasis added) (citing *Sierra Club* v. *Froehlke,* 534 F.2d 1289, 1296 (8th Cir. 1976); *Scientists' Institute for Public Information, Inc.* v. *AEC,* 481 F.2d 1079, 1092, 1098 (D.C. Cir. 1973); *Jicarilla Apache Tribe of Indians* v. *Morton,* 471 F.2d 1275, 1280 n.11 (9th Cir. 1973); *Citizens Against Toxic Sprays, Inc.* v. *Bergland,* 428 F. Supp. 908, 922 (D. Or. 1977)).

[777] *Id.* at 21 (citing NOPR, 168 FERC ¶ 61,184 at P 155).

[778] *Id.*

[779] *Id.* at 22 (citing *Mid States Coal. for Progress* v. *Surface Transp. Bd.,* 345 F.3d 520, 549–50 (8th Cir. 2003); *Scientists' Inst. For Public Info., Inc.* v. *AEC,* 481 F.2d at 1088–89).

[780] Northwest Coalition Request for Rehearing at 60–61 (citing *American Bird Conservancy, Inc.* v. *FCC,* 516 F.3d 1027, 1033–34 (D.C. Cir. 2008)).

[781] Public Interest Organizations Request for Rehearing at 24 (citing *National Parks & Conservation Ass'n* v. *Babbitt,* 241 F.3d 722, 732 (9th Cir. 2001)).

[782] *Id.* (citing *Seattle Audubon Soc'y* v. *Mosley,* 798 F. Supp. 1494, 1497 (W.D. Wash. 1992)).

[783] *Id.* at 24–25 (citing 40 CFR 1502.22(b)(3)–(b)(4)).

have been raised as to whether an agency action ''may cause significant degradation of some human environmental factor,'' adding that parties are not required to show that significant effects will occur, but only raise substantial questions that they may occur.[784]

424. Northwest Coalition and Public Interest Organizations allege that the Commission improperly relied on *Center for Biological Diversity* v. *Ilano* to determine that the rulemaking's impacts were too speculative for NEPA analysis.[785] Public Interest Organizations assert that the court found that the action would not change the ''status quo,'' in contrast to here, where they claim the final rule legally alters the status quo.[786] Public Interest Organizations claim that ''significantly'' reduced QF development is foreseeable based on experience in states that have undermined the prior rules, regardless of the fact that the proposed changes do not mandate or prohibit the construction of any specific QF's, and the environmental impacts of removing major incentives for emissions-free renewable resources will be significant and far-reaching.[787] Northwest Coalition asserts that the *Center for Biological Diversity* v. *Ilano* court ''relied on its finding that the designation did not authorize any discrete projects and would only potentially lead to such projects, making the exercise of an EIS too speculative.'' [788] Northwest Coalition claims that this reasoning does not apply to the final rule because the Commission has demonstrated it has the capability to conduct detailed market analysis on the impact of its proposed rules and their likely environmental impacts.[789]

b. Commission Determination

425. As an initial matter, Northwest Coalition errs in suggesting that the Commission does not dispute that the final rule may have significant impacts on the environment and that the precise impact would be too difficult to pinpoint. Rather, the Commission found that any consideration of whether the final rule could potentially have significant environmental impacts would be so speculative as to render meaningless any environmental analysis of these hypothetical impacts.[790]

426. Moreover, the Commission did not reach this conclusion based on an inability to ''pinpoint'' precise impacts. Rather the Commission made this determination based on, among other things, the inability to provide *any* reasonable forecast of the effects of the final rule on the environment. This is the case not only because it is not possible to predict how the states will exercise the increased flexibilities provided by the final rule and whether the effects, if any, of such state actions will encourage or discourage renewable resources as opposed to fossil-fueled resources, but also because any environmental effects on resources such as land use, vegetation, and water quality are all dependent on location, which is unknown at this time and could be anywhere in the United States.[791]

427. We also reject Northwest Coalition's argument that in making an impact determination, the Commission erroneously considered whether the final rule ''will,'' rather than ''may,'' have a significant impact on the environment. In explaining why no EA or EIS was required, the Commission stated that any consideration of whether the final rule *could potentially* result in significant new environmental impacts due to less QF development and increased development of coal, nuclear, and combined cycle natural gas plants, would be highly speculative, based on the difficulty in determining which additional flexibilities the final rule provides to the states that each state will adopt, if any; how such state rules would impact QF development going forward; and whether any reduction in QF renewables would be replaced by the much greater amount of non-QF renewable resources with similar environmental characteristics.[792]

428. Public Interest Organizations' reliance on *Mid States Coal. for Progress* v. *Surface Transp. Bd* [793] to support its claim that NEPA applies when an agency makes decisions which permit actions by other parties that will impact the environment is misplaced. In that case, parties challenged the permitting of a railroad extension that would transport coal to the Midwest, resulting in an increased availability of coal at reduced rates. The court found that the EIS prepared for the railroad extension had failed to address the indirect impacts of air emissions resulting from the consumption of this coal when it was used to generate electricity, even though the railroad had not yet signed any contracts to haul this coal. The court noted that ''if the *nature* of the effect is reasonably foreseeable but its *extent* is not . . . the agency may not simply ignore the effects.'' [794] In contrast to this proceeding, in *Mid States Coal. for Progress* v. *Surface Transp. Bd,* it was undisputed that the proposed rail line would increase the use of coal for power generation; the Surface Transportation Board itself had concluded that its action would lead to increased mining and air emissions but then failed to address those impacts in the EIS. Here, the Commission did not conclude that the final rule would have identifiable environmental impacts; on the contrary, it explained in detail why any potential impacts from the final rule are not reasonably foreseeable.

429. Public Interest Organizations' reliance on *Scientists' Institute for Public Information, Inc.,* v. *AEC* [795] is equally misplaced. There, the D.C. Circuit faulted the Atomic Energy Commission (AEC) for failing to prepare a NEPA analysis for its proposed liquid metal fast breeder reactor program. The D.C. Circuit noted that AEC had prepared a complex cost/benefit analysis in attempting to justify the proposed program but failed to include a consideration of the environmental costs and benefits associated with the proposed program. The court was persuaded that a NEPA analysis should have been prepared because AEC had existing detailed estimates on the

[784] Northwest Coalition Request for Rehearing at 57 (citing *LaFlamme* v. *FERC,* 852 F.2d 389, 397 (9th Cir. 1988)); Public Interest Organizations Request for Rehearing at 17 (citing *Greenpeace Action* v. *Franklin,* 14 F.3d 1324, 1332 (9th Cir. 1992)).

[785] Northwest Coalition Request for Rehearing at 59–60; Public Interest Organizations Request for Rehearing at 30.

[786] Public Interest Organizations Request for Rehearing at 31 (citing *Ctr. for Biological Diversity* v. *Ilano,* 928 F.3d at 781).

[787] *Id.* at 34.

[788] Northwest Coalition Request for Rehearing at 60.

[789] *Id.*

[790] Order No. 872, 172 FERC ¶ 61,041 at PP 717–719. We note that CEQ issued a final rule, *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,* 85 FR 43,304 (July 16, 2020) (to be codified at 40 CFR pts. 1500–08, 1515–18), which became effective as of September 14, 2020. The final rule replaces the requirement for agency consideration of ''direct, indirect, and cumulative effects'' of a proposed action, with agency consideration of environmental effects ''that are reasonably foreseeable and have a reasonably close causal relationship.'' 40 CFR 1508.1(g). CEQ explains that agencies should not consider effects that are ''remote in time, geographically remote, or the result of a lengthy causal chain.'' Under this standard, the mere fact that an effect might not occur ''but for'' the project is not sufficient to trigger a NEPA analysis; rather, there must be a ''reasonably close causal relationship'' between the proposed action and the effect, ''analogous to proximate cause in tort law.'' *Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act,* 85 FR at 43,343.

[791] *Id.*

[792] *Id.* P 717. (emphasis added).

[793] *Mid States Coal. for Progress* v. *Surface Transp. Bd.,* 345 F.3d 520.

[794] *Id.* (emphasis in original).

[795] *Scientists' Institute for Public Information, Inc.* v. *AEC,* 481 F.2d 1079.

amount of waste and the amount of land area necessary for storage of the waste, as well as ''much information on alternatives to the program and their environmental effects.'' [796] In contrast here, for the reasons discussed in the final rule and herein, the Commission has no existing detailed or quantifiable information, nor is such information attainable, with respect to future actions that might or might not occur as a result of the final rule that would assist us in a meaningful analysis.[797]

430. We also disagree with Public Interest Organizations' arguments that ''substantial questions'' have been raised with respect to potential significant environmental impacts such that the Commission must prepare an EA or EIS for the final rule.[798] Courts have found that the applicable standard for determining whether substantial questions have been raised is whether the ''alleged facts if true, show that the proposed project may significantly degrade some human environmental factor.'' [799] Public Interest Organizations' arguments are based not on alleged facts, but on speculative assumptions which the Commission considered and addressed in the final rule.[800] Public Interest Organizations' reliance on *LaFlamme* v. *FERC* [801] is without merit. There, the Commission approved the construction of a new hydroelectric project without benefit of an EA or an EIS. The court found that substantial questions had been raised regarding identifiable potential impacts from site specific activities.[802] In contrast, the final rule does not authorize any site-specific activities for which there are identifiable potential impacts; as discussed above, the final rule does not authorize any specific projects.

431. *Greenpeace Action* v. *Franklin* [803] is similarly inapposite. There, the National Marine Fisheries Service prepared an EA for proposed fishery harvest specifications for pollock that concluded in a finding of no significant impacts on the Stellar sea lion, whose diet included a significant amount of pollock.[804] The National Marine Fisheries Service determined that, while it was uncertain there would be adverse impacts on the Stellar sea lion, it would take precautions and impose management measures to provide an adequate buffer against any adverse impacts. The court rejected plaintiff's claim that the National Marine Fisheries Service should have prepared an EIS based on plaintiff's competing affidavits with respect to National Marine Fisheries Service's findings. While the court cited the general principle that an agency must prepare an EIS if substantial questions are raised as to environmental impacts, the court found that petitioner's affidavits did not set forth facts demonstrating there would be significant impacts on the Stellar sea lion; rather they only demonstrated ''uncertainty as to how pollock fishing affects the sea lion, which is undisputed.'' [805] The court declined to set aside the National Marine Fisheries Service's findings because there was no disagreement over *whether* the proposed action impact may have a significant impact on the environment but rather ''represent[ed] a difference of scientific opinion'' over the *extent* of potential impacts.[806]

432. We also reject Northwest Coalition's claim that the Commission must consider the impacts of reasonably foreseeable future actions even if there is no specific proposal, asserting there are previous experiences on how states have allegedly reacted to prior PURPA Regulations. Specifically, Northwest Coalition argues the Commission must assume that under the new rules the states will eliminate the right to fixed-price contracts and, therefore, the development of new QFs will halt.[807] Public Interest Organizations allege that the environmental impacts of removing major incentives for emissions-free renewable resources will be significant and far-reaching [808] Northwest Coalition's and Public Interest Organizations' arguments would require the Commission first to make highly speculative and hypothetical assumptions about future state action on QFs and that all QFs are renewables, as well as unrealistic and unsupported assumptions as to whether such actions would impact renewable QFs more than emitting QFs.

433. As discussed in the final rule, an agency ''is not required to engage in speculative analysis'' or ''to do the impractical, if not enough information is available to permit meaningful consideration'' or to ''foresee the unforeseeable.'' [809] Further, the Commission explained that the final rule ''continues to give states wide discretion and it is impossible to know what the states may choose to do in response to [the final rule], whether they will make changes in their current practices or not, and how those state choices would impact QF development and the environment in any particular state, let alone any particular locale.'' [810]

434. Public Interest Organizations cite *National Parks & Conservation Ass'n* v. *Babbitt* for the proposition that an EA or EIS is required ''where uncertainty *may* be resolved by further collection of data.[811] Here, attempting to collect further data or information would not resolve uncertainty; the Commission has explained that it is not possible to collect detailed or quantifiable information regarding future QF development.[812] This contrasts with *National Parks & Conservation Ass'n* v. *Babbitt,* where the National Park Service issued an EA finding that a substantial increase in cruise ship traffic entering Glacier Bay National Park and Preserve would have no significant impact on the environment. In requiring the National

[796] *Id.*

[797] Order No. 872, 172 FERC ¶ 61,041 at PP 718–19.

[798] Northwest Coalition Request for Rehearing at 57 (citing *LaFlamme* v. *FERC,* 852 F.2d at 397); Public Interest Organizations Request for Rehearing at 17 (citing *Greenpeace Action* v. *Franklin,* 14 F.3d at 1332).

[799] *Foundation for N. Am. Wild Sheep* v. *USDA,* 681 F.2d 1172, 1177–78 (9th Cir. 1982).

[800] Order No. 872, 172 FERC ¶ 61,041 at PP 717–19, 731–36.

[801] *LaFlamme* v. *FERC,* 852 F.2d at 389.

[802] *Id.* at 397 (finding that substantial questions were raised about potential ''significant environmental degradation [of a hydropower project] due to both its site-specific impact on recreational use and visual quality and its cumulative impact[s]'').

[803] *Greenpeace Action* v. *Franklin,* 14 F.3d 1324.

[804] *Id.* at 1327.

[805] *Id.* at 1333.

[806] *Id.* (emphasis added). Plaintiffs in this case also cited several cases to support its claim that the very existence of uncertainty mandates the preparation of an EIS. However, the court noted that because the cases cited ''deal not with whether an impact statement should be prepared, but with what information should be included in an impact statement after it has been judged necessary, they do not stand for the proposition that the existence of uncertainty mandates the preparation of an impact statement.'' *Id.* at 1334 n.11.

[807] Northwest Coalition Request for Rehearing at 59.

[808] Public Interest Organizations Request for Rehearing at 34.

[809] *See* Order No. 872, 172 FERC ¶ 61,041 at P 716 (citing *N. Plains Res. Council* v. *Surface Transp. Board,* 668 F.3d at 1078–79; *Concerned About Trident* v. *Rumsfeld,* 555 F.2d at 830).

[810] *Id.* P 714.

[811] *National Parks & Conservation Ass'n* v. *Babbitt,* 241 F.3d 722, 732 (9th Cir. 2001) (emphasis added).

[812] We also disagree with Public Interest Organizations' assertion that because the Commission is faced with incomplete or unavailable information, the CEQ regulations state the Commission must include in an EIS a summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable impacts of a proposed action. Public Interest Organizations Request for Rehearing at 23–24 (citing 40 CFR 1502.22(b)(3)–(b)(4)). This regulation is inapplicable to the final rule, as it contemplates that an EIS has been prepared, and that there are *reasonably foreseeable impacts* for which existing credible scientific evidence may be relevant (emphasis added). The Commission did not prepare an EIS because there are no reasonably foreseeable impacts for the reasons discussed in the final rule and herein.

Park Service to prepare an EIS, the court explained that scientific evidence provided by the National Park Service's own studies ''revealed very definite environmental effects,'' and the National Park Service's EA established that information was ''obtainable and that it would be of substantial assistance'' in considering the environmental impacts of the increased cruise ship traffic.[813]

435. We also reject Northwest Coalition's and Public Interest Organizations' claims that the Commission improperly relied on *Center for Biological Diversity* v. *Ilano,* because, they assert, the final rule legally alters the ''status quo.'' The court in *Center for Biological Diversity* held that an EIS is not required where a proposed action does not change the status quo, and defined changes in the status quo as those ''alter[ing] future land use or otherwise foreseeably impact[ing] the environment.'' [814] The court further explained that '' '[l]ong-range aims are quite different from concrete plans,' and 'NEPA does not require an agency to consider the environmental effects that speculative or hypothetical projects might have . . . .' '' [815] While the final rule results in changes to the implementation of the original PURPA Regulations, the final rule does not change the status quo as contemplated by NEPA. It does not direct or preclude the development of any project or otherwise require entities to take actions that foreseeably alter future land use or otherwise result in foreseeable environmental impacts. As discussed in the final rule, it is not possible to make simplifying assumptions that the mere implementation of the revised regulations necessarily would result in specific changes in the development of particular generation technologies compared to the status quo.[816] The final rule is premised on a finding that, even after the revisions, the PURPA Regulations will continue to encourage QF development while addressing concerns about how PURPA works in today's electric markets; therefore, there it cannot be presumed that the rule will result in a reduction in QF development or a change in the type of QFs that are built. The impact, if any, of the final rule on QF development is both uncertain or unknowable.[817] As the court found in *Center for Biological Diversity,* such speculative environmental consequences are not required to be analyzed under NEPA.[818] Thus, the Commission cannot analyze environmental impacts in this case, when such an analysis could only be done if multiple, unlikely, and unreasonable assumptions are made as to the variables above.[819]

2. A Categorical Exclusion Applies

436. The Commission found as a separate and independent alternative basis for concluding that no environmental analysis is warranted that the final rule falls within the categorical exclusion for rules that, as relevant here: (1) Are clarifying in nature; (2) are corrective in nature; or (3) are procedural in nature.[820]

437. The Commission explained that clarifying changes include those that clarify how market prices can be used to set as-available energy rates, the changes clarifying how fixed energy rates in contracts or LEOs may be determined, and the changes clarifying how competitive solicitations can be used to set avoided cost rates.[821]

438. The Commission stated that corrective changes include those needed in order to ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the regulation. The Commission noted that it does not find that its existing PURPA Regulations were inconsistent with the statutory requirements of PURPA when promulgated. The Commission found instead that the changes adopted in the final rule are required to ensure continued future compliance of the PURPA Regulations with PURPA, based on the changed circumstances found by the Commission in the final rule.[822]

439. The Commission found that three aspects of the final rule are corrective in nature. The first is the change allowing states to require variable energy rates in QF contracts. The Commission explained this change is required based on the Commission's finding that, contrary to the Commission's expectation in 1980, there have been numerous instances where overestimates and underestimates of energy avoided costs used in fixed energy rate contracts have not balanced out, causing the contract rate to violate the statutory avoided cost rate cap. The Commission explained that giving states the ability to require energy rates in QF contracts to vary based on the purchasing utility's avoided cost of energy at the time of delivery ensures that QF rates do not exceed the avoided cost rate cap imposed by PURPA.[823]

440. The second corrective aspect is the change in the PURPA Regulations regarding the determination of what facilities are located at the same site for purposes of complying with the statutory 80 MW limit on small power production facilities located at the same site.[824] The Commission explained that it found, based on changed circumstances, that the current one-mile rule is inadequate to determine which facilities are located at the same site. The Commission determined that, based on this finding, the Commission was obligated by PURPA to revise its definition of when facilities are located at the same site.[825]

441. The third corrective aspect relates to the implementation of PURPA section 210(m). The Commission explained that this statutory provision allows purchasing utilities to terminate their obligation to purchase from QFs that have nondiscriminatory access to certain statutorily-defined markets, which the Commission has determined to be the RTO/ISO markets.[826] The Commission explained that the final rule updates the presumption in the PURPA Regulations that QFs with a capacity of 20 MW or less do not have non-discriminatory access to such markets, reducing the threshold for such presumption to 5 MW.[827]

442. The Commission explained that, since the 20–MW threshold was established in 2005, the RTO/ISO markets have matured and the industry has developed a better understanding of the mechanics of market participation.[828] The Commission added that this determination rendered inaccurate the presumption currently

[813] *National Parks & Conservation Ass'n* v. *Babbitt,* 241 F.3d 732.

[814] *Ctr. for Biological Diversity* v. *Ilano,* 928 F.3d at 781.

[815] *Id.* at 780 (quoting *Northcoast Envtl. Ctr.* v. *Glickman,* 136 F.3d at 668).

[816] Order No. 872, 172 FERC ¶ 61,041 at P 733.

[817] *Id.* P 716 (citing *Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. at 767; *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. at 774).

[818] *Ctr. for Biological Diversity,* 928 F.3d at 781 (citing *Northcoast Envtl. Ctr.* v. *Glickman,* 136 F.3d at 668).

[819] *See* Order No. 872, 172 FERC ¶ 61,041 at PP 733–35.

[820] *Id.* P 720 (citing 18 CFR 380.4(a)(2)(ii)). The exclusion applies to a fourth type of rule, the promulgation of regulations ''that do not substantially change the effect of . . . regulations being amended.'' Further, although not challenged on rehearing, the final rule noted two revisions that are procedural in nature: The revision to procedures that apply to QF certification and the revision to the Commission's Form No. 556, used by QFs seeking certification. *Id.* P 727.

[821] *Id.* P 721.

[822] *Id.* P 722.

[823] *Id.* P 723.

[824] *Id.* P 724.

[825] *Id.*

[826] *Id.* P 725.

[827] *Id.*

[828] *Id.* P 726.

reflected in the PURPA Regulations that QFs of 20 MW and below do not have non-discriminatory access to the relevant markets.[829] The Commission explained that, once the Commission made this determination, it was appropriate for the Commission to update the 20 MW threshold to comply with the requirements of PURPA section 210(m).[830]

a. Exception to Categorical Exclusion

i. Requests for Rehearing

443. Northwest Coalition and Public Interest Organizations assert that, as a threshold matter, the final rule does not qualify for a categorical exclusion because the Commission's regulations provide that, ''[w]here circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment,'' the Commission will prepare either an EA or an EIS.[831] They add that the Commission's regulations provide that an exception to a categorical exclusion may exist ''[w]here the environmental effects are uncertain.'' [832]

ii. Commission Determination

444. We disagree that the Commission's exceptions to categorical exclusions preclude the application of a categorical exclusion to the final rule. The CEQ regulations state that a categorical exclusion applies to an action that does not individually or cumulatively have a significant effect on the environment and an agency's categorical exclusion procedures should provide for limitations on the use of a categorical exclusion where ''extraordinary circumstances'' indicate that a normally excluded action may have a significant environmental effect.[833] The Commission's regulations provide a list of these extraordinary circumstances, which are effects on Indian lands; Wilderness areas; Wild and Scenic rivers; Wetlands; Units of the National Park System, National Refuges, or National Fish Hatcheries; Anadromous fish or endangered species; or where environmental effects are uncertain.[834] None of these extraordinary circumstances are present here except to the extent the environmental effects are uncertain. The final rule explained in detail why any potential environmental impacts are uncertain and unknown as they are too speculative to provide an EA or EIS that would meaningfully inform the Commission.[835] In any case, the Commission's regulations state that the presence of one or more of the extraordinary circumstances ''will not automatically require . . . the preparation of an environmental assessment or an environmental impact statement.'' [836]

b. Applying a Categorical Exclusion for Clarifying and Corrective Actions Is Appropriate

i. Requests for Rehearing

445. Northwest Coalition and Public Interest Organizations also dispute that the final rule falls under the categorical exclusion for actions that are clarifying or corrective in nature.[837] Northwest Coalition argues that the final rule is not merely clarifying in nature but rather a major change in policy.[838] Northwest Coalition highlights what it deems the Commission's decision to change its long-standing precedent by allowing use of RFPs as the exclusive means for all QFs to obtain a long-term contract to sell energy and capacity.[839] Northwest Coalition further argues that overruling existing precedent is not clarifying and the new policy will result in loss of existing QF capacity.[840]

446. Northwest Coalition asserts that the Commission's reliance on the 'corrective' exclusion fails because it is contrary to what Northwest Coalition deems the ''obvious intent'' of the categorical exclusion for corrective changes to regulations.'' [841] Northwest Coalition opines that the categorical exclusion applies only to an action ''to correct an error, such as a misplaced word or mis-numbered section.'' [842] Northwest Coalition also contends that the Commission cites no authority to find that changes that are corrective in nature include ''changes needed in order to ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the regulation.'' [843] Northwest Coalition asserts that, as noted in Commissioner Glick's dissent, this interpretation would exempt from NEPA analysis virtually any action the Commission takes under any of its enabling statutes.[844]

447. Public Interest Organizations assert that the Commission fails to cite precedent for using multiple exclusionary categories for ''such an impactful rulemaking.'' [845] Public Interest Organizations suggest that doing so is a red flag that what they deem sweeping changes in the final rule are not suited for a categorical exclusion.[846]

448. Finally, Public Interest Organizations argue the Commission failed to engage in the appropriate scoping in determining that a categorical exclusion was appropriate. Public Interest Organizations assert that CEQ regulations require a federal agency to engage in scoping, which is defined in relevant part: ''There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.'' [847] Public Interest Organizations note that the CEQ regulations define ''NEPA process'' to mean ''all measures necessary for compliance with the requirements of section 2 and Title 1 of NEPA.'' [848] Public Interest Organizations conclude that taken together, these two regulations require the application of scoping to the entire NEPA process, including the application of a categorical exclusion.[849]

ii. Commission Determination

449. We affirm the alternative finding that the final rule was properly categorically excluded because it is clarifying and corrective in nature. Northwest Coalition's arguments are based primarily on what they deem to be the appropriate interpretation of the Commission's categorical exclusion regulation, rather than providing supporting precedent.[850]

450. Northwest Coalition specifically challenges the use of the clarifying categorical exclusion for the changes to the competitive solicitation process (allowing the use of RFPs as the means for QFs to obtain long-term

[829] *Id.*

[830] *Id.*

[831] Northwest Coalition Request for Rehearing at 62; Public Interest Organizations Request for Rehearing at 36 (citing 18 CFR 380.4(b)(1)).

[832] Northwest Coalition Request for Rehearing at 62; Public Interest Organizations Request for Rehearing at 36 (citing 18 CFR 380.4(b)(1)).

[833] 40 CFR 1508.4.

[834] 18 CFR 380.4(b)(ii).

[835] Order No. 872, 172 FERC ¶ 61,041 at P 716.

[836] 18 CFR 380.4.

[837] Northwest Coalition Request for Rehearing at 62–63; Public Interest Organizations Request for Rehearing at 35.

[838] Northwest Coalition Request for Rehearing at 63.

[839] *Id.* We address in section III.B.5 above Northwest Coalition's challenge to the competitive solicitation framework itself.

[840] *Id.*

[841] *Id.* at 63–64.

[842] *Id.* at 64.

[843] *Id.* at 63 (quoting Order No. 872, 172 FERC ¶ 61,041 at P 722).

[844] *Id.* at 63–64 (citing Order No. 872, 172 FERC ¶ 61,041, Glick, Comm'r, dissenting in part at P 26).

[845] Public Interest Organizations Request for Rehearing at 35–36.

[846] *Id.* at 35.

[847] *Id.* at 41 (citing 40 CFR 1501.7).

[848] *Id.* (citing 40 CFR 1508.21).

[849] *Id.*

[850] Northwest Coalition Request for Rehearing at 62–64.

contracts).[851] We affirm that the final rule's treatment of competitive solicitations is clarifying in nature because competitive solicitations are already often used by industry to set capacity rates in both PURPA and non-PURPA contexts. Additionally, by including the standards discussed in the *Allegheny* Principles and elaborating on how states may conduct competitive solicitations as the Commission explained in prior precedent,[852] the Commission clarified, formalized, and consolidated existing policy.[853] Finally, the final rule clarifies and follows logically from Commission precedent by requiring that, if a utility places its own capacity in competitive solicitations held at regular intervals and satisfies its capacity needs only through competitive solicitations following the procedural requirements formalized in the final rule, then that utility need not have an alternative avoided cost capacity rate for QFs because it no longer has any avoided capacity costs.

451. We also affirm that the final rule was corrective in nature. With respect to the challenge to variable energy rates in the QF contracts or LEOs, the Commission found that, contrary to expectations in 1980, there are numerous instances where overestimates and underestimates of energy avoided costs used in fixed energy rates did not balance-out over the long term.[854] Such an imbalance resulted in long-term fixed avoided cost energy rates well above the purchasing utility's avoided costs for energy.[855] This result is prohibited by PURPA section 210(b).[856] The Commission's actions to adjust the QF rate framework are necessary to harmonize the Commission's regulations with this underlying finding and to comply with the statutory provisions of PURPA section 210(b).

452. We also find that the Commission's interpretation that corrective actions include those that ensure that a regulation conforms to the requirements of the statutory provisions being implemented by the final rule is appropriate. We disagree that such an interpretation sets a precedent for evading NEPA analysis for future Commission actions. The Commission considers all matters before it, including rulemakings, on a case-by-case basis to determine whether an EIS, EA or a categorical exclusion is appropriate based on the facts and circumstances of each matter. Further, in this case the Commission is not relying on general statutory standards, such as the just and reasonable standard under the FPA, but specific statutory requirements that the Commission may not require above avoided cost rates, that small power production facilities located at a single site may not exceed 80 MW, and that the mandatory purchase obligation may be terminated with respect to QFs with nondiscriminatory access to certain markets.

453. We also disagree with Public Interest Organizations' claim that the Commission inappropriately relied on multiple exclusionary categories in determining that the final rule was subject to a categorical exclusion. As an alternative to its explanation that the effect of the final rule are so speculative as to preclude the preparation of an environmental analysis, the Commission applied a single categorical exclusion that provides four possible bases for its application, including, as relevant here, that the rulemaking is clarifying, corrective, or procedural in nature. The categorical exclusion does not limit the Commission to invoking only one of these bases, nor do Public Interest Organizations elaborate on why the Commission is precluded from doing so.

454. Finally, contrary to Public Interest Organizations' claim, the Commission was not required to initiate a scoping process for the application of the categorical exclusion to the final rule. Public Interest Organizations appear to erroneously conflate the definition of ''scoping process'' with the definition of ''NEPA process.'' The CEQ regulations address requirements for scoping only when an EIS is prepared.[857] Notwithstanding that there is no requirement to provide for scoping for a categorical exclusion, all commenters, including Public Interest Organizations, now have had ample opportunity to provide comments on the application of the categorical exclusion, which they have presented in their rehearing requests.

3. That the Commission Prepared NEPA Analyses for the Promulgation of the Original PURPA Rule and Other Prior Rulemakings Does Not Mean That Such Analysis Was Possible or Required Here

455. As discussed in the final rule, the Commission prepared an EA and EIS for its initial rules implementing PURPA in 1980.[858] The Commission explained that the EA for Order No. 70 was based on a market penetration study and that, to carry out the market penetration study, the EA had to make the simplifying assumption that the mere implementation of PURPA would necessarily result in the development and operation of certain types of generation facilities that would not otherwise be developed.[859] The Commission stated that, based on these types of facilities, the EA conducted in 1980 identified specific resource conflicts related to each type of facility, which were nothing more than a generalized listing of potential impacts.[860]

456. The Commission addressed comments on the NOPR that asserted that a NEPA analysis similarly should be possible for this rulemaking. The Commission explained that the assertions are undermined by the fact that circumstances have changed significantly since the promulgation of the original PURPA Regulations in 1980.[861] The Commission explained that, prior to 1980, essentially no QF generation technologies or other independent generation facilities (other than those used to supply the loads of the owners rather than to sell at wholesale) had been constructed. The Commission explained that by contrast, today QF generation technologies and other independent generation facilities are common, and they are predominantly built and operated outside of PURPA.

457. The Commission further explained that, because there was virtually no QF or independent power development in 1980, the original PURPA EA could reasonably project that the incentives created by PURPA and the original PURPA Regulations would lead to increased development of

[851] *Id.* at 63. We address in section III.B.5 above Northwest Coalition's challenge to the competitive solicitation framework itself.

[852] *E.g., Hydrodynamics,* 146 FERC ¶ 61,193 at PP 31–35; *City of Ketchikan,* 94 FERC ¶ 61,293 at 62,061; *Bidding NOPR,* FERC Stats. & Regs. ¶ 32,455 at 32,030–42.

[853] *See* Order No. 872, 172 FERC ¶ 61,041 at P 430 (citing *Allegheny Energy,* 108 FERC ¶ 61,082 at P 18).

[854] *Id.* PP 283, 723.

[855] *Id.* P 283.

[856] *Id.*

[857] 40 CFR 1501.7 (''As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent'' to prepare an EIS). Moreover, CEQ guidance addressing whether scoping applies to EAs, states that where an EA is being prepared, ''useful information *might* result from early participation . . . in a scoping process'' CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,* 46 FR 18,026, Q. 13 (Mar. 17, 1981) (emphasis added).

[858] Order No. 872, 172 FERC ¶ 61,041 at P 728.

[859] *Id.* P 729 (citing Order No. 70–E, 46 FR 33,025, 33,026 (June 18, 1981); *Small Power Production and Cogeneration Facilities—Environmental Findings; No Significant Impact and Notice of Intent To Prepare Environmental Impact Statement,* 45 FR 23,661, 23,664 (Apr. 8, 1980) (Original PURPA EA)).

[860] Original PURPA EA, 45 FR at 23,664.

[861] Order No. 872, 172 FERC ¶ 61,041 at P 731.

power generated by QF technologies.[862] The Commission stated that its market penetration study was based on these projections.

458. The Commission noted that, by contrast, it is not possible here to make simplifying assumptions that the mere implementation of the revised regulations necessarily would result in specific changes in the development of particular generation technologies compared to the status quo.[863] The Commission explained that the revisions to the PURPA Regulations are premised on a finding that, even after the revisions, the PURPA Regulations will continue to encourage QFs. The Commission found that, consequently, there is no way to estimate whether any reduction in QF development, as opposed to the status quo, will be focused on one or more of the many different types of QF technologies, some of which are renewable resources and some of which are fueled by fossil fuels [864] and have emissions comparable to non-QF fossil fueled generators. The Commission explained that, because the rule primarily increases state flexibility in setting QF rates, including giving states the option of not changing their current rate-setting approaches, there is no way to develop any estimate of the location or size of any hypothetical reduction in QF development.

459. The Commission stated that renewable generation technologies today are commonly, and even predominantly, built and operated outside of PURPA.[865] The Commission explained that current projections show that most new generation construction will be of renewable resources [866] and cost of renewables has declined so much that in some regions renewables are the most cost effective new generation technology available.[867] The Commission found that, even if the final rule were to result in reduced renewable QF development, there is little likelihood today that hypothetical, unbuilt QFs necessarily would be replaced by new conventional fossil fuel generation.

460. The Commission found that, alternatively, in the absence of these hypothetical, unbuilt QFs, existing generation units—whose current emissions, if any, would already be part of the baseline for any environmental analysis of the impacts of the final rule—might continue to operate without any change in their emissions; in sum, in the absence of these hypothetical, unbuilt QFs, emissions would remain at the baseline and might not increase at all.[868] The Commission explained that, in the current environment where stagnant load growth has prevailed in recent years, this would seem to be a more likely scenario than an alternative where these hypothetical, unbuilt QFs are replaced by brand new fossil fuel generation that would increase emissions over the baseline.

461. The Commission explained that, given these facts, it would not be possible to perform a market penetration study of the effects of the final rule that would not be wholly speculative.[869] The Commission found that, without such a study, there could be no analysis defining the types and geographic location of facilities that could serve as the basis for any NEPA analysis similar to that performed in 1980.

a. Requests for Rehearing

462. Northwest Coalition and Public Interest Organizations assert that, in addition to the NEPA analysis for Order No. 70, the Commission has conducted a NEPA analysis for prior rulemakings, which they argue undermines the Commission's claim that the impacts here are too speculative and uncertain to prepare an EA or EIS.[870] Specifically, Northwest Coalition and Public Interest Organizations point to the competitive bidding NOPR under section 210 of PURPA [871] and Order No. 888.[872]

463. Public Interest Organizations argue that, because an EA was prepared for Order No. 70, the Commission ''has experience doing the very thing it alleges is so impossibly burdensome.'' [873] Public Interest Organizations add that, with respect to Order No. 70, the Commission acknowledged that its NEPA analysis contains uncertainties but is nevertheless required to assess the environmental effects to the fullest extent possible.[874] They add that Order No. 70 states that the proposed rules did not authorize or fund a particular project or forbid or authorize the use of certain fuels, but the Commission nevertheless prepared a NEPA analysis.[875] Public Interest Organizations also argue that, in Order No. 70, the Commission was able to develop a specific methodology for predicting its effects on QF development and should be able to do so here as well.[876]

464. Northwest Coalition asserts that that the Commission's statement in the final rule that the NEPA analysis for Order No. 70 was simpler (because very few renewable cogeneration facilities were online prior to the rule) fails to address how the Commission was able to conduct NEPA analyses for later rulemakings with equal or greater magnitude and complexity than the current case.[877] Similarly, Public Interest Organizations claim that the Commission cannot underplay its past modeling efforts and could use similar methodology, or advancements in modern modeling software that has significantly improved over the last 40 years, to model the final rule's potential impacts.[878] As an example, Northwest Coalition and Public Interest Organizations point to the Commission's environmental analysis for the competitive bidding NOPR and Order No. 888, which they claim involved uncertainties and more complex market changes than the final rule.[879] Related to Order No. 888 specifically, Public Interest Organizations argue that the

[862] *Id.* P 732.

[863] *Id.* P 733.

[864] This would include both cogeneration, which typically is fossil fueled, and those small power production facilities that are fueled by waste, which would include a range of fossil fuel-based waste. *See* 18 CFR 292.202(b), 292.204(b)(1).

[865] Order No. 872, 172 FERC ¶ 61,041 at P 734.

[866] EIA, Annual Energy Outlook 2020, at tbl. 9 (Jan. 29, 2020) (in table see rows labeled Cumulative Planned Additions and Cumulative Unplanned Additions in the reference case) (Annual Energy Outlook 2020), *https://www.eia.gov/outlooks/aeo/.*

[867] Order No. 872, 172 FERC ¶ 61,041 at P 734.

[868] *Id.* P 735.

[869] *Id.* P 736.

[870] Northwest Coalition Request for Rehearing at 59; Public Interest Organizations Request for Rehearing at 26–30.

[871] Northwest Coalition Request for Rehearing at 59; Public Interest Organizations Request for Rehearing at 28 (citing *Bidding NOPR,* FERC Stats. & Regs. ¶ 32,455 at 32,047).

[872] Northwest Coalition Request for Rehearing at 59; Public Interest Organizations Request for Rehearing at 29 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080 and 61 FR 21,540 (May 10, 1996)), *order on reh'g,* Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220 and 62 FR 12,274 (Mar. 14, 1997)), *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997) (cross-referenced at 62 FR 64,688 (Dec. 9, 1997), *order on reh'g,* Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Pol'y Study Grp.* v. *FERC,* 225 F.3d 667, *aff'd sub nom. N.Y.* v. *FERC,* 535 U.S. 1 (2002)).

[873] Public Interest Organizations Request for Rehearing at 26.

[874] *Id.* at 26–27 (citing Order No. 70, FERC Stats. & Regs. ¶ 30,134).

[875] *Id.* at 27.

[876] *Id.*

[877] Northwest Coalition Request for Rehearing at 59.

[878] Public Interest Organizations Request for Rehearing at 29.

[879] Northwest Coalition Request for Rehearing at 59; Public Interest Organizations Request for Rehearing at 28–29.

Commission was able to conduct complex modeling to forecast emissions based on simulations of power generation patterns and should be able to reverse the modeling here to forecast the effects of the final rule.[880]

b. Commission Determination

465. We reiterate that the Commission considers all matters before it, including rulemakings, on a case-by-case basis as to whether an EIS, EA, or a categorical exclusion is appropriate. As the Commission stated in the final rule, the basis for its NEPA analysis for Order No. 70 was the ability to conduct a market penetration study.[881] However, circumstances since the promulgation of Order No. 70 have changed significantly, making it impossible to perform a market penetration study of the effects of the final rule that would not be wholly speculative. This is due in large part to the fact that renewable technologies that are commonly adopted by QFs are also commonly adopted by non-QF generation developers today.[882] In contrast, in 1980, essentially no QF technologies, renewable or otherwise, were being built by non-QFs.[883] Thus, it was possible in 1980 to assume that certain generation technologies would only be deployed if the PURPA Regulations were issued, and that assumption enabled a market penetration study that could underpin an analysis of the environmental impact of deploying those technologies.[884] These same assumptions cannot be made today. Renewable technology, for example, is being widely deployed without PURPA support; thus, it is impossible to assume that any potential impact of this rule change will necessarily reduce the deployment of renewables because PURPA is no longer the only route, or even the predominant route, to such development.[885] To the contrary, as much as 90 percent of all renewable capacity placed in service today was developed outside of PURPA.[886]

466. We also disagree with Northwest Coalition's and Public Interest Organizations' arguments that the Commission should be able to prepare a NEPA analysis similar to those for the competitive bidding NOPR and Order No. 888, using similar methodology and advancements in modern modeling software. Contrary to Northwest Coalition's and Public Interest Organizations' assertions, the Commission's ability to prepare NEPA analyses in these prior rulemakings does not facilitate our ability to prepare an EA or EIS for this rulemaking. While we agree that modelling technology has advanced since the Commission conducted a NEPA analysis in these prior rulemakings, the Commission would be required to make too many unsupported assumptions to undertake an analysis in this case, which would result in a speculative and meaningless analysis.

467. For example, the Commission would need to assume that all affected QFs would be renewables and all replacement utility generation would be conventional emitting resources, which as previously explained would not necessarily be true in either case.[887] Similar to the original PURPA rulemaking, the technologies that could qualify for QF status and independent generation more broadly were not widely used outside of the PURPA context when studies were conducted for the competitive bidding NOPR, so the Commission could make basic assumptions about the effects the competitive bidding NOPR would have on QF development.[888] The same assumptions cannot be made about the final rule as the technologies that renewable QFs use are now widespread and developed outside of PURPA, making any market penetration study wholly speculative.

468. Finally, we disagree that the Commission could reverse engineer the modeling used to forecast emissions based on simulations of power generation patterns in Order No. 888 to forecast the effects of the final rule in a NEPA analysis. The modeling from prior rulemakings is not applicable here. Order No. 888 involved the direct regulation of entities under the Commission's jurisdiction to impose open access requirements, and it was possible to estimate potential changes in conventional generation (gas and coal) development and dispatch in light of the advent of open access to the transmission grid.[889] In contrast, under the final rule, and PURPA more generally, the Commission sets rules for states and nonregulated electric utilities to implement. The Commission cannot predict how the states will choose to implement the final rule—if at all—and what effect that will have on QF development, whether renewable QFs will be impacted more than non-renewable QFs or whether non-QFs will develop renewables or conventional generation.

V. Regulatory Flexibility Act Certification

469. The Regulatory Flexibility Act of 1980 (RFA)[890] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. No comments on the Regulatory Flexibility Act were filed on rehearing, and the comments on rehearing regarding burden and cost estimates are addressed in the Information Collection Statement section.

470. As discussed in the final rule, we estimate that annual additional compliance costs on industry (detailed above) will be approximately $1,149,965 (or an average additional burden and cost per response, of 3.187 hrs. and the corresponding $264.51) to comply with these requirements.[891] Therefore, pursuant to section 605(b) of the RFA, we still conclude that this rule will not have a significant economic impact on a substantial number of small entities.

VI. Document Availability

471. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19).

472. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

473. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

[880] Public Interest Organizations Request for Rehearing at 29–30.

[881] Order No. 872, 172 FERC ¶ 61,041 at P 729.

[882] *Id.* P 731.

[883] *Id.*

[884] *Id.* PP 731–32.

[885] *Id.* PP 731–34.

[886] *See id.* P 240.

[887] *Id.* P 734.

[888] *Id.* PP 731–32.

[889] *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,861–96.

[890] 5 U.S.C. 601–12.

[891] Order No. 872, 172 FERC ¶ 61,041 at P 748.

VII. Effective Dates and Congressional Notification

474. The further revised regulation in this order is effective February 16, 2021. No other changes to the Commission's regulations have been made on rehearing to the final rule, however we modify the instructions to the Form No. 556. Out of an abundance of caution, this order addressing arguments raised on rehearing is being submitted to the Administrator of the Office of Information and Regulatory Affairs of OMB, Senate, House, and Government Accountability Office.

List of Subjects in 18 CFR Part 292

Electric power plants; Electric utilities, Reporting and recordkeeping requirements.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.

Issued: November 19, 2020.

Kimberly D. Bose,

Secretary.

In consideration of the foregoing, the Commission amends part 292, chapter I, title 18, Code of Federal Regulations, as follows.

SUBCHAPTER K—REGULATIONS UNDER THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

* * * * *

PART 292—REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

■ 1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. Amend § 292.309 by revising paragraphs (c), (d), (e), and (f) to read as follows:

§ 292.309 Termination of obligation to purchase from qualifying facilities.

* * * * *

(c) For purposes of paragraphs (a)(1), (2) and (3) of this section, with the exception of paragraph (d) of this section, there is a rebuttable presumption that a qualifying facility has nondiscriminatory access to the market if it is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, and Commission-approved interconnection rules.

(1) If the Commission determines that a market meets the criteria of paragraphs (a)(1), (2) or (3) of this section, and if a qualifying facility in the relevant market is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, a qualifying facility may seek to rebut the presumption of access to the market by demonstrating, *inter alia,* that it does not have access to the market because of operational characteristics or transmission constraints.

(2) For purposes of paragraphs (a)(1), (2), and (3) of this section, a qualifying small power production facility with a capacity between 5 megawatts and 20 megawatts may additionally seek to rebut the presumption of access to the market by demonstrating that it does not have access to the market in light of consideration of other factors, including, but not limited to:

(i) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates;

(ii) Unique circumstances impacting the time or length of interconnection studies or queues to process the small power production facility's interconnection request;

(iii) A lack of affiliation with entities that participate in the markets in paragraphs (a)(1), (2), and (3) of this section;

(iv) The qualifying small power production facility has a predominant purpose other than selling electricity and should be treated similarly to qualifying cogeneration facilities;

(v) The qualifying small power production facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(vi) The qualifying small power production facility lacks access to markets due to transmission constraints. The qualifying small power production facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(d)(1) For purposes of paragraphs (a)(1), (2), and (3) of this section, there is a rebuttable presumption that a qualifying cogeneration facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market.

(2) For purposes of paragraphs (a)(1), (2), and (3) of this section, there is a rebuttable presumption that a qualifying small power production facility with a capacity at or below 5 megawatts does not have nondiscriminatory access to the market.

(3) Nothing in paragraphs (d)(1) through (3) affects the rights the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on or before February 16, 2021, to purchase electric energy or capacity from or to sell electric energy or capacity to a small power production facility between 5 megawatts and 20 megawatts under this Act (including the right to recover costs of purchasing electric energy or capacity).

(4) For purposes of implementing paragraphs (d)(1) and (2) of this section, the Commission will not be bound by the standards set forth in § 292.204(a)(2).

(e) Midcontinent Independent System Operator, Inc. (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO–NE), and New York Independent System Operator, Inc. (NYISO) qualify as markets described in paragraphs (a)(1)(i) and (ii) of this section, and there is a rebuttable presumption that small power production facilities with a capacity greater than 5 megawatts and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to those markets through Commission-approved open access transmission tariffs and interconnection rules, and that electric utilities that are members of such regional transmission organizations or independent system operators should be relieved of the obligation to purchase electric energy from the qualifying facilities.

(1) A qualifying facility above 20 MW may seek to rebut this presumption by demonstrating, *inter alia,* that:

(i) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(ii) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(2) A small power producer qualifying facility between 5 megawatts and 20 megawatts may show it does not have access to the market in light of consideration of other factors, including, but not limited to:

(i) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates;

(ii) Unique circumstances impacting the time or length of interconnection studies or queues to process the small power production facility's interconnection request;

(iii) A lack of affiliation with entities that participate in the markets in section § 292.309(a)(1), (2), and (3);

(iv) The qualifying small power production facility has a predominant purpose other than selling electricity and should be treated similarly to qualifying cogeneration facilities;

(v) The qualifying small power production facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(vi) The qualifying small power production facility lacks access to markets due to transmission constraints. The qualifying small power production facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(f) The Electric Reliability Council of Texas (ERCOT) qualifies as a market described in paragraph (a)(3) of this section, and there is a rebuttable presumption that small power production facilities with a capacity greater than five megawatts and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to that market through Public Utility Commission of Texas (PUCT) approved open access protocols, and that electric utilities that operate within ERCOT should be relieved of the obligation to purchase electric energy from the qualifying facilities.

(1) A qualifying facility above 20 MW may seek to rebut this presumption by demonstrating, *inter alia,* that:

(i) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(ii) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(2) A small power producer qualifying facility between 5 megawatts and 20 megawatts may show it does not have access to the market in light of consideration of other factors, including, but not limited to:

(i) Specific barriers to connecting to the interstate transmission grid, such as excessively high costs and pancaked delivery rates;

(ii) Unique circumstances impacting the time or length of interconnection studies or queues to process the small power production facility's interconnection request;

(iii) A lack of affiliation with entities that participate in the markets in section § 292.309(a)(1), (2), and (3);

(iv) The qualifying small power production facility has a predominant purpose other than selling electricity and should be treated similarly to qualifying cogeneration facilities;

(v) The qualifying small power production facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(vi) The qualifying small power production facility lacks access to markets due to transmission constraints. The qualifying small power production facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix B

Revised Form No. 556

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC

OMB Control # 1902-0075
Expiration nn/nn/nnnn

Form 556 Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility

General

Questions about completing this form should be sent to Form556@ferc.gov. Information about the Commission's QF program, answers to frequently asked questions about QF requirements or completing this form, and contact information for QF program staff are available at the Commission's QF website, www.ferc.gov/QF. The Commission's QF website also provides links to the Commission's QF regulations (18 C.F.R. § 131.80 and Part 292), as well as other statutes and orders pertaining to the Commission's QF program.

Title 18, U.S.C. 1001 makes it a crime for any person knowingly and willingly to make to any Agency or Department of the United States any false, fictitious or fraudulent statements as to any matter within its jurisdiction.

Who Must File

Certification:

Any applicant seeking QF status for a generating facility that has a net power production capacity (as determined in lines 7a through 7g below) greater than 1 MW must file a self-certification or an application for Commission certification of QF status, which includes a properly completed Form 556. Any applicant seeking QF status for a generating facility with a net power production capacity 1 MW or less is exempt from the certification requirement and is therefore not required to complete or file a Form 556. See 18 C.F.R. § 292.203. This includes any applicant seeking small power production QF status for a generating facility that, together with any affiliated small power production QFs that use the same energy resource and are within one mile of the filing facility, has a net power production capacity 1 MW or less.

Recertification:

A QF must file a recertification whenever the qualifying facility "fails to conform with any material facts or representations presented . . . in its submittals to the Commission." 18 C.F.R. § 292.207(f).

Among other possible changes in material facts that would necessitate recertification, a small power production QF is required to recertify to update item 8a due to a change at an affiliated facility(ies) one mile or less from its electrical generating equipment. A small power production QF is *not* required to recertify due to a change at an affiliated facility(ies) listed in item 8a that is more than one mile but less than 10 miles away from its electrical generating equipment, unless that change also impacts any other entries on the Form 556.

How to Complete the Form 556

This form is intended to be completed by responding to the items in the order they are presented, according to the instructions given. If you need to back-track, you may need to clear certain responses before you will be allowed to change other responses made previously in the form. If you experience problems, click on the nearest help button (i) for assistance, or contact Commission staff at Form556@ferc.gov.

Certain lines in this form will be automatically calculated based on responses to previous lines, with the relevant formulas shown. You must respond to all of the previous lines within a section before the results of an automatically calculated field will be displayed. If you disagree with the results of any automatic calculation on this form, contact Commission staff at Form556@ferc.gov to discuss the discrepancy before filing.

You must complete all lines in this form unless instructed otherwise. Do not alter this form or save this form in a different format. Incomplete or altered forms, or forms saved in formats other than PDF, will be rejected.

How to File a Completed Form 556

Applicants are required to file their Form 556 electronically through the Commission's eFiling website (see instructions on page 3). By filing electronically, you will reduce your filing burden, save paper resources, save postage or courier charges, help keep Commission expenses to a minimum, and receive a much faster confirmation (via an email containing the docket number assigned to your facility) that the Commission has received your filing.

If you are simultaneously filing both a waiver request and a Form 556 as part of an application for Commission certification, see the "Waiver Requests" section on page 4 for more information on how to file.

Paperwork Reduction Act Notice

This form is approved by the Office of Management and Budget. Compliance with the information requirements established by the FERC Form 556 is required to obtain or maintain status as a QF. See 18 C.F.R. § 131.80 and Part 292. An agency may not penalize a person for not complying with a collection of information unless it displays a currently valid OMB control number.

The estimated total burden for completing the FERC Form 556, including gathering and reporting information, is as follows: 1.5 hours for self-certifications of facilities of 1 MW or less; 1.5 hours for self-certifications of a cogeneration facility over 1 MW; 50 hours for applications for Commission certification of a cogeneration facility; 3.5 hours for self-certifications of small power producers over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 56 hours for an application for Commission certification of a small power production facility over 1 MW and less than a mile or more than 10 miles from affiliated small power production QFs that use the same energy resource; 9.5 hours for self-certifications of small power producers over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource; 62 hours for an application for Commission certification of a small power production facility over 1 MW with affiliated small power production QFs more than one but less than 10 miles that use the same energy resource.

Send comments regarding this burden estimate or any aspect of this collection of information, including suggestions for reducing this burden, to the following: Information Clearance Officer, Office of the Executive Director (ED-32), Federal Energy Regulatory Commission, 888 First Street N.E., Washington, DC 20426 (DataClearance@ferc.gov); and Desk Officer for FERC, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 through www.reginfo.gov/public/do/PRAMain. Include FERC-556 and the Control No. 1902-0075 in any correspondence.

Filing Fee

No filing fee is required if you are submitting a self-certification or self-recertification of your facility as a QF pursuant to 18 C.F.R. § 292.207(a).

A filing fee is required if you are filing either of the following:

(1) an application for Commission certification or recertification of your facility as a QF pursuant to 18 C.F.R. § 292.207(b), or
(2) a petition for declaratory order granting waiver pursuant to 18 C.F.R. §§ 292.204(a)(3) and/or 292.205(c).

The current fees for applications for Commission certifications and petitions for declaratory order can be found by visiting the Commission's QF website at www.ferc.gov/QF and clicking the Filing Fees link.

You will be prompted to submit your filing fee, if applicable, during the electronic filing process described on page 3.

Electronic Filing (eFiling)

To electronically file your Form 556, visit the Commission's QF website at www.ferc.gov/QF and click the eFiling link.

If you are eFiling your first document, you will need to register with your name, email address, mailing address, and phone number. If you are registering on behalf of an employer, then you will also need to provide the employer name, alternate contact name, alternate contact phone number and and alternate contact email.

Once you are registered, log in to eFiling with your registered email address and the password that you created at registration. Follow the instructions. When prompted, select one of the following QF-related filing types, as appropriate, from the Electric or General filing category.

Filing category	Filing Type as listed in eFiling	Description
Electric	(Fee) Application for Commission Cert. as Cogeneration QF	Use to submit an application for Commission certification or Commission recertification of a cogeneration facility as a QF.
	(Fee) Application for Commission Cert. as Small Power QF	Use to submit an application for Commission certification or Commission recertification of a small power production facility as a QF.
	Self-Certification Notice (QF, EG, FC)	Use to submit a notice of self-certification of your facility (cogeneration or small power production) as a QF.
	Self-Recertification of Qualifying Facility (QF)	Use to submit a notice of self-recertification of your facility (cogeneration or small power production) as a QF.
	Self-Recertification of Qualifying Facility (QF) (Supplement or Correction)	Use to correct or supplement a Form 556 that was submitted with errors or omissions, or for which Commission staff has requested additional information. Do *not* use this filing type to report new changes to a facility or its ownership; rather, use a self-recertification or Commission recertification to report such changes.
General	(Fee) Petition for Declaratory Order (not under FPA Part 1)	Use to submit a petition for declaratory order granting a waiver of Commission QF regulations pursuant to 18 C.F.R. §§ 292.204(a)(3) and/or 292.205(c). A Form 556 is not required for a petition for declaratory order unless Commission recertification is being requested as part of the petition.

You will be prompted to submit your filing fee, if applicable, during the electronic submission process. Filing fees can be paid by check or money order via ACH transfer.

During the eFiling process, you will be prompted to select your file(s) for upload from your computer.

Required Notice to Utilities and State Regulatory Authorities

Pursuant to 18 C.F.R. § 292.207(a)(iii), you must provide a copy of your self-certification or request for Commission certification to the utilities with which the facility will interconnect and/or transact, as well as to the State regulatory authorities of the states in which your facility and those utilities reside. Links to information about the regulatory authorities in various states can be found by visiting the Commission's QF website at www.ferc.gov/QF and clicking the Notice Requirements link.

What to Expect From the Commission After You File

An applicant filing a Form 556 electronically will receive an email message acknowledging receipt of the filing and showing the docket number assigned to the filing. Such email is typically sent within one business day, but may be delayed pending confirmation by the Secretary of the Commission of the contents of the filing.

An applicant submitting a self-certification of QF status should expect to receive no documents from the Commission, other than the electronic acknowledgement of receipt described above. Consistent with its name, a self-certification is a certification *by the applicant itself* that the facility meets the relevant requirements for QF status, and does not involve a determination by the Commission as to the status of the facility. An acknowledgement of receipt of a self-certification, in particular, does not represent a determination by the Commission with regard to the QF status of the facility. An applicant self-certifying may, however, receive a rejection, revocation or deficiency letter if its application is found, during periodic compliance reviews, not to comply with the relevant requirements.

An applicant submitting a request for Commission certification will receive an order either granting or denying certification of QF status, or a letter requesting additional information or rejecting the application. Pursuant to 18 C.F.R. § 292.207(b)(3), the Commission must act on an application for Commission certification within 90 days of the later of the filing date of the application or the filing date of a supplement, amendment or other change to the application.

Protests to the Filing

Pursuant to 18 C.F.R. § 292.207, an interested party has 30 days from the date of the filing of a self-certification or self-recertification to intervene or file a protest. Protests may be made to an initial certification (both self-certification and application for Commission certification) filed on or after December 31, 2020, but only to a recertification (both self-recertification and application for Commission recertification) that makes substantive changes to the existing certification and that is filed on or after December 31, 2020, as described in Order No. 872 (accessible from the Commission's QF website at www.ferc.gov/QF). Substantive changes that may be subject to a protest may include, for example, a change in electrical generating equipment that increases power production capacity by the greater of 1 MW or 5% of the previously certified capacity of the QF, or a change in ownership in which an owner increases its equity interest by at least 10% from the equity interest previously reported. The protestor must concurrently serve a copy of such filing pursuant to 18 C.F.R. § 385.2011. Any response to a protest must be filed on or before 30 days from the date of filing of that protest.

Waiver Requests

18 C.F.R. § 292.204(a)(3) allows an applicant to request a waiver to modify the method of calculation pursuant to 18 C.F.R. § 292.204(a)(2) to determine if two facilities are considered to be located at the same site, for good cause. 18 C.F.R. § 292.205(c) allows an applicant to request waiver of the requirements of 18 C.F.R. §§ 292.205(a) and (b) for operating and efficiency upon a showing that the facility will produce significant energy savings. A request for waiver of these requirements must be submitted as a petition for declaratory order, with the appropriate filing fee for a petition for declaratory order. Applicants requesting Commission recertification as part of a request for waiver of one of these requirements should electronically submit their completed Form 556 along with their petition for declaratory order, rather than filing their Form 556 as a separate request for Commission recertification. Only the filing fee for the petition for declaratory order must be paid to cover both the waiver request and the request for recertification *if such requests are made simultaneously.*

18 C.F.R. § 292.203(d)(2) allows an applicant to request a waiver of the Form 556 filing requirements, for good cause. Applicants filing a petition for declaratory order requesting a waiver under 18 C.F.R. § 292.203(d)(2) do not need to complete or submit a Form 556 with their petition.

Geographic Coordinates

Items 3c and 8a of the Form 556 require you to report your facility's (and certain neighboring facilities') geographic coordinates (latitude and longitude). Geographic coordinates may be obtained from several different sources. You can find links to online services that show latitude and longitude coordinates on online maps by visiting the Commission's QF webpage at www.ferc.gov/QF. You may also be able to obtain your geographic coordinates from a GPS device, Google Earth (available free at http://earth.google.com), a property survey, various engineering or construction drawings, a property deed, or a municipal or county map showing property lines.

Filing Privileged Data or Critical Energy Infrastructure Information in a Form 556

The Commission's regulations provide procedures for applicants to either (1) request that any information submitted with a Form 556 be given privileged treatment because the information is exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, and should be withheld from public disclosure; or (2) identify any documents containing critical energy infrastructure information (CEII) as defined in 18 C.F.R. § 388.113 that should not be made public.

If you are seeking privileged treatment or CEII status for any data in your Form 556, then you must follow the procedures in 18 C.F.R. § 388.112. See www.ferc.gov/help/filing guide/file ceii.asp for more information.

Among other things (see 18 C.F.R. § 388.112 for other requirements), applicants seeking privileged treatment or CEII status for data submitted in a Form 556 must prepare and file both (1) a complete version of the Form 556 (containing the privileged and/or CEII data), and (2) a public version of the Form 556 (with the privileged and/or CEII data redacted). Applicants preparing and filing these different versions of their Form 556 must indicate below the security designation of this version of their document. If you are *not* seeking privileged treatment or CEII status for any of your Form 556 data, then you should not respond to any of the items on this page.

☐	**Non-Public**: Applicant is seeking privileged treatment and/or CEII status for data contained in the Form 556 lines indicated below. This non-public version of the applicant's Form 556 contains all data, including the data that is redacted in the (separate) public version of the applicant's Form 556.
☐	**Public (redacted)**: Applicant is seeking privileged treatment and/or CEII status for data contained in the Form 556 lines indicated below. This public version of the applicants's Form 556 contains all data *except* for data from the lines indicated below, which has been redacted.
Privileged: Indicate below which lines of your form contain data for which you are seeking privileged treatment	
Critical Energy Infrastructure Information (CEII): Indicate below which lines of your form contain data for which you are seeking CEII status	

The eFiling process described on page 3 will allow you to identify which versions of the electronic documents you submit are public, privileged and/or CEII. The filenames for such documents should begin with "Public", "Priv", or "CEII", as applicable, to clearly indicate the security designation of the file. Both versions of the Form 556 should be unaltered PDF copies of the Form 556, as available for download from www.ferc.gov/QF. To redact data from the public copy of the submittal, simply omit the relevant data from the Form. For numerical fields, leave the redacted fields blank. For text fields, complete as much of the field as possible, and replace the redacted portions of the field with the word "REDACTED" in brackets. Be sure to identify above all fields which contain data for which you are seeking non-public status.

The Commission is not responsible for detecting or correcting filer errors, including those errors related to security designation. If your documents contain sensitive information, make sure they are filed using the proper security designation.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC

OMB Control # 1902-0075
Expiration xxxx

Form 556 Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility

Application Information

1a Full name of applicant (legal entity on whose behalf qualifying facility status is sought for this facility)

1b Applicant street address

1c City | **1d** State/province

1e Postal code | **1f** Country (if not United States) | **1g** Telephone number

1h Has the instant facility ever previously been certified as a QF? Yes ☐ No ☐

1i If yes, provide the docket number of the last known QF filing pertaining to this facility: QF___ - _____ - ____

1j Under which certification process is the applicant making this filing?

☐ Notice of self-certification (see note below)

☐ Application for Commission certification (requires filing fee; see "Filing Fee" section on page 4)

Note: a notice of self-certification is a notice by the applicant itself that its facility complies with the requirements for QF status. A notice of self-certification does not establish a proceeding, and the Commission does not review a notice of self-certification to verify compliance. See the "What to Expect From the Commission After You File" section on page 4 for more information.

1k What type(s) of QF status is the applicant seeking for its facility? (check all that apply)

☐ Qualifying small power production facility status ☐ Qualifying cogeneration facility status

1l What is the purpose and expected effective date(s) of this filing?

☐ Original certification: facility expected to be installed by and to begin operation on

☐ Change(s) to a previously certified facility to be effective on _____
(identify type(s) of change(s) below, and describe change(s) in the Miscellaneous section starting on page 24)

☐ Name change and/or other administrative change(s)

☐ Change in ownership

☐ Change(s) affecting plant equipment, fuel use, power production capacity and/or cogeneration thermal output

☐ Supplement or correction to a previous filing submitted on _____
(describe the supplement or correction in the Miscellaneous section starting on page 24)

1m If any of the following three statements is true, check the box(es) that describe your situation and complete the form to the extent possible, explaining any special circumstances in the Miscellaneous section starting on page 24.

☐ The instant facility complies with the Commission's QF requirements by virtue of a waiver of certain regulations previously granted by the Commission in an order dated _____ (specify any other relevant waiver orders in the Miscellaneous section starting on page 24)

☐ The instant facility would comply with the Commission's QF requirements if a petition for waiver submitted concurrently with this application is granted

☐ The instant facility complies with the Commission's regulations, but has special circumstances, such as the employment of unique or innovative technologies not contemplated by the structure of this form, that make the demonstration of compliance via this form difficult or impossible (describe in Misc. section starting on p. 24)

FERC Form 556 Page 7 - All Facilities

Contact Information

2a Name of contact person **2b** Telephone number

2c Which of the following describes the contact person's relationship to the applicant? (check one)

☐ Applicant (self) ☐ Employee, owner or partner of applicant authorized to represent the applicant

☐ Employee of a company affiliated with the applicant authorized to represent the applicant on this matter

☐ Lawyer, consultant, or other representative authorized to represent the applicant on this matter

2d Company or organization name (if applicant is an individual, check here and skip to line 2e) ☐

2e Street address (if same as Applicant, check here and skip to line 3a) ☐

2f City **2g** State/province

2h Postal code **2i** Country (if not United States)

Facility Identification and Location

3a Facility name

3b Street address (if a street address does not exist for the facility, check here and skip to line 3c) ☐

3c Geographic coordinates: Specify the latitude and longitude coordinates of the facility in degrees (to three decimal places). Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the "Geographic Coordinates" section on page 5 for help.

Latitude degrees Choose +/- Longitude degrees Choose +/-

3d City (if unincorporated, check here and enter nearest city) ☐ **3e** State/province

3f County (or check here for independent city) ☐ **3g** Country (if not United States)

Transacting Utilities

Identify the electric utilities that are contemplated to transact with the facility.

4a Identify utility interconnecting with the facility

4b Identify utilities providing wheeling service or check here if none ☐

4c Identify utilities purchasing the useful electric power output or check here if none ☐

4d Identify utilities providing supplementary power, backup power, maintenance power, and/or interruptible power service or check here if none ☐

FERC Form 556 Page 8 - All Facilities

Ownership and Operation

5a Direct ownership as of effective date or operation date: Identify all direct owners of the facility holding at least 10 percent equity interest. For each identified owner, also (1) indicate whether that owner is an electric utility, as defined in section 3(22) of the Federal Power Act (16 U.S.C. 796(22)), or a holding company, as defined in section 1262(8) of the Public Utility Holding Company Act of 2005 (42 U.S.C. 16451(8)), and (2) for owners which are electric utilities or holding companies, provide the percentage of equity interest in the facility held by that owner. If no direct owners hold at least 10 percent equity interest in the facility, then provide the required information for the two direct owners with the largest equity interest in the facility.

	Full legal names of direct owners	Electric utility or holding company	If Yes, % equity interest
1)		Yes ☐ No ☐	%
2)		Yes ☐ No ☐	%
3)		Yes ☐ No ☐	%
4)		Yes ☐ No ☐	%
5)		Yes ☐ No ☐	%
6)		Yes ☐ No ☐	%
7)		Yes ☐ No ☐	%
8)		Yes ☐ No ☐	%
9)		Yes ☐ No ☐	%
10)		Yes ☐ No ☐	%

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

5b Upstream (i.e., indirect) ownership as of effective date or operation date: Identify all upstream (i.e., indirect) owners of the facility that both (1) hold at least 10 percent equity interest in the facility, and (2) are electric utilities, as defined in section 3(22) of the Federal Power Act (16 U.S.C. 796(22)), or holding companies, as defined in section 1262(8) of the Public Utility Holding Company Act of 2005 (42 U.S.C. 16451(8)). Also provide the percentage of equity interest in the facility held by such owners. (Note that, because upstream owners may be subsidiaries of one another, total percent equity interest reported may exceed 100 percent.)

Check here if no such upstream owners exist. ☐

	Full legal names of electric utility or holding company upstream owners	% equity interest
1)		%
2)		%
3)		%
4)		%
5)		%
6)		%
7)		%
8)		%
9)		%
10)		%

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

5c Identify the facility operator

FERC Form 556 Page 9 - All Facilities

Energy Input

6a Describe the primary energy input: (check one main category and, if applicable, one subcategory)

- ☐ Biomass (specify)
  - ☐ Landfill gas
  - ☐ Manure digester gas
  - ☐ Municipal solid waste
  - ☐ Sewage digester gas
  - ☐ Wood
  - ☐ Other biomass (describe on page 24)
- ☐ Waste (specify type below in line 6b)
- ☐ Renewable resources (specify)
  - ☐ Hydro power - river
  - ☐ Hydro power - tidal
  - ☐ Hydro power - wave
  - ☐ Solar - photovoltaic
  - ☐ Solar - thermal
  - ☐ Wind
  - ☐ Other renewable resource (describe on page 24)
- ☐ Geothermal
- ☐ Fossil fuel (specify)
  - ☐ Coal (not waste)
  - ☐ Fuel oil/diesel
  - ☐ Natural gas (not waste)
  - ☐ Other fossil fuel (describe on page 24)
- ☐ Other (describe on page 24)

6b If you specified "waste" as the primary energy input in line 6a, indicate the type of waste fuel used: (check one)

☐ Waste fuel listed in 18 C.F.R. § 292.202(b) (specify one of the following)

- ☐ Anthracite culm produced prior to July 23, 1985
- ☐ Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more
- ☐ Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more
- ☐ Top or bottom subbituminous coal produced on Federal lands or on Indian lands that has been determined to be waste by the United States Department of the Interior's Bureau of Land Management (BLM) or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that the applicant shows that the latter coal is an extension of that determined by BLM to be waste
- ☐ Coal refuse produced on Federal lands or on Indian lands that has been determined to be waste by the BLM or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicant shows that the latter is an extension of that determined by BLM to be waste
- ☐ Lignite produced in association with the production of montan wax and lignite that becomes exposed as a result of such a mining operation
- ☐ Gaseous fuels (except natural gas and synthetic gas from coal) (describe on page 24)
- ☐ Waste natural gas from gas or oil wells (describe on page 24 how the gas meets the requirements of 18 C.F.R. § 2.400 for waste natural gas; include with your filing any materials necessary to demonstrate compliance with 18 C.F.R. § 2.400)
- ☐ Materials that a government agency has certified for disposal by combustion (describe on page 24)
- ☐ Heat from exothermic reactions (describe on page 24) ☐ Residual heat (describe on page 24)
- ☐ Used rubber tires ☐ Plastic materials ☐ Refinery off gas ☐ Petroleum coke

☐ Other waste energy input that has little or no commercial value and exists in the absence of the qualifying facility industry (describe in the Miscellaneous section starting on page 24; include a discussion of the fuel's lack of commercial value and existence in the absence of the qualifying facility industry)

6c Provide the average energy input, calculated on a calendar year basis, in terms of Btu/h for the following fossil fuel energy inputs, and provide the related percentage of the total average annual energy input to the facility (18 C.F.R. § 292.202(j)). For any oil or natural gas fuel, use lower heating value (18 C.F.R. § 292.202(m)).

Fuel	Annual average energy input for specified fuel	Percentage of total annual energy input
Natural gas	Btu/h	%
Oil-based fuels	Btu/h	%
Coal	Btu/h	%

FERC Form 556 Page 10 - All Facilities

Technical Facility Information

Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery by completing the worksheet below. Respond to all items. If any of the parasitic loads and/or losses identified in lines 7b through 7e are negligible, enter zero for those lines.

7a The maximum gross power production capacity at the terminals of the individual generator(s) under the most favorable anticipated design conditions	kW
7b Parasitic station power used at the facility to run equipment which is necessary and integral to the power production process (boiler feed pumps, fans/blowers, office or maintenance buildings directly related to the operation of the power generating facility, etc.). If this facility includes non-power production processes (for instance, power consumed by a cogeneration facility's thermal host), do not include any power consumed by the non-power production activities in your reported parasitic station power.	kW
7c Electrical losses in interconnection transformers	kW
7d Electrical losses in AC/DC conversion equipment, if any	kW
7e Other interconnection losses in power lines or facilities (other than transformers and AC/DC conversion equipment) between the terminals of the generator(s) and the point of interconnection with the utility	kW
7f Total deductions from gross power production capacity = 7b + 7c + 7d + 7e	0 kW
7g Maximum net power production capacity = 7a - 7f	0 kW

7h Description of facility and primary components: Describe the facility and its operation. Identify all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar equipment, fuel cell equipment and/or other primary power generation equipment used in the facility. Descriptions of components should include (as applicable) specifications of the nominal capacities for mechanical output, electrical output, or steam generation of the identified equipment. For each piece of equipment identified, clearly indicate how many pieces of that type of equipment are included in the plant, and which components are normally operating or normally in standby mode. Provide a description of how the components operate as a system. Applicants for cogeneration facilities do not need to describe operations of systems that are clearly depicted on and easily understandable from a cogeneration facility's attached mass and heat balance diagram; however, such applicants should provide any necessary description needed to understand the sequential operation of the facility depicted in their mass and heat balance diagram. If additional space is needed, continue in the Miscellaneous section starting on page 24.

FERC Form 556 Page 11 - Small Power Production

Information Required for Small Power Production Facility

If you indicated in line 1k that you are seeking qualifying small power production facility status for your facility, then you must respond to the items on this page. Otherwise, skip pages 11 through 15.

Certification of Compliance with Size Limitations

Pursuant to 18 C.F.R. § 292.204(a), the power production capacity of any small power production facility, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts. To demonstrate compliance with this size limitation, or to demonstrate that your facility is exempt from this size limitation under the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Pub. L. 101-575, 104 Stat. 2834 (1990) *as amended by* Pub. L. 102-46, 105 Stat. 249 (1991)), respond to lines 8a through 8f below (as applicable).

Electric Generating Equipment

Electrical generating equipment will refer to all boilers, heat recovery steam generators, prime movers (any mechanical equipment driving an electric generator), electrical generators, photovoltaic solar panels, inverters, fuel cell equipment and/or other primary power generation equipment used in the facility, excluding equipment for gathering energy to be used in the facility. Each wind turbine on a wind farm and each solar panel in a solar facility is considered electrical generating equipment because each wind turbine and each solar panel is independently capable of producing electric energy.

Distance

The distance between two facilities is to be measured from the edge of the closest electrical generating equipment for which qualification or recertification is sought to the edge of the nearest electrical generating equipment of the other affiliated small power production qualifying facility using the same energy resource. An affiliated small power production QF located one mile or less from the instant facility is irrebuttably presumed to be at the same site. An affiliated small power production QF located more than one mile and less than 10 miles from the instant facility is rebuttably presumed to be at a separate site. An affiliated small power production QF located 10 miles or more from the instant facility is irrebuttably presumed to be located at a separate site.

8a Identify affiliated small power production QFs located less than 10 miles from the electrical generating equipment of the instant facility that use the same energy resource and are held (with at least a 5 percent equity interest) by any of the entities identified in lines 5a or 5b or their affiliates. Specify the latitude and longitude coordinates for both the applicant and the affiliate small power production QF based on the nearest electrical generating equipment for each facility. Report coordinates in degrees (to three decimal places) as a positive number for east and north or a negative number for west and south. Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the "Geographic Coordinates" section on page 5 for help obtaining coordinates. The distances for each facility listed below will be automatically calculated from the reported coordinates. See **www.ferc.gov/QF** for more information on how this form calculates distance.

Check here if no such facilities exist. ☐

	Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
1)		QF -	kW	

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- | Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- | Longitude Choose +/-

Distance: c miles

FERC Form 556 Page 12 - Small Power Production

Certification of Compliance with Size Limitations (continued)

8a Continued

2)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- c _____ miles

3)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- c _____ miles

4)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- c _____ miles

5)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- c _____ miles

FERC Form 556 Page 13 - Small Power Production

Certification of Compliance with Size Limitations (continued)

8a Continued

6)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- (_____ miles

7)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- (_____ miles

8)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- (_____ miles

9)

Facility location (city or county, state) _____ Root docket # (if any) QF ___ - ___ Maximum net power production capacity _____ kW Common owner(s) _____

Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude _____ Choose +/- Longitude _____ Choose +/-

Closest electrical generating equipment for affiliate's facility: Distance

Latitude _____ Choose +/- Longitude _____ Choose +/- (_____ miles

FERC Form 556 Page 14 - Small Power Production

Certification of Compliance with Size Limitations (continued)

8a Continued

Facility location (city or county, state)	Root docket # (if any)	Maximum net power production capacity	Common owner(s)
	QF -	kW	

10) Coordinates (in degrees) and Distance (miles):

Closest electrical generating equipment for applicant's facility:

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility:

Latitude Choose +/- Longitude Choose +/- Distance 0 miles

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed. Use the calculator below below to calculate distances based on facility coordinates.

Distance Calculator Specify the latitude and longitude coordinates for both the applicant and the affiliate small power production QF based on the nearest electrical generating equipment for each facility. Report coordinates in degrees (to three decimal places) as a positive number for east and north or a negative number for west and south. Use the following formula to convert to decimal degrees from degrees, minutes and seconds: decimal degrees = degrees + (minutes/60) + (seconds/3600). See the 'Geographic Coordinates' section on page 5 for help obtaining coordinates. The distances for each facility listed below will be automatically calculated from the reported coordinates. See **www.ferc.gov/QF** for more information on how this form calculates distance.

Closest electrical generating equipment for applicant's facility (degrees):

Latitude Choose +/- Longitude Choose +/-

Closest electrical generating equipment for affiliate's facility (degrees): Distance

Latitude Choose +/- Longitude Choose +/- 0 miles

8b You have the option below to assert preemptively that your facility is at a separate site from affiliated small power production QFs using the same energy resource more than one mile but less than 10 miles from your facility. If additional space is needed, continue in the Miscellaneous section starting on page 24.

Pursuant to 18 C.F.R. § 292.204(a)(2)(i)(C), if affiliated small power producer qualifying facilities are more than one mile but less than 10 miles apart there is a rebuttable presumption that they are at separate sites. The factors listed below are examples of the factors that the Commission may consider in deciding whether small power production facilities that are owned by the same person(s) or its affiliates are located "at the same site": (1) *physical characteristics*, including such common characteristics as: infrastructure, property ownership, property leases, control facilities, access and easements, interconnection agreements, interconnection facilities up to the point of interconnection to the distribution or transmission system, collector systems or facilities, points of interconnection, motive force or fuel source, off-take arrangements, connections to the electrical grid, evidence of shared control systems, common permitting and land leasing, and shared step-up transformers; and (2) *ownership/other characteristics*, including such characteristics as whether the facilities in question are: owned or controlled by the same person(s) or affiliated persons(s), operated and maintained by the same or affiliated entity(ies), selling to the same electric utility, using common debt or equity financing, constructed by the same entity within 12 months, managing a power sales agreement executed within 12 months of a similar and affiliated small power production qualifying facility (continued next page)...

FERC Form 556 Page 15 - Small Power Production

Certification of Compliance with Size Limitations (continued)

8b Continued

... (continued from previous page) in the same location, placed into service within 12 months of an affiliated small power production QF project's commercial operation date as specified in the power sales agreement, or sharing engineering or procurement contracts.

8c The Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Incentives Act) provides exemption from the size limitations in 18 C.F.R. § 292.204(a) for certain facilities that were certified prior to 1995. Are you seeking exemption from the size limitations in 18 C.F.R. § 292.204(a) by virtue of the Incentives Act?

☐ Yes (continue at line 8d below) ☐ No (skip lines 8d through 8f)

8d Was the original notice of self certification or application for Commission certification of the facility filed on or before December 31, 1994? Yes ☐ No ☐

8e Did construction of the facility commence on or before December 31, 1999? Yes ☐ No ☐

8f If you answered No in line 8e, indicate whether reasonable diligence was exercised toward the completion of the facility, taking into account all factors relevant to construction? Yes ☐ No ☐

If you answered Yes, provide a brief narrative explanation in the Miscellaneous section starting on page 24 of the construction timeline (in particular, describe why construction started so long after the facility was certified) and the diligence exercised toward completion of the facility.

Certification of Compliance with Fuel Use Requirements

Pursuant to 18 C.F.R. § 292.204(b), qualifying small power production facilities may use fossil fuels, in minimal amounts, for only the following purposes: ignition; start-up; testing; flame stabilization; control use; alleviation or prevention of unanticipated equipment outages; and alleviation or prevention of emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. The amount of fossil fuels used for these purposes may not exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy or any calendar year thereafter.

9a Certification of compliance with 18 C.F.R. § 292.204(b) with respect to uses of fossil fuel:

☐ Applicant certifies that the facility will use fossil fuels *exclusively* for the purposes listed above.

9b Certification of compliance with 18 C.F.R. § 292.204(b) with respect to amount of fossil fuel used annually:

☐ Applicant certifies that the amount of fossil fuel used at the facility will not, in aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy or any calendar year thereafter.

Information Required for Cogeneration Facility

If you indicated in line 1k that you are seeking qualifying cogeneration facility status for your facility, then you must respond to the items on pages 16 through 18. Otherwise, skip pages 16 through 18.

General Cogeneration Information

Pursuant to 18 C.F.R. § 292.202(c), a cogeneration facility produces electric energy and forms of useful thermal energy (such as heat or steam) used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy. Pursuant to 18 C.F.R. § 292.202(s), "sequential use" of energy means the following: (1) for a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard contained in 18 C.F.R. § 292.205(a); or (2) for a bottoming-cycle cogeneration facility, the use of at least some reject heat from a thermal application or process for power production.

10a What type(s) of cogeneration technology does the facility represent? (check all that apply)

☐ Topping-cycle cogeneration ☐ Bottoming-cycle cogeneration

10b To help demonstrate the sequential operation of the cogeneration process, and to support compliance with other requirements such as the operating and efficiency standards, include with your filing a mass and heat balance diagram depicting average annual operating conditions. This diagram must include certain items and meet certain requirements, as described below. You must check next to the description of each requirement below to certify that you have complied with these requirements.

Check to certify compliance with indicated requirement	Requirement
☐	Diagram must show orientation within system piping and/or ducts of all prime movers, heat recovery steam generators, boilers, electric generators, and condensers (as applicable), as well as any other primary equipment relevant to the cogeneration process.
☐	Any average annual values required to be reported in lines 10b, 12a, 13a, 13b, 13d, 13f, 14a, 15b, 15d and/or 15f must be computed over the anticipated hours of operation.
☐	Diagram must specify all fuel inputs by fuel type and average annual rate in Btu/h. Fuel for supplementary firing should be specified separately and clearly labeled. All specifications of fuel inputs should use lower heating values.
☐	Diagram must specify average gross electric output in kW or MW for each generator.
☐	Diagram must specify average mechanical output (that is, any mechanical energy taken off of the shaft of the prime movers for purposes not directly related to electric power generation) in horsepower, if any. Typically, a cogeneration facility has no mechanical output.
☐	At each point for which working fluid flow conditions are required to be specified (see below), such flow condition data must include mass flow rate (in lb/h or kg/s), temperature (in °F, R, °C or K), absolute pressure (in psia or kPa) and enthalpy (in Btu/lb or kJ/kg). Exception: For systems where the working fluid is *liquid only* (no vapor at any point in the cycle) and where the type of liquid and specific heat of that liquid are clearly indicated on the diagram or in the Miscellaneous section starting on page 24, only mass flow rate and temperature (not pressure and enthalpy) need be specified. For reference, specific heat at standard conditions for pure liquid water is approximately 1.002 Btu/(lb*R) or 4.195 kJ/(kg*K).
☐	Diagram must specify working fluid flow conditions at input to and output from each steam turbine or other expansion turbine or back-pressure turbine.
☐	Diagram must specify working fluid flow conditions at delivery to and return from each thermal application.
☐	Diagram must specify working fluid flow conditions at make-up water inputs.

FERC Form 556 Page 17 - Cogeneration Facilities

EPAct 2005 Requirements for Fundamental Use of Energy Output from Cogeneration Facilities

EPAct 2005 cogeneration facilities: The Energy Policy Act of 2005 (EPAct 2005) established a new section 210(n) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC 824a-3(n), with additional requirements for any qualifying cogeneration facility that (1) is seeking to sell electric energy pursuant to section 210 of PURPA and (2) was either not a cogeneration facility on August 8, 2005, or had not filed a self certification or application for Commission certification of QF status on or before February 1, 2006. These requirements were implemented by the Commission in 18 C.F.R. § 292.205(d). Complete the lines below, carefully following the instructions, to demonstrate whether these additional requirements apply to your cogeneration facility and, if so, whether your facility complies with such requirements.

11a Was your facility operating as a qualifying cogeneration facility on or before August 8, 2005? Yes ☐ No ☐

11b Was the initial filing seeking certification of your facility (whether a notice of self certification or an application for Commission certification) filed on or before February 1, 2006? Yes ☐ No ☐

If the answer to either line 11a or 11b is Yes, then continue at line 11c below. Otherwise, if the answers to both lines 11a and 11b are No, skip to line 11e below.

11c With respect to the design and operation of the facility, have any changes been implemented on or after February 2, 2006 that affect general plant operation, affect use of thermal output, and/or increase net power production capacity from the plant's capacity on February 1, 2006?

☐ Yes (continue at line 11d below)

☐ No. Your facility is not subject to the requirements of 18 C.F.R. § 292.205(d) at this time. However, it may be subject to to these requirements in the future if changes are made to the facility. At such time, the applicant would need to recertify the facility to determine eligibility. Skip lines 11d through 11j.

11d Does the applicant contend that the changes identified in line 11c are not so significant as to make the facility a "new" cogeneration facility that would be subject to the 18 C.F.R. § 292.205(d) cogeneration requirements?

☐ Yes. Provide in the Miscellaneous section starting on page 24 a description of any relevant changes made to the facility (including the purpose of the changes) and a discussion of why the facility should not be considered a "new" cogeneration facility in light of these changes. Skip lines 11e through 11j.

☐ No. Applicant stipulates to the fact that it is a "new" cogeneration facility (for purposes of determining the applicability of the requirements of 18 C.F.R. § 292.205(d)) by virtue of modifications to the facility that were initiated on or after February 2, 2006. Continue below at line 11e.

11e Will electric energy from the facility be sold pursuant to section 210 of PURPA?

☐ Yes. The facility is an EPAct 2005 cogeneration facility. You must demonstrate compliance with 18 C.F.R. § 292.205(d)(2) by continuing at line 11f below.

☐ No. Applicant certifies that energy will *not* be sold pursuant to section 210 of PURPA. Applicant also certifies its understanding that it must recertify its facility in order to determine compliance with the requirements of 18 C.F.R. § 292.205(d) *before* selling energy pursuant to section 210 of PURPA in the future. Skip lines 11f through 11j.

11f Is the net power production capacity of your cogeneration facility, as indicated in line 7g above, less than or equal to 5,000 kW?

☐ Yes, the net power production capacity is less than or equal to 5,000 kW. 18 C.F.R. § 292.205(d)(4) provides a rebuttable presumption that cogeneration facilities of 5,000 kW and smaller capacity comply with the requirements for fundamental use of the facility's energy output in 18 C.F.R. § 292.205(d)(2). Applicant certifies its understanding that, should the power production capacity of the facility increase above 5,000 kW, then the facility must be recertified to (among other things) demonstrate compliance with 18 C.F.R. § 292.205(d)(2). Skip lines 11g through 11j.

☐ No, the net power production capacity is greater than 5,000 kW. Demonstrate compliance with the requirements for fundamental use of the facility's energy output in 18 C.F.R. § 292.205(d)(2) by continuing on the next page at line 11g.

EPAct 2005 Requirements for Fundamental Use of Energy Output from Cogeneration Facilities (continued)

Lines 11g through 11k below guide the applicant through the process of demonstrating compliance with the requirements for "fundamental use" of the facility's energy output. 18 C.F.R. § 292.205(d)(2). Only respond to the lines on this page if the instructions on the previous page direct you to do so. Otherwise, skip this page.

18 C.F.R. § 292.205(d)(2) requires that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility. If you were directed on the previous page to respond to the items on this page, then your facility is an EPAct 2005 cogeneration facility that is subject to this "fundamental use" requirement.

The Commission's regulations provide a two-pronged approach to demonstrating compliance with the requirements for fundamental use of the facility's energy output. First, the Commission has established in 18 C.F.R. § 292.205(d)(3) a "fundamental use test" that can be used to demonstrate compliance with 18 C.F.R. § 292.205(d)(2). Under the fundamental use test, a facility is considered to comply with 18 C.F.R. § 292.205(d)(2) if at least 50 percent of the facility's total annual energy output (including electrical, thermal, chemical and mechanical energy output) is used for industrial, commercial, residential or institutional purposes.

Second, an applicant for a facility that does not pass the fundamental use test may provide a narrative explanation of and support for its contention that the facility nonetheless meets the requirement that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

Complete lines 11g through 11j below to determine compliance with the fundamental use test in 18 C.F.R. § 292.205(d)(3). Complete lines 11g through 11j *even if you do not intend to rely upon the fundamental use test to demonstrate compliance with 18 C.F.R. § 292.205(d)(2).*

11g Amount of electrical, thermal, chemical and mechanical energy output (net of internal generation plant losses and parasitic loads) expected to be used annually for industrial, commercial, residential or institutional purposes and not sold to an electric utility	MWh
11h Total amount of electrical, thermal, chemical and mechanical energy expected to be sold to an electric utility	MWh
11i Percentage of total annual energy output expected to be used for industrial, commercial, residential or institutional purposes and not sold to a utility = 100 * 11g /(11g + 11h)	%

11j Is the response in line 11i greater than or equal to 50 percent?

☐ Yes. Your facility complies with 18 C.F.R. § 292.205(d)(2) by virtue of passing the fundamental use test provided in 18 C.F.R. § 292.205(d)(3). Applicant certifies its understanding that, if it is to rely upon passing the fundamental use test as a basis for complying with 18 C.F.R. § 292.205(d)(2), then the facility must comply with the fundamental use test both in the 12-month period beginning with the date the facility first produces electric energy, and in all subsequent calendar years.

☐ No. Your facility does not pass the fundamental use test. Instead, you must provide in the Miscellaneous section starting on page 24 a narrative explanation of and support for why your facility meets the requirement that the electrical, thermal, chemical and mechanical output of an EPAct 2005 cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a QF to its host facility. Applicants providing a narrative explanation of why their facility should be found to comply with 18 C.F.R. § 292.205(d)(2) in spite of non-compliance with the fundamental use test may want to review paragraphs 47 through 61 of Order No. 671 (accessible from the Commission's QF website at www.ferc.gov/QF), which provide discussion of the facts and circumstances that may support their explanation. Applicant should also note that the percentage reported above will establish the standard that that facility must comply with, both for the 12-month period beginning with the date the facility first produces electric energy, and in all subsequent calendar years. *See* Order No. 671 at paragraph 51. As such, the applicant should make sure that it reports appropriate values on lines 11g and 11h above to serve as the relevant annual standard, taking into account expected variations in production conditions.

Information Required for Topping-Cycle Cogeneration Facility

If you indicated in line 10a that your facility represents topping-cycle cogeneration technology, then you must respond to the items on pages 19 and 20. Otherwise, skip pages 19 and 20.

Usefulness of Topping-Cycle Thermal Output

The thermal energy output of a topping-cycle cogeneration facility is the net energy made available to an industrial or commercial process or used in a heating or cooling application. Pursuant to sections 292.202(c), (d) and (h) of the Commission's regulations (18 C.F.R. §§ 292.202(c), (d) and (h)), the thermal energy output of a qualifying topping-cycle cogeneration facility must be useful. In connection with this requirement, describe the thermal output of the topping-cycle cogeneration facility by responding to lines 12a and 12b below.

12a Identify and describe each thermal host, and specify the annual average rate of thermal output made available to each host for each use. For hosts with multiple uses of thermal output, provide the data for each use in *separate rows.*

	Name of entity (thermal host) taking thermal output	Thermal host's relationship to facility; Thermal host's use of thermal output	Average annual rate of thermal output attributable to use (net of heat contained in process return or make up water)
1)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
2)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
3)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
4)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
5)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h
6)		Select thermal host's relationship to facility Select thermal host's use of thermal output	Btu/h

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

12b Demonstration of usefulness of thermal output: At a minimum, provide a brief description of each use of the thermal output identified above. In some cases, this brief description is sufficient to demonstrate usefulness. However, if your facility's use of thermal output is not common, and/or if the usefulness of such thermal output is not reasonably clear, then you must provide additional details as necessary to demonstrate usefulness. Your application may be rejected and/or additional information may be required if an insufficient showing of usefulness is made. (Exception: If you have previously received a Commission certification approving a specific use of thermal output related to the instant facility, then you need only provide a brief description of that use and a reference by date and docket number to the order certifying your facility with the indicated use. Such exemption may not be used if any change creates a material deviation from the previously authorized use.) If additional space is needed, continue in the Miscellaneous section starting on page 24.

FERC Form 556 Page 70 - Topping-Cycle Cogeneration Facilities

Topping-Cycle Operating and Efficiency Value Calculation

Applicants for facilities representing topping cycle technology must demonstrate compliance with the topping cycle operating standard and, if applicable, efficiency standard. Section 292.205(a)(1) of the Commission's regulations (18 C.F.R. § 292.205(a)(1)) establishes the operating standard for topping-cycle cogeneration facilities: the useful thermal energy output must be no less than 5 percent of the total energy output. Section 292.205(a)(2) (18 C.F.R. § 292.205(a)(2)) establishes the efficiency standard for topping-cycle cogeneration facilities for which installation commenced on or after March 13, 1980: the useful power output of the facility plus one-half the useful thermal energy output must (A) be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; and (B) if the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility. To demonstrate compliance with the topping-cycle operating and/or efficiency standards, or to demonstrate that your facility is exempt from the efficiency standard based on the date that installation commenced, respond to lines 13a through 13l below.

If you indicated in line 10a that your facility represents *both* topping-cycle and bottoming-cycle cogeneration technology, then respond to lines 13a through 13l below considering only the energy inputs and outputs attributable to the topping-cycle portion of your facility. Your mass and heat balance diagram must make clear which mass and energy flow values and system components are for which portion (topping or bottoming) of the cogeneration system.

13a Indicate the annual average rate of useful thermal energy output made available to the host(s), net of any heat contained in condensate return or make-up water	Btu/h
13b Indicate the annual average rate of net electrical energy output	kW
13c Multiply line 13b by 3,412 to convert from kW to Btu/h	Btu/h
13d Indicate the annual average rate of mechanical energy output taken directly off of the shaft of a prime mover for purposes not directly related to power production (this value is usually zero)	hp
13e Multiply line 13d by 2,544 to convert from hp to Btu/h	Btu/h
13f Indicate the annual average rate of energy input from natural gas and oil	Btu/h
13g Topping-cycle operating value = 100 * 13a / (13a + 13c + 13e)	%
13h Topping-cycle efficiency value = 100 * (0.5*13a + 13c + 13e) / 13f	%

13i Compliance with operating standard: Is the operating value shown in line 13g greater than or equal to 5%?

☐ Yes (complies with operating standard) ☐ No (does not comply with operating standard)

13j Did installation of the facility in its current form commence on or after March 13, 1980?

☐ Yes. Your facility is subject to the efficiency requirements of 18 C.F.R. § 292.205(a)(2). Demonstrate compliance with the efficiency requirement by responding to line 13k or 13l, as applicable, below.

☐ No. Your facility is exempt from the efficiency standard. Skip lines 13k and 13l.

13k Compliance with efficiency standard (for low operating value): If the operating value shown in line 13g is less than 15%, then indicate below whether the efficiency value shown in line 13h greater than or equal to 45%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

13l Compliance with efficiency standard (for high operating value): If the operating value shown in line 13g is greater than or equal to 15%, then indicate below whether the efficiency value shown in line 13h is greater than or equal to 42.5%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

FERC Form 556 Page 21 - Bottoming-Cycle Cogeneration Facilities

Information Required for Bottoming-Cycle Cogeneration Facility

If you indicated in line 10a that your facility represents bottoming-cycle cogeneration technology, then you must respond to the items on pages 21 and 22. Otherwise, skip pages 21 and 22.

Usefulness of Bottoming-Cycle Thermal Output

The thermal energy output of a bottoming-cycle cogeneration facility is the energy related to the process(es) from which at least some of the reject heat is then used for power production. Pursuant to sections 292.202(c) and (e) of the Commission's regulations (18 C.F.R. § 292.202(c) and (e)), the thermal energy output of a qualifying bottoming-cycle cogeneration facility must be useful. In connection with this requirement, describe the process(es) from which at least some of the reject heat is used for power production by responding to lines 14a and 14b below.

14a Identify and describe each thermal host and each bottoming-cycle cogeneration process engaged in by each host. For hosts with multiple bottoming cycle cogeneration processes, provide the data for each process *in separate rows.*

	Name of entity (thermal host) performing the process from which at least some of the reject heat is used for power production	Thermal host's relationship to facility; Thermal host's process type	Has the energy input to the thermal host been augmented for purposes of increasing power production capacity? (If Yes, describe on p. 24)
1)		Select thermal host's relationship to facility	Yes ☐ No ☐
		Select thermal host's process type	
2)		Select thermal host's relationship to facility	Yes ☐ No ☐
		Select thermal host's process type	
3)		Select thermal host's relationship to facility	Yes ☐ No ☐
		Select thermal host's process type	

☐ Check here and continue in the Miscellaneous section starting on page 24 if additional space is needed

14b Demonstration of usefulness of thermal output: At a minimum, provide a brief description of each process identified above. In some cases, this brief description is sufficient to demonstrate usefulness. However, if your facility's process is not common, and/or if the usefulness of such thermal output is not reasonably clear, then you must provide additional details as necessary to demonstrate usefulness. Your application may be rejected and/or additional information may be required if an insufficient showing of usefulness is made. (Exception: If you have previously received a Commission certification approving a specific bottoming cycle process related to the instant facility, then you need only provide a brief description of that process and a reference by date and docket number to the order certifying your facility with the indicated process. Such exemption may not be used if any material changes to the process have been made.) If additional space is needed, continue in the Miscellaneous section starting on page 24.

FERC Form 556 Page 22 - Bottoming-Cycle Cogeneration Facilities

Bottoming-Cycle Operating and Efficiency Value Calculation

Applicants for facilities representing bottoming cycle technology and for which installation commenced on or after March 13, 1990 must demonstrate compliance with the bottoming-cycle efficiency standards. Section 292.205(b) of the Commission's regulations (18 C.F.R. § 292.205(b)) establishes the efficiency standard for bottoming-cycle cogeneration facilities: the useful power output of the facility must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing. To demonstrate compliance with the bottoming-cycle efficiency standard (if applicable), or to demonstrate that your facility is exempt from this standard based on the date that installation of the facility began, respond to lines 15a through 15h below.

If you indicated in line 10a that your facility represents *both* topping-cycle and bottoming-cycle cogeneration technology, then respond to lines 15a through 15h below considering only the energy inputs and outputs attributable to the bottoming-cycle portion of your facility. Your mass and heat balance diagram must make clear which mass and energy flow values and system components are for which portion of the cogeneration system (topping or bottoming).

15a Did installation of the facility in its current form commence on or after March 13, 1980?

☐ Yes. Your facility is subject to the efficiency requirement of 18 C.F.R. § 292.205(b). Demonstrate compliance with the efficiency requirement by responding to lines 15b through 15h below.

☐ No. Your facility is exempt from the efficiency standard. Skip the rest of page 22.

15b Indicate the annual average rate of net electrical energy output	kW
15c Multiply line 15b by 3,412 to convert from kW to Btu/h	Btu/h
15d Indicate the annual average rate of mechanical energy output taken directly off of the shaft of a prime mover for purposes not directly related to power production (this value is usually zero)	hp
15e Multiply line 15d by 2,544 to convert from hp to Btu/h	Btu/h
15f Indicate the annual average rate of supplementary energy input from natural gas or oil	Btu/h
15g Bottoming-cycle efficiency value = 100 * (15c + 15e) / 15f	%

15h Compliance with efficiency standard: Indicate below whether the efficiency value shown in line 15g is greater than or equal to 45%:

☐ Yes (complies with efficiency standard) ☐ No (does not comply with efficiency standard)

FERC Form 556 Page 23 - All Facilities

Certificate of Completeness, Accuracy and Authority

Applicant must certify compliance with and understanding of filing requirements by checking next to each item below and signing at the bottom of this section. Forms with incomplete Certificates of Completeness, Accuracy and Authority will be rejected by the Secretary of the Commission.

Signer identified below certifies the following: (check all items and applicable subitems)

☐ He or she has read the filing, including any information contained in any attached documents, such as cogeneration mass and heat balance diagrams, and any information contained in the Miscellaneous section starting on page 24, and knows its contents.

☐ He or she has provided all of the required information for certification, and the provided information is true as stated, to the best of his or her knowledge and belief.

☐ He or she possess full power and authority to sign the filing; as required by Rule 2005(a)(3) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2005(a)(3)), he or she is one of the following: (check one)

- ☐ The person on whose behalf the filing is made
- ☐ An officer of the corporation, trust, association, or other organized group on behalf of which the filing is made
- ☐ An officer, agent, or employe of the governmental authority, agency, or instrumentality on behalf of which the filing is made
- ☐ A representative qualified to practice before the Commission under Rule 2101 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2101) and who possesses authority to sign

☐ He or she has reviewed all automatic calculations and agrees with their results, unless otherwise noted in the Miscellaneous section starting on page 24.

☐ He or she has provided a copy of this Form 556 and all attachments to the utilities with which the facility will interconnect and transact (see lines 4a through 4d), as well as to the regulatory authorities of the states in which the facility and those utilities reside. See the Required Notice to Public Utilities and State Regulatory Authorities section on page 4 for more information.

Provide your signature, address and signature date below. Rule 2005(c) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2005(c)) provides that persons filing their documents electronically may use typed characters representing his or her name to sign the filed documents. A person filing this document electronically should sign (by typing his or her name) in the space provided below.

Your Signature	Your address	Date

Audit Notes
Commission Staff Use Only:

FERC Form 556 Page 24 - All Facilities

Miscellaneous

Use this space to provide any information for which there was not sufficient space in the previous sections of the form to provide. For each such item of information *clearly identify the line number that the information belongs to.* You may also use this space to provide any additional information you believe is relevant to the certification of your facility.

Your response below is not limited to one page. Additional page(s) will automatically be inserted into this form if the length of your response exceeds the space on this page. Use as many pages as you require.

BILLING CODE 6717–01–C

United States of America

Federal Energy Regulatory Commission

	Docket Nos.
Qualifying Facility Rates and Requirements	RM19–15–001
Implementation Issues Under the Public Utility Regulatory Policies Act of 1978	AD16–16–001

(Issued November 19, 2020)

GLICK, Commissioner, *dissenting in part:*

1. I dissent in part from today's order on rehearing (Rehearing Order [1]) because it upholds the overwhelming majority of Order No. 872,[2] which effectively gutted the Commission's implementation of the Public Utility Regulatory Policies Act (PURPA).[3] The Commission's basic responsibilities under PURPA are three-fold: (1) To encourage the development of qualifying facilities (QFs); (2) to prevent discrimination against QFs by incumbent utilities; and (3) to ensure that the resulting rates paid by electricity customers remain just and reasonable, in the public interest, and do not exceed the incremental costs to the utility of alternative energy.[4] I do not believe that Order No. 872 satisfies those responsibilities.

2. Although I have concerns about many of the individual changes imposed by the Order No. 872,[5] I remain, on a broader level, dismayed that the Commission is attempting to accomplish via administrative fiat what Congress has repeatedly declined to do via legislation. I am especially disappointed because Congress expressly provided the Commission with a different avenue for ''modernizing'' our administration of PURPA. The Energy Policy Act of 2005 gave the Commission the authority to excuse utilities from their obligations under PURPA where QFs have non-discriminatory access to competitive wholesale markets.[6] Had we pursued reforms based on those provisions, rather than gutting our longstanding regulations, I believe we could have reached a durable, consensus solution that would ultimately have done more for all interested parties.

• PURPA's Continuing Relevance Is an Issue for Congress To Decide

3. This proceeding began with a bang. The Commission championed its NOPR as a ''truly significant'' action that would fundamentally overhaul the Commission's implementation of PURPA.[7] And so it was. The NOPR suggested altering almost every significant aspect of the Commission's PURPA regulations, thereby transforming the foundation on which the Commission had carried out its statutory responsibility to ''encourage'' the development of QFs for over four decades. Although Order No. 872 walked back some of the NOPR's most extreme proposals, it adopted the overwhelming majority of the NOPR, including all of its tenets. In so doing, the Commission upended the regulatory regime that has formed the basis of its implementation of PURPA almost since the day the statute was enacted.

4. I partially dissented from both the NOPR and Order No. 872 in large part because I believe that it is not the Commission's role to sit in judgment of a duly enacted statute and determine whether it has outlived its usefulness. As I explained, ''almost from the moment PURPA was passed, Congress began to hear many of the arguments being used today to justify scaling the law back.'' [8] Congress, however, has seen fit to significantly amend PURPA only once in its more-than-forty-year lifespan. As part of the Energy Policy Act of 2005, Congress amended PURPA, leaving in place the law's basic framework, while adding a series of provisions that allowed the Commission to excuse utilities from its requirements in regions of the country with sufficiently competitive wholesale energy markets.[9] And while Congress considered numerous proposals to further reform the law, it never saw fit to act on them.[10] Against that background, I could not support my colleagues' willingness to ''remove[ ] an important debate from the halls of Congress and isolate[ ] it within the Commission.'' [11] Whatever your position on PURPA—and I recognize views vary widely—''what should concern all of us is that resolving these sorts of questions by regulatory edict rather than congressional legislation is neither a durable nor desirable approach for developing energy policy.'' [12]

5. Order No. 872 and today's order on rehearing retreat from much of the original rationale used to support the NOPR, but the effect is the same: The Commission is administratively gutting PURPA. Make no mistake, although the Commission has dropped much of the NOPR preamble's opening screed against PURPA's continuing relevance, Order No. 872 is a full-throated endorsement of the conclusion that PURPA has outlived its usefulness. And while walking back the argument that PURPA is antiquated may reduce the risk that Order No. 872 is overturned on appeal, that does not change the fact that the rule usurps what should be Congress's proper role.

6. Throughout this proceeding, the Commission has been quick to point to Congress's directive to from time to time amend our regulations implementing PURPA.[13] Order No. 872, however, is a wholesale overhaul of the Commission's PURPA regulations that reflects a deep skepticism of the need for the law we are charged with implementing. I continue to doubt that is what Congress had in mind when it gave us responsibility for periodically updating our implementing regulations.

• The Commission's Proposed Reforms Are Inconsistent With Our Statutory Mandate

7. PURPA directs the Commission to adopt such regulations as are ''necessary to encourage'' QFs,[14] including by establishing rates for sales by QFs that are just and reasonable and by ensuring that such rates ''shall not discriminate'' against QFs.[15] The changes adopted by the Commission in Order No. 872 fail to meet that standard. In addition, many of the reforms are unsupported—and, in many cases, contradicted—by the evidence in the record.[16] Accordingly, I believe Order No. 872 is not just poor public policy, but also arbitrary and capricious agency action.

A. Avoided Cost

8. The Final Rule adopted two fundamental changes to how QF rates are determined. First, and most importantly, it eliminated the requirement that a utility must afford a QF the option to enter a contract at a rate for energy that is either fixed for the duration of the contract or determined at the outset—*e.g.,* based on a forward curve reflecting estimated prices over the term of the contract.[17] Second, it presumptively allows states to set the rate for as-available energy at the relevant locational marginal price (LMP).[18] The record in this proceeding does not support either of those changes.

i. Elimination of Fixed Energy Rate

9. Prior to Order No. 872, a QF generally had two options for selling its output to a utility. Under the first option, the QF could sell its energy on an as-available basis and

[1] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Order No. 872–A, 173 FERC ¶ 61,158 (2020).

[2] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Order No. 872, 172 FERC ¶ 61,041 (2020).

[3] Public Law 95–617, 92 Stat. 3117 (1978).

[4] *See* 16 U.S.C. 824a–3(a)–(b) (2018).

[5] Those concerns notwithstanding, I supported certain aspects of Order No. 872, including the revisions to the ''one-mile'' rule, requiring that QFs demonstrate commercial viability before securing a legally enforceable obligation, and allowing stakeholders to protest a QF's self-certification. *See* Order No. 872, 172 FERC ¶ 61,041 (Glick, Comm'r, dissenting in part at n.4).

[6] Public Law 109–58, 1253, 119 Stat. 594 (2005).

[7] Sept. 2019 Commission Meeting Tr. at 8.

[8] *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978,* Notice of Proposed Rulemaking, 168 FERC ¶ 61,184 (2019) (NOPR) (Glick, Comm'r, dissenting in part at P 3).

[9] *Supra* note 6.

[10] *See* Solar Energy Industries Association (SEIA) Comments at 11.

[11] NOPR, 168 FERC ¶ 61,184 (Glick, Comm'r, dissenting in part at P 4).

[12] *Id.*

[13] Order No. 872–A, 173 FERC ¶ 61,158 at P 115; Order No. 872, 172 FERC ¶ 61,041 at PP 24, 48, 54, 67, 296, 628; NOPR, 168 FERC ¶ 61,184 at PP 4, 16, 29, 155.

[14] A QF is a cogeneration facility or a small power production facility. *See* 18 CFR 292.101(b)(1) (2019).

[15] 16 U.S.C. 824a–3(a)–(b).

[16] *Genuine Parts Co.* v. *EPA,* 890 F.3d 304, 312 (D.C. Cir. 2018) (''[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation.'') (citations omitted); *id.* (''Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.'' (quoting *Int'l Union, United Mine Workers* v. *Mine Safety & Health Admin.,* 626 F.3d 84, 94 (D.C. Cir. 2010)).

[17] Order No. 872, 172 FERC ¶ 61,041 at P 253.

[18] *Id.* P 151.

receive an avoided cost rate calculated at the time of delivery. This is generally known as the as-available option. Under the second option, a QF could enter into a fixed-duration contract at an avoided cost rate that was fixed either at the time the QF established a legally enforceable obligation (LEO) or at the time of delivery. This is generally known as the contract option. The ability to choose between the two options played an important role in fostering the development of a variety of QFs. For example, the as-available option provided a way for QFs whose principal business was not generating electricity, such as industrial cogeneration facilities, to monetize their excess electricity generation. The contract option, by contrast, provided QFs who were principally in the business of generating electricity, such as small renewable electricity generators, a stable option that would allow them to secure financing. Together, the presence of these two options allowed the Commission to satisfy its statutory mandate to encourage the development of QFs and ensured that the rates they received were non-discriminatory.

10. Order No. 872 eliminated the requirement that states provide a contract option that includes a fixed energy rate.[19] Prior to this proceeding, the Commission recognized time and again that fixed-price contracts play an essential role in financing QF facilities, making them a necessary element of any effort to encourage QF development, at least in certain regions of the country.[20] In addition, fixed-price contracts have helped prevent discrimination against QFs by ensuring that they are not structurally disadvantaged relative to vertically integrated utilities that are guaranteed to recover the costs of their prudently incurred investments through retail rates.[21]

11. The record before us confirms the continuing importance of the fixed-price contract option for QFs. Numerous entities with experience in financing and developing QFs explain that a fixed revenue stream of some sort is necessary to obtain the financing needed to develop a new QF.[22] In both Order No. 872 and today's order on rehearing, the Commission responds to that evidence with a reference to the general track record of independent power producers, and renewables developers in particular, that develop new resources without a regulatory guarantee of a fixed revenue stream.[23] But the overwhelming majority of the Commission's statistics reflect development in RTO/ISO markets, where developers generally can rely on financing arrangements, such as commodity hedges, to lock-in the revenue needed to secure financing.[24]

12. Those products are far less ubiquitous—if they are available at all—outside of RTO/ISO markets.[25] Accordingly, the success of relatively large independent power producers in the organized markets does not constitute substantial evidence suggesting that QFs will be able to finance new development outside RTO/ISO markets where PURPA plays a larger role.[26] Indeed, the Commission's deliberate blurring of the lines between RTO/ISO markets and the rest of the country is the equivalent of arguing that Tommie and Hank Aaron ought to both be hall-of-famers because, together, they hit 768 home runs, while ignoring the fact that Hank was responsible for 755 of the brothers' 768 home runs.[27]

13. The Commission next responds that PURPA does not require that QFs be financeable.[28] That is true in a literal sense; nothing in PURPA directs the Commission to ensure that at least some QFs be financeable. But it does require the Commission to encourage their development, which we have previously equated with financeability.[29] If the Commission is going to abandon that standard, it must then explain why what is left of its regulations provides the requisite encouragement—an explanation that is lacking from this order, notwithstanding the Commission's repeated assertions to the contrary.[30]

14. In addition, much of the Commission's justification for eliminating the fixed-price contract option for energy rests on the availability of a fixed-price contract option for capacity.[31] Commission precedent, however, permits utilities to offer a capacity rate of zero to QFs when the utility does not

[19] *Id.* P 253.

[20] *See, e.g., Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978,* Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,880, *order on reh'g sub nom.* Order No. 69–A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part vacated in part, Am. Elec. Power Serv. Corp.* v. *FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst.* v. *Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983) (justifying the rule on the basis of ''the need for certainty with regard to return on investment in new technologies''); NOPR, 168 FERC ¶ 61,184 at P 63 (''The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.''); *Windham Solar LLC,* 157 FERC ¶ 61,134, at P 8 (2016).

[21] *See, e.g.,* ELCON Comments at 21–22 (''More variable avoided cost rates will result in unintended consequences that result in less competitive conditions and may leave consumers worse off, as utility self-builds do not face the same market risk exposure. Pushing more market risk to QFs while utility assets remain insulated from markets creates an investment risk asymmetry. This puts QFs at a competitive disadvantage.''); South Carolina Solar Business Association Comments at 8 (''[A]s-available rates for QFs in vertically-integrated states therefore discriminate against QFs by requiring QFs to enter into contracts at substantially and unjustifiably different terms than incumbent utilities.''); Southern Environmental Law Center Supplement Comments, Docket No. AD16–16–000, at 6–8 (Oct. 17, 2018) (explaining that vertically integrated utilities in Indiana, Alabama, Virginia and Tennessee only offer short-term rates to QFs); sPower Comments at 13; *see also* Statement of Travis Kavulla, Docket No. AD16–16–000, at 2 (June 29, 2016).

[22] *See, e.g.,* Public Interest Organizations Rehearing Request at 73–76; SEIA Comments at 29; North Carolina Attorney General's Office Comments at 5; ConEd Development Comments at 3; South Carolina Solar Business Association Comments at 6; sPower Comments at 11; Resources for the Future Comments at 6–7; Southeast Public Interest Organizations Comments at 9.

[23] Order No. 872–A, 173 FERC ¶ 61,158 at PP 150–151 (citing Order No. 872, 172 FERC ¶ 61,041 at P 340).

[24] *See, e.g.,* EEI Comments at 36; sPower Comments at 12; Public Interest Organization Comments at n. 87 (fixed price contracts for non-QF generation); SEIA Rehearing Request at 14–15.

[25] *See, e.g.,* SEIA Comments at 29–30 (''As both Mr. Shem and Mr. McConnell explain, financial hedge products are not available outside of ISO/RTO markets.''); Resources for the Future Comments at 6–7 (''[W]hile hedge products do support wind and solar project financing, they would not be suited for most QF projects. To hedge energy prices, wind projects have used three products: Bank hedges, synthetic power purchase agreements (synthetic PPAs), and proxy revenue swaps. . . . From US project data for 2017 and 2018, the smallest wind project securing such a hedge was 78 MW, and most projects were well over 100 MW. Additionally, as hedges rely on wholesale market access and liquid electricity trading, all of the projects were in ISO regions.''); SEIA Rehearing Request at 18.

[26] *See, e.g.,* Public Interest Organizations Rehearing Request at 74–78; Northwest Coalition Rehearing Request at 28.

[27] Compare *https://en.wikipedia.org/wiki/Hank_Aaron* with *https://en.wikipedia.org/wiki/Tommie_Aaron.* The Commission also points to the rate structure discussed in *Town of Norwood* v. *FERC,* 962 F.2d 20, 21, 24 (D.C. Cir. 1992), ''variable energy rate/fixed capacity rate construct is the standard rate structure used throughout the electric industry.'' Order No. 872, 172 FERC ¶ 61,041 at P 38; *see also* Order No. 872–A, 173 FERC ¶ 61,158 at P 143. I do not believe that the discussion of a single contract in a single case, decided roughly thirty years ago, is substantial evidence regarding the typical financing and contractual requirements of a QF in the contemporary electricity sector.

[28] *See, e.g.,* Order No. 872–A, 173 FERC ¶ 61,158 at PP 145–146, 172.

[29] *See, e.g.,* Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 (finding that ''legally enforceable obligations are intended to reconcile the requirement that the rates for purchases equal to the utilities avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs'' and ''the need for certainty with regard to return on investment in new technologies''); NOPR, 168 FERC ¶ 61,184 at P 63 (''The Commission's justification for allowing QFs to fix their rate at the time of the LEO for the entire term of a contract was that fixing the rate provides certainty necessary for the QF to obtain financing.''). The Commission responds that ''[i]t is not necessary to prove that all potential QFs would be able to raise useful financing.'' Order No. 872–A, 173 FERC ¶ 61,158 at P 175. Talk about moving the goal posts. No one has argued that this is the Commission's burden. Rather, the argument is that the Commission's reforms may render it impossible, or nearly so, for QFs outside the organized markets to obtain the necessary financing. Order No. 872, 172 FERC ¶ 61,041 (Comm'r, Glick, dissenting in part at PP 11–12); Public Interest Organizations at 79–84. The Commission cannot skirt that point by knocking down a strawman, especially given the weight it is has historically given to the importance of financeability for QFs.

[30] *See, e.g.,* Order No. 872–A, 173 FERC ¶ 61,158 at P 43.

[31] *See id.* P 174; Order No. 872, 172 FERC ¶ 61,041 at P 36 (''This assertion that the Commission has eliminated fixed rates for QFs is not correct. . . . The NOPR thus made clear: under the proposed revisions to 292.304(d), a QF would continue to be entitled to a contract with avoided *capacity* costs calculated and fixed at the time the LEO is incurred.'') (internal quotation marks omitted); *id.* P 237 (''The Commission stated that these fixed capacity and variable energy payments have been sufficient to permit the financing of significant amounts of new capacity in the RTOs and ISOs.'').

need incremental capacity.[32] That means that, after Order No. 872, QF developers now face the very real prospect of not receiving any fixed revenue stream, whether for energy or capacity, on top the fact at they also may not be able to secure hedging products or other mechanisms needed to finance a new QF.[33] It is hard for me to understand how the Commission can, with a straight face, claim to be encouraging QF development while at the same time eliminating the conditions necessary to develop QFs in the regions where they are being built.[34]

15. The Commission also does not sufficiently explain how eliminating the fixed-price contract requirement is consistent with PURPA's requirement that rates ''shall not discriminate against'' QFs.[35] Vertically integrated utilities effectively receive guaranteed fixed-price contracts through their rights to recover prudently incurred investments.[36] QFs' equivalent right to receive fixed-price contracts for energy has to date proved an integral element of the Commission's ability to prevent discrimination against QFs.[37] Neither Order No. 872 nor today's order on rehearing adequately explain how eliminating the fixed-price option is consistent with that prohibition or, moreover, how permitting QFs to receive variable rates for energy while any vertically integrated utility to which they sell electricity receives fixed rates is consistent with the Commission's obligation to encourage QF development.[38]

16. On rehearing, the Commission argues that both Congress and the Supreme Court ''recognize that PURPA treats QFs differently from purchasing utilities, rendering QFs not similarly situated to non-QF resources.'' [39] As an initial matter, the question of whether entities are similarly situated is one that is relevant to evaluating whether any discrimination is undue.[40] PURPA, however, prohibits *any* discrimination against QFs, not just undue discrimination.[41] In any case, the congressional language cited by the Commission,[42] which the Court reiterated, stands only for the proposition that Congress did not intend to apply traditional utility ratemaking concepts, such as guaranteed cost recovery, to QFs. But while Congress clearly envisioned different cost-recovery regimes for incumbent utilities and QFs, PURPA's prohibition on discrimination against QFs indicates that the ratemaking regime applicable to QFs can be no less favorable than that applied to incumbent purchasing utilities. Permitting QFs to receive only variable-rate contracts while incumbent utilities simultaneously receive what are functionally decades-long fixed price contracts through their retail rates plainly falls short of the standard.

17. Finally, the Commission fails to explain why certain allegations of QF rates exceeding a utility's actual avoided cost require us to abandon fixed-price contracts.[43] The Commission has long recognized that QF rates may exceed actual avoided costs, but, at the same time, that avoided cost rates might also turn out to be lower than the electric utility's avoided costs over the course of the contract. The Commission has reasoned that, ''in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out.'' [44] Today's order on rehearing takes the position that variable-price contracts are necessary to ensure that QF rates do not exceed utility avoided costs.[45] The Commission, however, both fails to adequately explain that new interpretation of PURPA [46] and justify the avulsive change of course that it represents.[47]

ii. Setting Avoided Cost at LMP

18. I also do not support the Commission's decision to treat LMP as a presumptively reasonable measure of a utility's as-available avoided cost for energy.[48] The short-term marginal cost of production represented by LMP can be a useful and transparent input and ought to be *considered* in calculating an appropriate avoided-cost for as-available energy. But considering LMP in setting avoided cost is not the same thing as presuming that LMP is a sufficient measure to establish the avoided cost rate for energy. And, as the Public Interest Organizations explain, the record is replete with evidence indicating that vertically integrated utilities' costs are often well above LMP.[49] Where there is good reason to believe that LMP may not actually reflect the avoided cost of the purchasing utility, it makes no sense to put the burden on QFs to prove the point.

19. On rehearing, the Commission responds that its rebuttable presumption has not changed the burden of proof, only the burden of production.[50] That's an argument that only a lawyer's mother could love. It discounts the very real concerns about whether LMP is an accurate reflection of a purchasing utility's avoided energy costs. In any case, as the precedent cited by the Commission makes clear, an administrative agency cannot defend an irrational presumption simply by labeling it a shift in the burden of production.[51] Because the presumption does not makes sense in its own right, the Commission cannot rehabilitate that presumption by labeling it merely a shift in the burden of production rather than persuasion.[52]

20. Finally, the presumption that LMP is an adequate measure of a utility's full avoided energy cost is even more problematic when combined with the decision to eliminate the fixed-price contract option. Because the Commission has removed the

[32] *See, e.g.,* Order No. 872, 172 FERC ¶ 61,041 at P 422 (citing to *City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, at 62,061 (2001)).

[33] *See, e.g.,* Electric Power Supply Association (EPSA) Rehearing Request at 13–14; Resources for the Future Comments at 6; SEIA Comments at 30; Southeast Public Interest Organizations Comments at 12.

[34] *See* Public Interest Organizations Comments at 10–11 (''Obviously, rules that have an effect of *discouraging* QFs cannot be 'necessary to' encouraging them.''); *see also* Massachusetts Attorney General Maura Healey Comments at 6 (''This action may reduce investor confidence and discourage future development. That outcome is a negative one for the Commonwealth and its ratepayers.'').

[35] 16 U.S. Code 824a–3(b)(2). Unlike provisions of the Federal Power Act, PURPA prohibits any discrimination against QFs, not just undue discrimination. *See* Order No. 872, 172 FERC ¶ 61,041 at P 82; *see also* EPSA Rehearing Request at 6; ELCON Comments at 21–22; South Carolina Solar Business Alliance Comments at 7–8; sPower Comments at 13.

[36] Order No. 872, 172 FERC ¶ 61,041 at P 40.

[37] *See supra* note 20; Commissioner Slaughter Comments at 4.

[38] EPSA Rehearing Request at 8–9; Public Interest Organizations Comments at 51 (''[L]imiting QFs to contracts providing no price certainty for energy values, while non-QF generation regularly obtains fixed price contracts and utility-owned generation receives guaranteed cost recovery from captive ratepayers, constitutes discrimination.'').

[39] Order No. 872–A, 173 FERC ¶ 61,158 at P 142.

[40] *See* Public Interest Organizations Rehearing Request at 94–95; Northwest Coalition Rehearing Request at 11–12.

[41] *See supra* note 35.

[42] Order No. 872–A, 173 FERC ¶ 61,158 at P 142 n.275.

[43] *Id.* PP 76–78.

[44] Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880.

[45] Order No. 872–A, 173 FERC ¶ 61,158 at PP 84, 175.

[46] EPSA Rehearing Request at 15–16 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880).

[47] Order No. 872 was quick to point to ''the precipitous decline in natural gas prices'' starting in 2008 that may have caused QF contracts fixed prior to that period to underestimate the actual cost of energy. *See, e.g.,* Order No. 872, 172 FERC ¶ 61,041 at P 287. However, PURPA has been in place for forty years, and the Commission does not wrestle with the magnitude of potential savings conveyed to consumers from the fixed-price energy contracts that locked-in low rates for consumers during the decades prior when natural gas prices were several times higher. *See* Energy Information Administration Total Energy, tbl. 9.10, *https://www.eia.gov/totalenergy/data/browser/* (last viewed November 18, 2020).

[48] Order No. 872, 172 FERC ¶ 61,041 at PP 151, 189, 211.

[49] *See, e.g.,* Public Interest Organizations Rehearing Request at 69–71. These points have also been raised throughout this proceeding. Public Interest Organizations Comments at 47–49 (explaining that numerous power plants incur marginal production costs that exceed the LMP); *id* at 50–51 (discussing analysis from Bloomberg New Energy Finance that compares marginal production costs with LMP and finds that many vertically integrated utilities regularly incur production costs that exceed LMP); *id.* at 51–52 (showing that a Springfield Illinois coal-fired power plant's marginal dispatch costs exceeds LMP); *id.* at 52–53 (explaining that many utilities' per-net-kWh costs exceed LMP); *id.* at 53–54 (contending that the cost associated with long-term fixed-price contracts for nuclear plants exceed LMP even net of capacity value).

[50] Order No. 872–A, 173 FERC ¶ 61,158 at PP 63–64 (citing *Cablevision Sys. Corp.* v. *FCC,* 649 F.3d 695, 716 (D.C. Cir. 2011)).

[51] *Cablevision,* 649 F.3d at 716 (''[A]n evidentiary presumption is only permissible if there is a sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact.' '' (quoting *Nat'l Mining Ass'n* v. *Dep't of Interior,* 177 F.3d 1, 6 (D.C. Cir. 1999))).

[52] It is also unclear from this record whether that presumption is best characterized as a shift in the burden of production rather than the burden of persuasion. To the extent that a QF or other entity must show that LMP is not an adequate measure of avoided cost in order to rebut the presumption, then the Commission has, for all intents and purposes, shifted the burden of *persuasion* to those entities no matter how the Commission describes its presumption.

requirement that utilities offer a fixed-price contract option for energy, it is entirely possible that a QF will be eligible to receive only LMP both on a short-term basis and a long-term basis as a result of the variable cost structure now permitted under the long-term contract.[53] Given this reality, QFs may be reduced to relying solely on some highly variable measure of the spot market price for energy, all while the utilities whose costs the QF is avoiding potentially recover an effectively guaranteed rate well above that spot market price, particularly in RTO/ISO markets that remain vertically integrated.[54] I am not persuaded that this approach will satisfy our obligation to encourage QFs and do so using rates that are non-discriminatory across all regions of the country.

B. Rebuttable Presumption 20 MW to 5 MW

21. Following the Energy Policy Act of 2005, the Commission established a rebuttable presumption that QFs with a capacity greater than 20 MW operating in RTOs and ISOs have non-discriminatory access to competitive markets, eliminating utilities' must-purchase obligation from those resources.[55] Order No. 872 reduced the threshold for that presumption from 20 MW to 5 MW.[56] That was an improvement over the NOPR, which—without any support whatsoever—proposed to lower that threshold to 1 MW.[57] But, even so, the reduced 5–MW threshold is unsupported by the record and inadequately justified on rehearing.

22. When it originally established the 20–MW threshold, the Commission pointed to an array of barriers that prevented resources below that level from having truly non-discriminatory access to RTO/ISO markets. Those barriers included complications associated with accessing the transmission system through the distribution system (a common occurrence for such small resources), challenges with reaching distant off-takers, as well as ''jurisdictional differences, pancaked delivery rates, and additional administrative procedures'' that complicate those resources' ability to participate in those markets on a level playing field.[58] In just the last few years, the Commission has recognized the persistence of those barriers ''that gave rise to the rebuttable presumption that smaller QFs lack nondiscriminatory access to markets.'' [59]

23. Nevertheless, Order No. 872 abandoned the 20 MW threshold based on the conclusory assertion that ''it is reasonable to presume that access to RTO/ISO markets has improved,'' making it ''appropriate to update the presumption.'' [60] No doubt markets have improved. But a borderline-truism about maturing markets does not explain how the barriers arrayed against small resources have dissipated, why it is reasonable to ''presume'' that the remaining barriers do not still significantly inhibit non-discriminatory access, or why 5 MW is an appropriate new threshold for that presumption.[61]

24. Instead of any such evidence, Order No. 872 noted that the Commission uses the 5–MW level as a demarcating line for other rules applying to small resources. It points in particular to the fact that resources below 5 MW can use a ''fast-track'' interconnection process, whereas larger ones must use the large generator interconnection procedures.[62] But the fact that the Commission used 5 MW as the cut off in another context hardly shows that it is the right cut off to use in this context. Specifically, the 5 MW cut off in the Commission's interconnection rule is based on the impacts that projects below 5 MW are likely to have on system safety and reliability, not on whether they have non-discriminatory market access.[63] In addition, the Commission points to the fact that '''all of the RTOs/ISOs have at least one participation model that allows resources as small as 100 kW to participate in their markets.' '' [64] Be that as it may, that fact that all RTOs do not prohibit certain small resources from accessing their markets does not support the proposition that QFs below 5 MW now have non-discriminatory access to those markets.

25. Lacking substantial evidence to support the 5 MW threshold, Order No. 872 made a great deal out the deferential standard of review applied to the Commission's rulemakings.[65] But while judicial review of agency policymaking is deferential, it is not toothless. The cases on which the Commission relied still require that, when an agency's policy reversal ''rests upon factual findings that contradict those which underlay its prior policy,'' the agency must ''provide a more detailed justification than what would suffice for a new policy created on a blank slate.'' [66] That is because reasoned decisionmaking requires that, when an agency changes course, it must provide ''a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy.'' [67] For the foregoing reasons, the Commission has failed to produce any such explanation, making its change of course arbitrary and capricious.

• **Environmental Review Under the National Environmental Policy Act**

26. Today's order also doubles down on the Commission's refusal to conduct any environmental review whatsoever of the likely consequences of Order No. 872's reforms. Whatever one may think of the questionable merits of those reforms, no one can seriously argue that they are anything short of a significant and sweeping overhaul of the Commission's forty-year-old framework for implementing PURPA. And yet, at the same time that the Commission has championed the scope of its sweeping reforms, it simultaneously insists that no environmental review is necessary both because it cannot venture any guess as to the effects of those reforms and because they somehow fit into a categorical exception from NEPA review. Neither justification holds water.

27. As an initial matter, the Commission's assertion that Order No. 872's effects are overly speculative is tough to square with the fact that it has not undertaken any effort whatsoever to assess those effects. For example, instead of performing any modeling exercises, as the Commission did in the environmental assessment it issued along with its PURPA regulations in 1980,[68] the Commission peremptorily rejects the possibility that it could glean anything useful from such an exercise. I have a hard time believing that our modeling capabilities have not improved dramatically over the course of the last four decades or that we cannot use those capabilities to perform an analysis that is quite a bit more detailed and reliable than that which was previously good enough for the Commission. In any case, NEPA does not require complete certainty or exacting precision. Instead, it recognizes that administrative agencies will often have to rely '' 'reasonable forecasting' '' aided by '' 'educated assumptions.' '' [69] Nothing in

[53] Public Interest Organizations Rehearing Request at P 61.

[54] EPSA Rehearing Request at 13–14; Public Interest Organizations Rehearing Request at 98–99.

[55] *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, 117 FERC ¶ 61,078, at P 72 (2006), *order on reh'g,* Order No. 688–A, 119 FERC ¶ 61,305 (2007), *aff'd sub nom. Am. Forest & Paper Ass'n* v. *FERC,* 550 F.3d 1179 (D.C. Cir. 2008); *see* 16 U.S.C. 824a–3(m).

[56] Order No. 872, 172 FERC ¶ 61,041 at P 625.

[57] NOPR, 168 FERC ¶ 61,184 at P 126.

[58] Order No. 688–A, 119 FERC ¶ 61,305 at PP 96, 103.

[59] *E.g., N. States Power Co.,* 151 FERC ¶ 61,110, at P 34 (2015).

[60] Order No. 872, 172 FERC ¶ 61,041 at P 629 (''Over the last 15 years, the RTO/ISO markets have matured, market participants have gained a better understanding of the mechanics of such markets and, as a result, we find that it is reasonable to presume that access to the RTO/ISO markets has improved and that it is appropriate to update the presumption for smaller production facilities.''); *see* Order No. 872–A, 173 FERC ¶ 61,158 at P 361.

[61] *See* Public Interest Organizations Rehearing Request at 135.

[62] Order No. 872, 172 FERC ¶ 61,041 at P 630; Order No. 872–A, 173 FERC ¶ 61,158 at P 361.

[63] Order No. 792, 145 FERC ¶ 61,159, at P 103 (2013) (''The Commission finds that the modifications . . . are just and reasonable and strike a balance between allowing larger projects to use the Fast Track Process while ensuring safety and reliability.''); *see also* SEIA Rehearing Request at 39–40.

[64] Order No. 872–A, 173 FERC ¶ 61,158 at P 362 (citing *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators,* Order No. 841, 162 FERC ¶ 61,127 (2018), at P 272).

[65] Order No. 872, 172 FERC ¶ 61,041 at P 637 (citing *FCC* v. *Fox Television,* 556 U.S. 502, 515 (2009), for the proposition that an agency ''need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.''); *see* Order No. 872–A, 173 FERC ¶ 61,158 at P 347.

[66] *Fox Television,* 556 U.S. at 515; Advanced Energy Economy Comments at 6.

[67] *Fox Television,* 556 U.S. at 516; Advanced Energy Economy Comments at 6–7.

[68] *Small Power Production and Cogeneration Facilities—Environmental Findings; No Significant Impact and Notice of Intent To Prepare Environmental Impact Statement,* 45 FR 23,661 (Apr. 8, 1980).

[69] *Sierra Club* v. *FERC,* 867 F.3d 1357, 1374 (D.C. Cir. 2018) (quoting *Del. Riverkeeper Network* v. *FERC,* 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

Order No. 872 or today's order on rehearing adequately explains why those techniques could not have formed the basis for a useful environmental review of the likely consequences of this proceeding.

28. In addition, in a head-spinning contrast to the Commission's crowing over the significance of its PURPA overhaul, the Commission describes the changes adopted as merely corrective and clarifying in nature for the purposes of avoiding its environmental review.[70] In particular, the Commission contends that ''the changes adopted in this final rule are required to ensure continued future compliance of the PURPA Regulations with PURPA, based on the changed circumstances found by the Commission in this final rule.''[71] In other words, because the Commission believes that the changes adopted are necessary to conform with the statute, they are mere corrective changes, which, in turn, qualifies them for the categorical exemption from any environmental review under NEPA, or so the argument goes.

29. But by that logic, any Commission action needed to comply with our various statutory mandates—whether ''just and reasonable'' or the ''public interest''—would be deemed corrective in nature and, therefore, excluded from environmental review. That would seem to exempt any future Commission action under PUPRA or Title II of the FPA from NEPA, at least absent a major congressional revision of those statutes. The Commission, however, fails to point to any evidence suggesting that is what the Council on Environmental Quality contemplated when it allowed for categorical exemptions. Accordingly, I do not believe that the Commission has demonstrated that the significant changes made in Order No. 872 qualify for any of the existing categorical exclusions, meaning that this significant revision of our PURPA regulations requires an environmental review under NEPA.

• The Way To Revise PURPA Is To Create More Competition, Not Less

30. It didn't have to be this way. When Congress reformed PURPA in the 2005 Energy Policy Act amendments, it indicated an unmistakable preference for using market competition as the off-ramp for utilities seeking relief from their PURPA obligations.[72] Those reforms directed the Commission to excuse utilities from those obligations where QFs had non-discriminatory access to RTO/ISO markets or other sufficiently competitive constructs.[73]

31. This record contains numerous comments explaining how the Commission could use those amendments as a way to ''modernize'' PURPA in a manner that both promotes *actual* competition and reflects Congress's unambiguous intent.[74] For example, in a white paper released prior to the NOPR, the National Association of Regulatory Utility Commissioners (NARUC) urged the Commission to give meaning to the 2005 amendments by establishing criteria by which a vertically integrated utility outside of an RTO or ISO could apply to terminate the must-purchase obligation if it conducts sufficiently competitive solicitations for energy and capacity.[75] Other groups, including representatives of QF interests, submitted additional comments on how an approach along those lines might work.[76] Several parties commented on those proposals.[77]

32. It is a shame that the Commission has elected to administratively gut its long-standing PURPA implementation regime, rather than pursuing reform rooted in PURPA section 210(m), such as the NARUC proposal. Although the Commission can still consider proposals along the lines of the NARUC approach,[78] making that approach the center of our reforms could have produced a durable, consensus solution to the issues before us. I continue to believe that the way to modernize PURPA is to promote real competition, not to simply dismantle the provisions that the Commission has relied on for decades out of frustration that Congress has repeatedly failed to repeal the statute itself.

For these reasons, I respectfully dissent in part.

Richard Glick,
Commissioner.

[FR Doc. 2020–26106 Filed 12–29–20; 8:45 am]

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[70] Order No. 872–A, 173 FERC ¶ 61,158 at P 449.

[71] Order No. 872, 172 FERC ¶ 61,041 at P 722; Order No. 872–A, 173 FERC ¶ 61,158 at P 438.

[72] 16 U.S.C. 824a–3(m).

[73] *See* Order No. 688, 117 FERC ¶ 61,078 at P 8.

[74] *See* Advanced Energy Economy Comments at 13; Industrial Energy Consumers Comments at 13–14; EPSA Comments at 16.

[75] National Association of Regulatory Utility Commissioners Supplemental Comments, Docket No. AD16–16–00, Attach. A, at 8 (Oct. 17, 2018); *id.* (proposing the Commission's *Edgar-Allegheny* criteria as a basis for evaluating whether a proposal was adequately competitive).

[76] *See, e.g.,* SEIA Supplemental Comments, Docket No. AD16–16–000 (Aug. 28, 2019).

[77] *See, e.g.,* Advanced Energy Economy Comments at 12; APPA Comments at 29; Colorado Independent Energy Comments at 7; ELCON Comments at 19; Public Interest Organizations Comments at 90; SEIA Comments at 24; Xcel Comments at 11.

[78] Order No. 872, 172 FERC ¶ 61,041 at P 662.

FEDERAL REGISTER

Vol. 85 Wednesday,

No. 250 December 30, 2020

Part III

Department of Labor

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

29 CFR Parts 516, 531, 578, et al.

Tip Regulations Under the Fair Labor Standards Act (FLSA); Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 10

Wage and Hour Division

29 CFR Parts 516, 531, 578, 579, and 580

RIN 1235–AA21

Tip Regulations Under the Fair Labor Standards Act (FLSA)

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In the Consolidated Appropriations Act of 2018 (CAA), Congress amended section 3(m) of the Fair Labor Standards Act (FLSA) to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). In this final rule, the Department of Labor (Department) amends its tip regulations to address these amendments. The final rule also codifies the Department's guidance regarding the tip credit's application to employees who perform tipped and non-tipped duties.

DATES: This final rule is effective March 1, 2021.

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov/agencies/whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The FLSA generally requires covered employers to pay their employees at least the Federal minimum wage, which is currently $7.25 per hour. *See* 29 U.S.C. 206(a)(1). As amended, section 3(m) of the FLSA allows an employer that satisfies certain requirements to count a limited amount of the tips received by its ''tipped employees'' as a credit toward its Federal minimum wage obligation (known as a ''tip credit''). *See* 29 U.S.C. 203(m)(2)(A). An employer may take a tip credit only for ''tipped employees'' and only if, among other things, its tipped employees retain all their tips. *Id.* This requirement does not, however, preclude an employer that takes a tip credit from implementing a tip pool in which tips are shared only among those employees who ''customarily and regularly receive tips.'' *Id.*

In 2011, the Department revised its tip regulations to reflect its view at the time that, regardless of whether their employer takes a tip credit, the FLSA required that tipped employees retain all tips they received, except tips distributed through a tip pool limited to employees who customarily and regularly receive tips. (76 FR 18855) *See, e.g.,* 29 CFR 531.52. On December 5, 2017, the Department published a notice of proposed rulemaking (NPRM), 82 FR 57395, which proposed to rescind the parts of its tip regulations that applied to employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit.

On March 23, 2018, Congress amended section 3(m) of the FLSA in the CAA, Public Law 115–141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148–49 (2018). Among other things, the CAA revised section 3(m) by renumbering the existing tip credit language as section 3(m)(2)(A) and adding a new section 3(m)(2)(B). That new section prohibits employers from keeping their employees' tips ''for any purposes, including allowing managers or supervisors to keep any portion of employees' tips'' even if they do not claim a tip credit. In addition, the CAA amended sections 16(b) and 16(c) of the FLSA to permit private parties and the Department to recover any tips unlawfully kept by an employer in violation of section 3(m)(2)(B), in addition to an equal amount of liquidated damages. Finally, the CAA amended section 16(e) of the FLSA to give the Department discretion to impose civil money penalties (CMPs) up to $1,100 when employers unlawfully keep employees' tips. On October 8, 2019, the Department issued a new NPRM proposing, among other things, to update its tip regulations to incorporate the CAA amendments (84 FR 53956).

Congress specified in the CAA that the portions of the 2011 final rule that ''are not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].'' CAA, Div. S, Tit. XII, sec. 1201(c). As the Department explained in a Field Assistance Bulletin (FAB) published shortly thereafter, that statement applies to those portions of the Department's regulations—§§ 531.52, 531.54, and 531.59—that restricted tip pooling by employers that pay tipped employees at least the full minimum wage as a direct cash wage and, therefore, do not claim a tip credit. *See* FAB No. 2018–3 (Apr. 6, 2018).[1] In light of the CAA's amendments to the FLSA, the Department's 2019 NPRM withdrew the 2017 NPRM, which addressed the same topic as those amendments. 84 FR 53956.

This final rule revises the Department's current tip pooling regulations in light of the 2018 CAA amendments. The CAA did not change the statutory requirements, now in section 3(m)(2)(A) of the FLSA, that apply to employers that take a tip credit. Those employers may continue to institute a mandatory ''traditional'' tip pool, that is, a tip pool limited to employees who ''customarily and regularly'' receive tips. In addition, the CAA removed the regulatory restrictions on an employer's ability to require tip pooling when it does not take a tip credit; those employers may now implement mandatory, ''nontraditional'' tip pools, which include employees who do not customarily and regularly receive tips, such as cooks and dishwashers.

The CAA also imposed a new prohibition, in section 3(m)(2)(B), that applies to all employers regardless of whether they take a tip credit: Employers may not keep employees' tips and may not allow managers or supervisors to do so. Among other things, section 3(m)(2)(B) prohibits employers, managers, and supervisors from receiving employees' tips as part of any tip pooling arrangement. It also prohibits employers from operating tip pools in any manner such that they ''keep'' tips.

This final rule updates the Department's tip regulations to incorporate the CAA's amendments to the FLSA. As explained above, the CAA renumbered the FLSA's existing tip

[1] *https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab2018_3.pdf.*

credit language as section 3(m)(2)(A), but made no substantive changes to that language. As a result, this rule does not alter the Department's existing regulations and guidance regarding section 3(m)(2)(A) for employers that claim a tip credit. Those regulations are addressed only as necessary to clarify how they relate to the CAA's amendments to the FLSA. In this rule, the Department makes the following three substantive changes to regulations concerning tips. First, the rule incorporates the new statutory language, section 3(m)(2)(B)—which applies whether or not the employer takes a tip credit—into the Department's regulations and incorporates a new recordkeeping requirement to help it administer the new statutory language. Second, this rule, consistent with the CAA's amendments, removes the portions of the Department's regulations that prohibited certain employers—those that pay their tipped employees a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations—from including employees who do not customarily and regularly receive tips, such as cooks and dishwashers, in mandatory tip pooling arrangements. Third, this rule amends the Department's regulations to reflect recent guidance explaining that an employer may take a tip credit for time that an employee in a tipped occupation spends performing related, non-tipped duties contemporaneously with tipped duties, or for a reasonable time immediately before or after performing the tipped duties. These amended regulations also address which non-tipped duties are related to a tip-producing occupation.

Additionally, the Department incorporates the CAA's new language regarding CMPs into its regulations. The Department also takes this opportunity to revise portions of its CMP regulations on willful violations (specifically, 29 CFR 578.3 and 579.2). It does so to make the regulatory language consistent with the way the Department actually litigates willfulness issues and to address the appellate courts that have, for example, ''urge[d]'' it to reconsider those regulations to ensure their consistency with the Supreme Court's interpretation of the meaning of ''willful'' in the FLSA.

Finally, the Department amends the portions of its regulations that address the payment of tipped employees under Executive Order 13658, Establishing a Minimum Wage for Contractors, to reflect rescissions in the FLSA regulations for tipped employees, incorporate the Department's explanation of when an employee performing non-tipped work is a tipped employee, and otherwise align those regulations with the Executive order.

The Department estimates this final rule could result in a potential transfer of $109 million, as tip pools are expanded from front-of-the-house employees alone to include back-of-the-house employees. A directly observable transfer would occur only among employees because section 3(m)(2)(B) prohibits employers from participating in these tip pools or otherwise keeping employees' tips. However, assuming the shared tips are large enough to maintain wage levels for all workers in the tip pool, the Department acknowledges that some employers could potentially offset some of the increase in total compensation received by back-of-the-house workers by reducing the direct wage that they pay those workers (as long as they do not reduce their wage below the applicable minimum wage), and such an outcome is what is modeled to produce the $109 million estimate of transfers from employees to employers. The rule may also result in transfers to workers as employers who adopt tip pools containing back-of-the-house workers may not take a tip credit for their front-of-the-house staff. The Department also acknowledges the possibility that some transfers could occur as a result of the changes to the regulations involving when an employer may take a tip credit, but the Department is unable to estimate the likelihood or magnitude of these transfers. The Department estimates that regulatory familiarization costs associated with this final rule would be $3.86 million in the first year.

This rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings of this rule can be found in the rule's economic analysis. The Office of Information and Regulatory Affairs designated this rule as a 'major rule,' as defined by 5 U.S.C. 804(2), under the Congressional Review Act (5 U.S.C. 801 *et seq.*).

II. Background

A. Section 3(m)

Section 6(a) of the FLSA requires covered employers to pay their nonexempt employees a minimum wage of at least $7.25 per hour. 29 U.S.C. 206(a). Section 3(m)(2)(A) allows an employer to satisfy a portion of its minimum wage obligation to any ''tipped employee'' by taking a partial credit toward the minimum wage based on tips an employee receives. *Id.* 203(m)(2)(A). Section 3(t) defines ''tipped employee'' as ''any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.'' *Id.* 203(t). An employer that elects to take a tip credit must pay the tipped employee a direct cash wage of at least $2.13 per hour. The employer may then take a credit against its wage obligation for the difference—up to $5.12 per hour—in tips received by the employee if the cash wage plus the employee's tips equal at least the minimum wage. If the employee does not earn sufficient tips to bring his or her hourly earnings to the minimum wage, the employer must pay any additional wages required to make up the difference. If the employee's cash wage plus tips exceeds the minimum wage, the employer must still pay a cash wage of at least $2.13 per hour. An employer may take a tip credit only if, among other things, the tipped employees retain all the tips they receive. An employer taking a tip credit is also allowed to implement a mandatory tip pool in which tips are shared only among employees who ''customarily and regularly receive tips.''

Under section 3(m)(2)(B) of the FLSA, added by the CAA, ''an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips.'' *See* Div. S., Tit. XII, sec.1201. Section 3(m)(2)(B) applies regardless of whether an employer takes a tip credit.

B. Statutory and Regulatory History

i. 1966 and 1974 Amendments to the FLSA [2]

Congress created the FLSA's tip credit in 1966 by amending the definition of ''wage'' in section 3(m). *See* Public Law 89–601, sec. 101(a), 80 Stat. 830 (1966). The Department promulgated its initial tip regulations the following year. *See* 32 FR 13575 (Sep. 28, 1967). In 1974, Congress amended section 3(m) to prohibit an employer from taking a tip credit unless, among other things, ''all tips received by [an] employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.'' Public Law 93–259, sec. 13(e), 88 Stat. 55 (1974). As a result, an employer that takes a tip

[2] Congress also amended section 3(m)'s tip credit language in 1977, 1989, and 1996. These amendments changed only the amount of tips received by employees that could be credited toward an employer's minimum wage obligations. *See* Public Law 95–151, sec. 3(b), 91 Stat. 1245 (1977); Public Law 101–157, sec. 5, 103 Stat. 938 (1989); Public Law 104–188, sec. 2105(b), 110 Stat. 1755 (1996).

credit may require a tipped employee to share tips with other employees engaged in occupations that customarily and regularly receive tips, but it cannot use employees' tips for any other purpose or require tipped employees to share them with employees who do not customarily and regularly receive tips. By setting conditions under which an employer may take a tip credit, the statute makes plain that Congress intended these conditions to apply only to employers who take such a credit. Section 3(m)(2)(A) contains no indication that Congress intended for these restrictions to apply to employers that do not take a tip credit and that use tip pools for other purposes, such as by sharing tips with ''back-of-the-house'' employees like cooks and dishwashers.

The Ninth Circuit reached this same conclusion in 2010, observing that ''nothing in the text of the FLSA purports to restrict employee tip-pooling arrangements when no tip credit is taken.'' *Cumbie* v. *Woody Woo, Inc.,* 596 F.3d 577, 583 (9th Cir. 2010). It reasoned that section 3(m)'s ''plain text'' merely ''imposes conditions on taking a tip credit and does not state freestanding requirements pertaining to all tipped employees.'' *Id.* at 580–81. The contrary position, the court concluded, would render section 3(m)'s ''reference to the tip credit, as well as its conditional language and structure, superfluous.'' *Id.* at 581. It accordingly held that the employer, which did not take a tip credit, did not violate section 3(m) by requiring its tipped employees to contribute to a tip pool that included employees who were not customarily and regularly tipped. *See id.*

ii. 2011 Regulations

The Department did not promulgate regulations addressing the 1974 amendments to the FLSA's tip credit language until 37 years later. *See* 76 FR 18832, 18854–56 (Apr. 5, 2011). Though issued after the *Cumbie* decision, the 2011 regulations prohibited employers from, among other things, establishing mandatory tip pools that include employees who are not customarily and regularly tipped—whether the employers took a tip credit or not. *See* 29 CFR 531.52 (2011) (''The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.''). *See also* 29 CFR 531.54 (''an employer . . . may not retain any of the employees' tips''); 531.59 (''With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.''). The Department acknowledged that section 3(m) did not expressly address the use of an employee's tips when an employer does not take a tip credit and pays a direct cash wage equal to or greater than the minimum wage, but stated that the regulation would fill a ''gap'' that the Department then believed to exist in the statutory scheme. 76 FR 18841–42.

Multiple lawsuits challenged the Department's authority under section 3(m) to regulate employers that pay a direct cash wage of at least the Federal minimum wage. The parties challenging the validity of the 2011 regulations argued, and several courts ruling in favor of those parties recognized, that section 3(m)'s text reflected Congress' intent to impose conditions only on employers that take a tip credit. *See, e.g., Malivuk* v. *Ameripark, LLC,* No. 15–2570, 2016 WL 3999878, at *4 (N.D. Ga. July 26, 2016) (agreeing that ''Section 203(m) only imposed a condition on employers who take a tip credit, rather than a blanket requirement on all employers regardless of whether they take a tip credit.''); *Trinidad* v. *Pret A Manger (USA) Ltd.,* 962 F. Supp. 2d 545, 562 (S.D.N.Y. 2013) (''Although the Court need not resolve this issue definitively . . . [it] finds Pret's argument more persuasive: The DOL regulations are contrary to the plain language of § 203(m).'').

In 2016, a divided Ninth Circuit panel upheld the validity of the 2011 regulations. *See Oregon Rest. & Lodging Ass'n (ORLA)* v. *Perez,* 816 F.3d 1080, 1090 (9th Cir. 2016). Although the Ninth Circuit declined *en banc* review of the decision, ten judges dissented on the ground that the FLSA authorized the Department to address tip pooling and tip retention only when an employer takes a tip credit. 843 F.3d 355, 356 (9th Cir. 2016) (O'Scannlain, J., dissenting from denial of reh'g *en banc*). The dissent noted that the Ninth Circuit itself had decided in *Cumbie* that the FLSA ''clearly and unambiguously permits employers who forgo a tip credit to arrange their tip-pooling affairs however they see fit.'' *Id.* at 358 (citing *Cumbie,* 596 F.3d at 579 n.6, 581–83). The dissent therefore concluded that ''because the Department [had] not been delegated authority to ban tip pooling by employers who forgo the tip credit, the Department's assertion of regulatory jurisdiction [was] manifestly contrary to the statute and exceed[ed] its statutory authority.'' *Id.* at 363 (internal quotation marks omitted). The National Restaurant Association, on behalf of itself and other *ORLA* plaintiffs, sought U.S. Supreme Court review. *See* Pet. for Writ of Cert., *Nat'l Rest. Ass'n* v. *U.S. Dep't of Labor,* No. 16–920, 2017 WL 360483, (U.S. Jan. 19, 2017).

While the National Restaurant Association's petition was pending, the Tenth Circuit issued a conflicting decision, ruling that the 2011 tip regulations were invalid to the extent they barred an employer from using or sharing tips with employees who do not customarily and regularly receive tips when the employer pays a direct cash wage of at least the Federal minimum wage and does not take a section 3(m) tip credit. *See Marlow* v. *New Food Guy, Inc.,* 861 F.3d 1157, 1159 (10th Cir. 2017). The Tenth Circuit held that the text of the FLSA limits an employer's use of tips only when the employer takes a tip credit, ''leaving [the Department] without authority to regulate to the contrary.'' *See Marlow,* 861 F.3d at 1163–64.

In light of the conflicting decisions from the Federal courts of appeals, the Department adopted a nationwide ''nonenforcement policy'' under which it would ''not enforce'' the 2011 regulations in any context in which an employer pays its employees a direct cash wage of at least the Federal minimum wage. *See* 82 FR 57395, 57399 (Dec. 5, 2017).

In its 2018 response to the petition for a writ of certiorari in the *ORLA* case, the Government explained that the Department had reconsidered its defense of the 2011 regulations in light of the Ninth Circuit's ten-judge dissent from denial of rehearing in *ORLA* and the Tenth Circuit's decision in *Marlow.* That reconsideration had led the Department to conclude that it had exceeded its statutory authority in promulgating those regulations to the extent they apply to employers that do not take a tip credit against their Federal minimum wage obligations: ''[U]ntil the 2018 [congressional] amendments, Section 203(m) placed limits only on employers that took a tip credit,'' and ''[n]either Section 203(m) nor any other provision of the FLSA prevents an employer that pays at least the minimum wage from instituting a nontraditional tip pool [that includes back-of-the-house employees like cooks and janitors] for employees' tips.'' Br. for Resps. at 26–27, *Nat'l Rest. Ass'n.* (May 22, 2018). The government also noted that the Department had published in December 2017 an NPRM that proposed to rescind the challenged portions of the regulations. *Id.* at 10. Shortly thereafter, the Supreme Court denied the petition. 138 S. Ct. 2697 (2018).

iii. 2017 Notice of Proposed Rulemaking

On December 5, 2017, the Department published an NPRM proposing to rescind the portions of its 2011 tip regulations that imposed restrictions on employers that pay a direct cash wage of at least the full Federal minimum wage and do not take a tip credit against their minimum wage obligations. *See* 82 FR 57395 (Dec. 5, 2017). It did so in part because of its concerns at the time, in light of *Marlow* and the dissent from the denial of rehearing in *ORLA,* that it had misconstrued the statute when it promulgated the 2011 regulations. *See* 82 FR 57399. The Department stated that where ''an employer has paid a direct cash wage of at least the full federal minimum wage and does not take the employee tips directly, a strong argument exists that the statutory protections of section 3(m) do not apply.'' 82 FR 57402. The Department also proposed allowing these employers to establish tip pools that include employees who contribute to the customers' experience but do not customarily and regularly receive tips, such as dishwashers or cooks. *See, e.g.,* 82 FR 57399.

A number of commenters on the 2017 NPRM supported allowing employers to establish these tip pools. Several commenters pointed out that these workers contribute to each customer's overall service, which directly affects the size of the customer's tip. Many commenters, however, expressed concern that employers would take tips received by employees for its own purposes.

During a hearing on March 6, 2018, before the Subcommittee on Labor, Health and Human Services, and Education of the U.S. House of Representatives Committee on Appropriations, Secretary of Labor R. Alexander Acosta was asked about the proposed rulemaking. The Secretary explained that the Tenth Circuit had made clear in *Marlow,* in reasoning the Secretary found persuasive, that the Department lacked statutory authority for its 2011 regulations at issue. He noted that Congress had the authority to implement a solution, and he suggested that Congress enact legislation stating that establishments, whether or not they take a tip credit, may not keep any portion of employees' tips.[3]

C. The CAA's Amendments to the FLSA

Later that month, Congress enacted the CAA, amending the FLSA to address employers' practices with respect to their employees' tips. Public Law 115–141, Div. S., Tit. XII, sec. 1201. Shortly thereafter, the Department issued a FAB concerning the Wage and Hour Division's (WHD) enforcement of the CAA amendments. *See* FAB No. 2018–3 (Apr. 6, 2018).

i. Amendments to Section 3(m) of the FLSA

The CAA left unchanged section 3(m)'s then-existing text, renumbered as section 3(m)(2)(A), preserving the longstanding requirements that apply to employers that take a tip credit. It also added a new section 3(m)(2)(B) to the FLSA, which states that ''[a]n employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.'' CAA, Div. S, Tit. XII, sec. 1201(a) (codified at 29 U.S.C. 203(m)(2)(B)); *see* FAB No. 2018–3 (Apr. 6, 2018).

ii. Effect on Regulations

Section 1201(c) of the CAA expressly addressed the portions of the Department's 2011 regulations that restricted tip pooling when employers pay tipped employees a direct cash wage of at least the full FLSA minimum wage and do not take a tip credit. CAA, Div. S, Tit. XII, sec. 1201(c). Under that section, the portions of the regulations at 29 CFR 531.52, 531.54, and 531.59 that were ''not addressed by section 3(m) . . . (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by [the Department of Labor].'' The Department explained in FAB No. 2018–3 that this language effectively suspended the Department's existing regulations prohibiting employers that pay tipped employees the full Federal minimum wage from including back-of-the-house workers, such as cooks and dishwashers, in a tip pool.

iii. Amendments to Section 16 of the FLSA

Section 16(b) of the FLSA allows employees to sue for unpaid minimum wages or overtime compensation. The CAA amended that section to add that ''[a]ny employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages.'' CAA, Div. S, Tit. XII, sec. 1201(b)(1).

Section 16(c) of the FLSA authorizes the Department to enforce the payment of unpaid minimum wages and unpaid overtime compensation. The CAA amended that section to add to the Department's enforcement authority: ''The authority and requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.'' CAA, Div. S, Tit. XII, sec. 1201(b)(2).

Under section 16(e)(2), repeated or willful violators of the FLSA's minimum wage and overtime requirements are subject to a CMP not to exceed $1,100 for each such violation.[4] The CAA amended this section to add a CMP for violations of section 3(m)(2)(B): ''Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages[.]''

D. The Dual Jobs Regulation

The CAA's changes to the FLSA, in conjunction with subregulatory guidance the Department issued in 2018, have illuminated the need to harmonize and update the Department's ''dual jobs'' regulation, codified at 29 CFR 531.56(e). The dual jobs regulation addresses when an employer can take a tip credit for time that an employee in a tipped occupation spends performing duties that do not directly result in tips for that employee.[5]

The dual jobs regulation, § 531.56(e), was introduced in 1967 as part of the Department's first final rule addressing tipped employment. 32 FR 13575; *see* 29 CFR 531.50 through 531.60. The ''dual jobs'' regulation was not contemplated in the notice proposing that rule, *see* 32 FR 222–227 (Jan. 10, 1967), but was added as part of the final rule. Under the regulation, an employee who works for the same employer in

[3] A recording of the testimony is available at *https://www.congress.gov/committees/video/house-appropriations/hsap00/6Weo1vfNM1k.*

[4] The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701), requires that inflationary adjustments be made annually in these civil money penalties according to a specified formula.

[5] As explained further below, there are a number of duties that may contribute to the tipped worker's tips, but which are performed by other employees who do not directly receive tips for their work (*e.g.,* the cook at a restaurant makes the food which the server delivers to a table, but only the server receives a tip for that work).

both a tipped occupation and a non-tipped occupation is a ''tipped employee'' for purposes of section 3(t) of the FLSA only while employed in the tipped occupation. Therefore, an employer may take a tip credit against its minimum wage obligations only for the hours the employee spends in the tipped occupation. It may not take a tip credit for the time spent in a non-tipped occupation.

Section 531.56(e) also distinguishes between employees who have dual jobs and tipped employees who perform ''related duties'' that are not themselves directed toward producing tips. It uses the example of a server who ''spends part of her time'' performing non-tipped duties, such as ''cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.'' In that example, the employee is still engaged in the tipped occupation of a server, for which the employer may take a tip credit, rather than working part of the time in a non-tipped occupation. 29 CFR 531.56(e). But that is as far as the regulation goes. It does not set forth or explain criteria for determining whether particular non-tipped duties are related to a tipped occupation. It does not set forth or explain criteria for determining when an employee is performing duties unrelated to his or her tipped occupation and therefore engaged in a dual job. Nor does it explain whether or when an employee who performs related non-tipped duties more than ''part of the time'' or ''occasionally'' might cease being employed in a tipped occupation and instead be engaged in a non-tipped occupation. Nor does it even give examples illustrating activities that would be considered (or not considered) related duties for workers other than those in restaurants.

Section 531.56(e) did not define ''related duties,'' ''part of the time,'' or ''occasionally,'' and this lack of precision creates a need for clarification. WHD over the years attempted to clarify this rule through subregulatory guidance, but this piecemeal approach was insufficient. *Cf. Perez* v. *Mortg. Bankers Ass'n,* 575 U.S. 92, 112–13 (2015) (Scalia, J., concurring) (''There are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means.''). For example, following the 1974 statutory amendments to section 3(m) of the FLSA, WHD issued three opinion letters that address this issue. In 1977, WHD addressed whether workers employed as ''salad preparation persons'' could participate in a tip pooling arrangement. WHD concluded that salad-preparation personnel could not participate in a tip pool as they ''are essentially chefs'' who ''prepare food in the kitchen as any chef ordinarily would[,]'' and rather than serving food to customers, ''their basic duty outside the kitchen is to keep the buffet tables clean and replenish food as needed.'' WHD Opinion Letter FLSA–623 (June 3, 1977).[6]

In 1979, WHD addressed servers who ''report to work two hours before the doors are opened to the public to prepare the vegetables for the salad bar.'' WHD Opinion Letter FLSA–895 (Aug. 8, 1979). WHD opined that the employer could not claim a tip credit for those two hours because ''salad preparation activities are essentially . . . [those] performed by chefs.'' *Id.* (citing WHD Opinion Letter FLSA–623 (June 3, 1977)).

In 1980, WHD addressed whether the tip credit applied to servers in a restaurant who, as part of their closing duties, cleaned the salad bar, placed condiment crocks in the cooler, cleaned and stocked the server station, cleaned and reset the tables (including filling cheese, salt, and pepper shakers), and vacuumed the dining room carpet. *See* WHD Opinion Letter (Mar. 28, 1980). WHD opined that the employees would be considered tipped employees for this period because they were not engaged in a dual occupation. WHD noted that the after-hours cleanup duties were ''assigned generally to the [server] staff'' at the establishment. *Id.* WHD did not explain why it concluded that tearing down and cleaning the salad bar was a tipped server's duty but preparing vegetables for that same salad bar was a non-tipped chef's duty. The letter suggested that if ''specific employees were routinely assigned, for example, maintenance-type work such as floor vacuuming,'' the employer would have been precluded from claiming a tip credit for the time the specific employees spent performing those maintenance activities. *Id.*

Finally, in 1985, WHD addressed whether a server who, during a 5-hour shift, performed 1.5 to 2 hours of preparatory work before the restaurant opened, could be paid the tip-credit rate for the time spent performing those preparatory activities. WHD Opinion Letter (Dec. 20, 1985). The preparatory work included a variety of tasks such as setting tables, preparing coffee, and salad preparation. WHD repeated, but did not elaborate upon or explain, its earlier statements that ''salad preparation activities are essentially the activities performed by chefs'' for which the employer could not take a tip credit. WHD then concluded that because only one employee was assigned to the non-salad preparatory work, the employee was responsible for preparing the entire restaurant, not just his or her area. The employee spent 30 percent to 40 percent of the entire shift on those duties. Such a ''substantial portion'' of the workday spent ''performing general preparation or maintenance'' work was too extensive to be considered part of the same occupation, and the employer could not take a tip credit for the hours spent on those tasks. *Id.* This was the first time WHD employed a proportion-of-time analysis to the ''dual jobs'' regulation.

In 1988, WHD amended its Field Operations Handbook (FOH) to include section 30d00(e), regarding time spent in duties related to a tipped occupation. WHD FOH Revision 563 (Dec. 12, 1988). According to the handbook entry, § 531.56(e) ''permits the taking of the tip credit for time spent in duties related to the tipped occupation, even though those duties are not by themselves directed toward producing tips (*i.e.,* maintenance and preparatory or closing activities),'' if those duties are ''incidental'' and ''generally assigned'' to tipped employees. To illustrate the types of related, non-tip producing duties for which employers could take a tip credit, the FOH listed ''a waiter/waitress . . . who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses,'' the same examples included in § 531.56(e). But ''where the facts indicate that specific employees are routinely assigned to maintenance, or that tipped employees spend a substantial amount of time performing general preparation work or maintenance, no tip credit may be taken for the time spent in such duties.'' For the first time, the FOH noted a ''substantial'' amount of time spent performing general preparation or maintenance work as being in excess of 20 percent.

The FOH does not establish a binding legal standard on the public and is not a device for establishing interpretive policy.[7] Rather, the FOH is an ''operations manual'' that makes available to WHD investigators and staff policies already ''established through changes in legislations, regulations, significant court decisions, and the decisions and opinions of the WHD

[6] The letter cited legislative history to support its conclusion that chefs were among the ''employees who have not customarily and regularly participated in tip pools.'' *Id.* (citing S. Rep. 93–690 (1974) at 43).

[7] *Field Operations Handbook,* U.S. Dep't of Labor (last accessed Aug. 18, 2020), *available at https://www.dol.gov/agencies/whd/field-operations-handbook.*

Administrator.'' *Id.; see also* WHD Opinion Letter FLSA2020–12 (Aug. 31, 2020); *Probert* v. *Family Centered Servs. of Alaska, Inc.,* 651 F.3d 1007, 1012 (9th Cir. 2011). But, by furnishing these instructions to WHD investigators and staff in the field, the FOH in practice prohibited an employer from claiming a tip credit for ''related-duties'' time if that time exceeded 20 percent of the employee's workweek. The handbook entry stated no rationale for a hard percentage cap in general or the 20 percent figure in particular, and the Department did not issue any guidance rationalizing a hard cap. The standard in the FOH became known as the ''80/20 rule,'' even though it was not promulgated as a regulation.

In 2009, WHD issued an opinion letter expressly rescinding the 80/20 approach prescribed in the FOH, concluding that 20 years of experience had shown it to be confusing and unworkable. WHD Opinion Letter FLSA2009–23 (Jan. 16, 2009). WHD explained that, consistent with the text of the FLSA and its regulations, so long as the duties performed by the employees are part of their tipped occupation, those employees are not engaged in ''dual jobs.'' Thus, the Department would interpret the dual jobs regulation such that ''no limitation shall be placed on the amount of these [related] duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involving direct service to customers or for a reasonable time immediately before or after performing such direct-service duties.'' *Id.* Following a change in the administration, however, in 2009 WHD withdrew that opinion letter ''for further consideration'' and stated it would ''provide a further response in the near future.''

In 2012, WHD revised FOH 30d00(e), replacing it with language currently located at section 30d00(f). The prior 1988 language had stated that tipped employees could spend up to 20 percent of their working time engaged in ''maintenance and preparatory or closing activities'' such as cleaning and setting tables, making coffee, and occasionally washing dishes or glasses.'' The 2012 revision, on the other hand, stated categorically that ''maintenance work,'' such as ''cleaning bathrooms and washing windows,'' is not related to the occupation of a server. Rather, ''such jobs are non-tipped occupations'' subject to the full minimum wage, regardless of the time spent. As with the 1988 entry, this language was not promulgated as a rule and was not supported by guidance from WHD or the Department. As the Department explained in the 2019 NPRM, this dual jobs policy set forth in the FOH has proven difficult to enforce and resulted in widespread compliance issues; it has also generated extensive, costly litigation. *See* 84 FR 53972.

Due in large part to those concerns, the Department in November 2018 reinstated the January 16, 2009, opinion letter and later released an accompanying FAB. *See* WHD Opinion Letter FLSA 2018–27; *see also* FAB No. 2019–2 (Feb. 15, 2019). In these documents, the Department explained that it would no longer prohibit an employer from taking a tip credit for the time an employee performed related, non-tipped duties as long as those duties were performed contemporaneously with, or for a reasonable time immediately before or after, tipped duties. *See id.* The Department also explained that, in addition to the examples listed in § 531.56(e), it would use the Occupational Information Network (O*NET), a comprehensive database of worker attributes and job characteristics, to determine whether a tipped employee's non-tipped duties were related to his or her tipped occupation. The 2019 NPRM proposed to revise § 531.56(e) to reflect this 2018 guidance.

E. The Department's Proposal

On October 8, 2019, the Department issued a new NPRM, proposing to amend its tip regulations under the FLSA to address the CAA's amendments to the statute and to codify policy on how the tip credit applies to employees who perform both tipped and non-tipped duties. The Department proposed to incorporate the new statutory prohibition against keeping employee tips—section 3(m)(2)(B), which applies whether or not the employer takes a tip credit—into its existing regulations and to enact new recordkeeping requirements to assist it in administering the new language. The Department proposed, consistent with the CAA's depriving of further force or effect those portions of the Department's 2011 regulations that restricted tip pooling by employers that do not take a tip credit, to remove the portions of its regulations that prohibited those employers from including in mandatory tip-pooling arrangements those employees who do not customarily and regularly receive tips. Since the CAA merely renumbered the FLSA's existing tip credit language, now section 3(m)(2)(A), the Department did not propose revising the existing tip retention, tip pooling, and notice regulations.

The Department proposed to incorporate into its CMP regulations the new statutory language giving it authority to seek CMPs for violations of section 3(m)(2)(B). To harmonize the regulations with Supreme Court authority and the manner in which the Department actually litigates willfulness, it also proposed to revise portions of its CMP regulations (specifically, 29 CFR 578.3 and 579.2) that address how the Department determines whether an FLSA violation is willful. Additionally, the Department proposed to amend its tip regulations to reflect recent guidance stating that an employer may take a tip credit for time that an employee in a tipped occupation performs related, non-tipped duties contemporaneously with or for a reasonable time immediately before or after performing the tipped duties. Finally, the Department proposed to amend its regulations that address the payment of tipped employees under Executive Order 13658 (Establishing a Minimum Wage for Contractors) to reflect the rescissions proposed in the FLSA regulations for tipped employees, to incorporate the Department's guidance on when an employee performing non-tipped work is a tipped employee and to otherwise align those regulations with the Executive order.

The Department received 466 timely comments on the NPRM during the 64-day comment period that ended on December 11, 2019.[8] The comments were from a broad array of constituencies, including small business owners, restaurant companies, employer and industry associations, worker advocacy groups, trade unions, non-profit organizations, social scientists, law firms, Members of Congress, state attorneys general, a state department of labor, and other interested members of the public. All timely received comments may be viewed on the *regulations.gov* website, docket ID WHD–2019–0004. Some of the comments the Department received were general statements of support or opposition, and the Department also received approximately 340 identical or nearly identical ''campaign'' comments sent in response to an organized initiative. Commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal; however, most commenters favored some, if not all, of the changes proposed in the NPRM. Some commenters, including numerous

[8] The Department extended the end of the comment period from December 9 to December 11, 2019, due to an outage that temporarily caused most web browsers to refuse access to *Regulations.gov.*

worker advocacy groups that submitted comments with substantially similar language, requested that the Department reject proposed revisions to its regulations that reflected recent guidance addressing the extent to which an employer can take a tip credit for the time a tipped employee spends performing related, non-tipped duties. The Department has considered the timely submitted comments addressing the proposed changes.

The Department also received a small number of comments that are beyond the scope of this rulemaking. These include, for example, requests that the Department reconsider its regulation on compulsory service charges, § 531.55, and a request that the Department reconsider the notice requirements in § 531.59. The Department does not address those issues in this final rule.

Significant issues raised in the comments are discussed below, along with the Department's responses to those comments.

III. Final Regulatory Revisions

The Department finalizes its proposals to amend its tip regulations to implement the CAA amendments and address other issues. The sections below address these regulatory revisions as adopted in the final rule.

The sections of this rule are separate and severable and operate independently from one another. If any section is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intends that the remaining sections continue in effect.

A. General Restrictions on an Employer's Use of Its Employees' Tips—Section 531.52

i. An Employer May Not Keep Tips, Regardless of Whether It Takes a Tip Credit

Section 3(m)(2)(B) of the FLSA prohibits an employer from ''keeping'' tips received by its employees ''for any purposes.'' The prohibition on employers keeping tips applies regardless of whether the employer takes a tip credit. The Department proposed to amend § 531.52 to include the new statutory language prohibiting an employer from keeping employees' tips and to clarify the extent to which an employer may exert control over employees' tips without ''keep[ing]'' them in violation of 3(m)(2)(B). The Department proposed that an employer may exert control over tips only to (1) promptly distribute tips to the employee or employees who received them; (2) require employees to share tips with other eligible employees; or (3) where the employer facilitates tip pooling by collecting and redistributing employees' tips, promptly distribute tips to eligible employees in a tip pool. In these circumstances, the Department explained, employees, not the employer, ''keep'' the tips.

Commenters—representing both employers and employees—supported the Department's proposal to implement section 3(m)(2)(B)'s prohibition on employers' keeping tips. *See, e.g.,* Center for Workplace Compliance; National Employment Lawyers Association (NELA); National Restaurant Association; Oxfam. The Center for Workplace Compliance, for example, commented that the proposal aligns with the language of the amendment. The Department agrees, and adopts the changes to § 531.52 as proposed.

In addition to comments on the Department's proposal, several commenters requested that the Department address whether, under the new section 3(m)(2)(B), employers may deduct a portion of the transactional fee charged by the credit card company from employees' credit card tips. Historically, the Department has consistently taken the position that, when a tip is charged to a credit card, an employer may reduce the amount of tips paid to the employee by the percentage charged by the credit card company as a transactional fee. For example, where a credit card company charges an employer 3 percent on all sales charged to its credit service, the employer may pay the employee 97 percent of the charged tips without violating FLSA. The Department has long permitted employers to do so, finding this consistent with the statutory requirement that employees retain their tips. *See* WHD Opinion Letter FLSA–214 (Mar. 28, 1977); WHD Opinion Letter FLSA 2006–1 (Jan. 13, 2006); 29 U.S.C. 203(m)(1) (1974); 32 FR 13580 (adopting 29 CFR 531.52 (1967)). The NPRM did not specifically address this issue; however, as the Department explained shortly after Congress passed the CAA amendments, the Department has continued to apply its previous guidance concerning tips charged on credit cards. *See* FAB No. 2018–3 (Apr. 6, 2018). In response to the NPRM, some commenters urged the Department to clarify that employers cannot reduce the amount of tips by the amount of credit card transactional fees. These commenters stated that it is the employer's choice to incur the costs associated with taking credit cards, and section 3(m)(2)(B) should be interpreted to prohibit them from using a portion of employee tips to subsidize those costs. *See* NELP, NWLC, and the Pennsylvania Department of Labor and Industry. In contrast, another commenter requested that the Department affirm that an employer may continue to deduct those fees under whatever final rule is implemented based on the NPRM. *See* Littler Mendelson. The commenter noted the Department's longstanding position allowing employers to do this and that courts have allowed the practice. *See, e.g., Myers* v. *Copper Cellar,* 192 F.3d 546, 554 (6th Cir. 1999) (employer may deduct the cost of ''converting the credited tip to cash'').

After considering these comments, the Department affirms its longstanding guidance authorizing employers to deduct the actual cost of credit card processing charges from employees' tips. By deducting transactional fees, the employer exerts only the amount of control necessary to liquidate the tips to cash and distribute them to employees. This is consistent with the Department's proposal, adopted in this final rule, that an employer may exert control over employees' tips without ''keep[ing]'' them in violation of 3(m)(2)(B) only to distribute them to employees or to facilitate tip pooling. Credit-card processing fees are not an imposition by the employer on the employee; they are the price of converting credit obligations to cash. The same fees would be imposed upon servers themselves if they collected their tips through credit payments separate from the customer's payment to the establishment. The Department reiterates that an employer may not deduct more than the actual transactional fee charged by the credit card company attributable to liquidating the credit card tip, nor may the employer reduce the amount of tips paid to the employee to cover other costs incurred by the employer related to credit card use, such as the cost of installing a Point of Sale system. *See* WHD Opinion Letter FLSA2006–1 (Jan. 13, 2006). An employer that uses tips to cover those operating expenses would violate section 3(m)(2)(B).

ii. Managers and Supervisors May Not Keep Tips

a. Summary of the Final Rule

Section 3(m)(2)(B) prohibits employers, regardless of whether they take a tip credit, from keeping tips, ''including allowing managers or supervisors to keep any portion of employees' tips.'' 29 U.S.C. 203(m)(2)(B). The prohibition applies to managers or supervisors obtaining employees' tips directly or indirectly,

such as via a tip pool. To clarify which employees qualify as managers or supervisors for purposes of section 3(m)(2)(B), the 2019 NPRM proposed § 531.52(b)(2), which would codify the Department's current enforcement policy under FAB No. 2018–3 (Apr. 6, 2018).

The Department is finalizing the language as proposed. Specifically, the final rule uses the duties test, but not the salary tests, from the FLSA's executive employee exemption to determine which individuals are managers or supervisors who may not keep tips under section 3(m)(2)(B).[9] As the 2019 NPRM explained, this exclusion ensures that the terms ''manager'' and ''supervisor'' encompass more individuals than the term ''executive'' as used in section 13(a)(1) of the FLSA.

In effect, the final rule defines a manager or supervisor for purposes of section 3(m)(2)(B) as any employee (1) whose primary duty is managing the enterprise or a customarily recognized department or subdivision of the enterprise; (2) who customarily and regularly directs the work of at least two or more other full-time employees or their equivalent; and (3) who has the authority to hire or fire other employees, or whose suggestions and recommendations as to the hiring or firing are given particular weight. The definition also includes as managers or supervisors any individuals who own at least a bona fide 20 percent equity interest in the enterprise in which they are employed and who are actively engaged in its management.

The final rule also revises § 531.52 to state that FLSA section 3(m)(2)(B) ''prohibits employers from requiring employees to share tips with managers and supervisors,'' and revises § 531.54 to state that employers who do not take a tip credit ''may not include supervisors and managers'' in a tip pool.

b. Comments Regarding the Definition of Managers and Supervisors

The Department received several comments addressing the issue of who should be included as managers or supervisors under section 3(m)(2)(B). The majority of commenters expressed general support for the proposal and one commenter noted that the proposed approach would be familiar and therefore less likely to have unintended consequences. Many commenters recommended modifications to the Department's proposal.

The Pennsylvania Department of Labor & Industry supported using the executive exemption duties test, but recommended that every employee who satisfies any of the three elements of the duties test be deemed a ''manager'' or ''supervisor'' under section 3(m)(2)(B). For example, an employee who customarily and regularly directs the work of two or more other employees, but does not have the authority to hire or fire other employees, would be counted as a ''manager'' or ''supervisor'' under this definition, and prohibited from sharing employee's tips.

Other commenters, including Littler Mendelson and Fisher Phillips, recommended that the Department adopt the entire executive exemption, including the salary basis and salary level tests, rather than incorporating only the duties test. Littler asserted that this would state ''an easy, bright-line rule'' and would save ''time and effort necessary to determine whether lower-paid employees qualify for the exemption.''

Other commenters, including the National Employment Law Project (NELP), Restaurant Opportunities Center United (ROC), and A Better Balance recommended incorporating a salary level into the definition, such as the median wage for supervisors of food preparation and serving workers based on the National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES). They proposed in the alternative that the definition include the executive exemption's salary level test, 29 CFR 541.100(a)(1), but allow an hourly equivalent. This, they urged, would allow more low-level managerial employees to participate in tip pools.

Finally, Senator Patty Murray and Representative Rosa DeLauro stated that the executive exemption duties test ''is not appropriate for accurately identifying all employees who are managers and supervisors.'' Senator Murray and Representative DeLauro asserted that the Department's proposal allows employees who engage in some managerial work to participate in tip pools, while section 3(m)(2)(B) prohibits that group from keeping employees' tips. They instead recommended importing the definition of ''supervisor'' from section 2(11) of the National Labor Relations Act or using ''as a starting point'' the definition of ''management'' from 29 CFR 541.102.

After considering all comments, the Department finalizes this portion of § 531.52 as proposed. Using the duties test disjunctively or using the definition of ''management'' set forth in 29 CFR 541.102 would prevent employees who perform some lower-level managerial responsibilities from participating in tip pools, even if they are not bona fide managers or supervisors of the employer. On the other hand, adopting the full executive exemption test (including the salary basis and salary threshold tests) would, as Senator Murray and Representative DeLauro noted, conflict with Congress's use of the terms ''managers'' and ''supervisors''—terms not used elsewhere in the FLSA—rather than ''executives'' or a reference to section 13(a)(1). This counsels against fully adopting the test used for the executive exemption.

Relatedly, Senator Murray and Representative DeLauro asserted that the Department's proposed definition of ''managers'' and ''supervisors'' as used in section 3(m)(2)(B) violates Congress's intent because that section does not refer to the executive exemption. However, the section 13(a)(1) executive exemption requires each of the three tests—salary basis, salary threshold, and duties—to be met. The proposed definition of ''manager'' and ''supervisor'' uses just one of those criteria—the duties test. As the NPRM noted, this definition therefore encompasses a different, broader group of employees than the term ''executive'' as used in section 13(a)(1).

As for other commenters' suggestion to establish two different salary levels, one for the executive exemption and one for managers and supervisors excluded from tip pools, the Department concludes that this would likely cause undue confusion in the regulated community. Additionally, setting a separate compensation level, as suggested by some commenters, could require periodic updates to § 531.52 to reflect inflation. Finally, there is no basis for applying a salary level based on the restaurant industry to tipped employees in all industries. For instance, the Department has not studied or received comments on an appropriate salary level at which to exclude managers and supervisors from tip pools in the cosmetology, casino, or cleaning-service industries and therefore cannot reasonably predict the effects imposing such a requirement would have in those industries. The Department therefore declines to adopt these proposals and finalizes this portion of § 531.52 as proposed.

In sum, the Department concludes that the criteria in § 531.52 effectively identify the managers and supervisors whom Congress sought to prevent from

[9] An employee is an executive exempt from the FLSA's minimum wage and overtime requirements if the employee performs certain duties, is paid on a salary basis, and is paid a minimum salary level. 29 U.S.C. 213(a)(1), 29 CFR 541.100(a)(2)–(4).

keeping other employees' tips. The Department believes that employers can readily use these criteria to determine whether an employee is a manager or supervisor because employers are generally familiar with the longstanding regulations from which those criteria are drawn.

c. Comments Regarding Managerial Participation in Tip Pools

The Department also received several comments supporting the language in § 531.52 prohibiting employers ''from requiring employees to share tips with managers and supervisors'' and the language in § 531.54 specifying that employers that do not take a section 3(m)(2)(A) tip credit ''may not include supervisors and managers'' in a tip pool.

Some commenters raised concerns, however, that the Department's proposed regulations neither expressly prohibit nor expressly allow managers or supervisors to retain tips they receive directly from customers. For example, the National Restaurant Association and the Bowling Proprietors' Association of America suggested that the regulations clarify that the law does not prohibit supervisors or managers from retaining tips they themselves receive directly from customers. These commenters also requested that the Department allow managers or supervisors who receive tips directly from customers to share or pool tips with other managers or other nontipped employees. The National Restaurant Association proposed that the prohibition against managers and supervisors participating in a tip pool ''extend only to those individuals receiving money from the pool or share, but not to individuals who only contribute money into the pool or share.''

The Department agrees that section 3(m)(2)(B) permits a manager or supervisor to keep a tip that he or she receives directly from a customer for the service only he or she provides. The statute states only that an ''employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips'' and is implicitly stating that managers and supervisors may not keep tips received by employees other than themselves. A salon manager, for example, may keep tips left by customers whose hair she personally styles. In response to commenters' suggestions, the Department added language in finalized § 531.52(b)(2) to make this clear: ''A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides.''

With regard to tip pools, the Department notes that the requirements of § 531.54 only apply to those tip pools mandated by employers. When a manager or supervisor who receives tips directly from customers wishes to voluntarily ''tip out'' a portion of his or her tips to other employees, that is not considered to be participation in a tip pool and is not prohibited by the FLSA or the proposed regulations. Voluntarily ''tipping out'' is different from an employer-mandated tip pool. The Department believes that allowing managers and supervisors to participate in tip pools for one purpose (contributing tips) and not for another (receiving tips) would create confusion among employers and employees. Furthermore, such a proposal could lead to situations where it is difficult for employers to demonstrate compliance with the prohibition on employees sharing tips with managers and supervisors. Therefore, the Department declines to make such changes in the final rule.

Finally, upon review, the Department realizes that it may have unintentionally created confusion by not including language expressly forbidding manager and supervisor participation in tip pools in proposed § 531.54(c), which applies to employers that take a section 3(m)(2) tip credit. As the statutory text and proposed § 531.52(b) make clear, no employer may require employees to share tips with managers and supervisors—there is no distinction between employers who do or do not take a tip credit. Therefore, the Department will add a new § 531.54(c)(3) that mirrors the language in proposed § 531.54(d): ''An employer may not participate in such a tip pool and may not include managers and supervisors in the pool.'' The Department otherwise finalizes as proposed the language in §§ 531.52(b) and 531.54(d).

B. Tip Pooling—Section 531.54

The Department proposed to amend § 531.54, which generally addresses tip pooling, to reflect the CAA amendments. The Department proposed to incorporate section 3(m)(2)(B)'s prohibition on employers keeping tips, which applies regardless of whether the employer takes a tip credit, into § 531.54. The Department also proposed to amend § 531.54 to include the specific requirements that apply to employers that establish mandatory tip pools, depending on whether the employer does or does not take a tip credit, and depending on whether the mandatory tip pool is a traditional pool limited to customarily and regularly tipped employees or a nontraditional tip pool, which may include employees who do not customarily and regularly receive tips.

i. Requirements When an Employer Collects and Redistributes Tips—Section 531.54(b)

In its proposed rule, the Department took the position that section 3(m)(2)(B) does not prohibit an employer from collecting tips received by employees to facilitate a mandatory tip pool if the employer fully redistributes the tips it collects no less often than when it pays wages. In those circumstances, the employees' tips are only temporarily within the employer's possession, and the employer does not ''keep'' the tips within the meaning of section 3(m)(2)(B). However, the Department proposed that employers ''keep'' tips in violation of section 3(m)(2)(B) when they collect tips but do not redistribute them within this time period.

As proposed, § 531.54(b)(1) covered employers that collect tips to administer a tip pool and required those employers to fully distribute any collected tips at the regular payday for the workweek, or, for pay periods of more than one workweek, at the regular payday for the period in which the particular workweek ends. Proposed § 531.54(b) also required that, to the extent an employer could not ascertain the amount of tips received or how tips should be distributed before processing payroll, those tips be distributed to employees as soon as practicable after the regular payday. As the Department observed in the 2019 NPRM, these requirements align with current guidance on how soon an employer must distribute to tipped employees tips that were charged on credit cards. *See* WHD Opinion Letter FLSA2006–1 (Jan. 13, 2006). Because proposed § 531.54(b)(1) defined ''keep'' within the confines of section 3(m)(2)(B), the requirement that an employer fully and promptly distribute any tips it collects would have applied regardless of whether the employer took a tip credit and regardless of the type of tip pool the employer administered.

The Pennsylvania Department of Labor and Industry expressed support for proposed § 531.54(b)(1). Restaurant owners who submitted comments as part of a comment campaign also expressed general support for ''the proposed changes regarding tip pooling,'' noting that they ''closely track the new statutory language.'' Accordingly, the Department adopts

§ 531.54(b)(1) as proposed, but separates it into two paragraphs, (b)(1) and (2).

ii. Additional Requirements for Mandatory Tip Pools When an Employer Takes a Tip Credit—Section 531.54(c)

Proposed § 531.54(c) sets forth the tip pooling requirements for employers that take a tip credit. As explained in the 2019 NPRM, the Department's approach to those employers remains unchanged because the CAA did not amend the substance of what is now section 3(m)(2)(A), which applies to those employers. Accordingly, proposed § 531.54(c) would retain the Department's existing requirements in § 531.54 but would clarify that these requirements apply only to employers that take a tip credit. Those existing requirements state that those employers that take a tip credit can require tipped employees to contribute tips to a tip pool only if the pool's membership is limited to employees who customarily and regularly receive tips.

Proposed § 531.54(c)'s requirements are drawn directly from section 3(m)(2)(A) of the FLSA—formerly numbered section 3(m)—which has imposed the same tip pooling, notice, and tip retention requirements on employers that take a tip credit since 1974. The Department thus adopts § 531.54(c) as proposed.

iii. Nontraditional Tip Pools When an Employer Does Not Take a Tip Credit—Sections 531.52, 531.54, and 531.59

In 2011, the Department revised its tip regulations to require that tipped employees retain the tips that they receive, except those distributed through a tip pool comprising solely employees who customarily and regularly receive tips. The Department applied this interpretation to all employers of tipped employees, regardless of whether they took a tip credit. *See* 29 CFR 531.52, 531.54, and 531.59 (2011).

Through the CAA, Congress suspended portions of §§ 531.52, 531.54, and 531.59 that restricted employers that do not take a tip credit from instituting nontraditional tip pools. *See* CAA, Div. S, Tit. XII, sec. 1201(c). As a result, since the CAA's effective date, employers that do not claim a tip credit have been permitted to implement mandatory nontraditional tip pools that include both tipped and nontipped employees. *See* FAB No. 2018–3 (Apr. 6. 2018).

Consistent with these amendments, the Department proposed to revise its regulations to remove certain restrictions on employers that do not claim a tip credit (and therefore pay workers a direct cash wage of at least the minimum wage), including those prohibiting them from instituting mandatory nontraditional tip pools. These restrictions were based on what is now section 3(m)(2)(A) of the FLSA, which the Department previously concluded neither limits employers that do not take a tip credit nor grants authority to the Department to do so. *See* Resps.' Br. at 13, *Nat'l Rest. Ass'n* v. *Dept. of Labor,* No. 16–920 (U.S.), *cert. denied,* 138 S. Ct. 2697 (2018); *see also* 82 FR 57399. In particular, the Department proposed to rescind the congressionally-suspended language in § 531.52 that bars employers from establishing mandatory nontraditional tip pools, ''whether or not it takes a tip credit,'' and to make additional clarifying edits; to revise § 531.54 to clarify that the restrictions and notice requirements for tip pools apply only to employers that take a tip credit; and to revise § 531.59 to state that the bar on mandatory nontraditional tip pools applies only to employers that take a tip credit. *See* 84 FR 53976–77. The Department also proposed to make explicit in § 531.54 that an employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a mandatory tip pooling arrangement that includes dishwashers, cooks, or other employees who are not employed in an occupation in which employees customarily and regularly receive tips, as long as that arrangement does not include any employer, supervisor, or manager. *See* 84 FR 53976.

A number of commenters addressed the Department's proposal to allow employers that do not take a tip credit to mandate nontraditional tip pools. Commenters including the NFIB, Bloomin' Brands, Littler, and several individuals, supported the proposal, noting that it reflects the realities of tipped workplaces and is fairer to nontipped employees. As Bloomin' Brands stated, ''it takes an entire team,'' including employees in occupations that do not customarily and regularly receive tips, to give customers ''the total quality experience necessary to earn a tip.'' Littler stated that nontraditional tip pools are especially helpful where state law precludes employers from taking a tip credit, and tipped employees who continue to earn tips on top of their wages would otherwise ''earn far more than their nontipped coworkers.''

In contrast, Texas RioGrande Legal Aid and some individual commenters opposed allowing employers that do not take a tip credit to institute mandatory nontraditional tip pools, arguing that this arrangement is contrary to what customers intend when they leave a tip and unfair to tipped employees. At least one of these commenters, however, appears to have misunderstood that the Department's proposal requires an employer to pay a tipped employee the full Federal minimum wage before the employer can require the employee to participate in a mandatory tip pool or other similar arrangement that includes one or more nontipped employees. Texas RioGrande Legal Aid also opposed the removal of language in § 531.52 stating that the customer ''has the right to determine who shall be the recipient'' of a tip.

Other commenters, including those who did not oppose mandatory nontraditional tip pools as a general matter, expressed concern that an employer that institutes a mandatory nontraditional tip pool could conceivably reduce the cash wages it pays to nontipped employees, such as cooks and dishwashers, who receive tips from the pool. *See, e.g.,* ROC, NELP, and Policy Integrity. The Department had acknowledged this possibility in the economic analysis accompanying the NPRM. *See* 84 FR 53968. NELP and other commenters asked the Department to prohibit employers from taking advantage of nontraditional tip pools to pay lower cash wages to nontipped employees, asserting that those actions would be inconsistent with 3(m)(2)(B)'s prohibition on employers' keeping tips. Policy Integrity acknowledged, however, that it would be ''difficult to design a rule'' to accomplish this end.

Finally, Senator Murray and Representative DeLauro recommended that the Department require employers to institute a ''democratic process'' to obtain the consent of tipped employees before instituting nontraditional tip pools. They asserted that such a safeguard would ensure that employers are not keeping employees' tips.

After considering the comments, the Department adopts without modification the changes it proposed to §§ 531.52, 531.54, and 531.59, which allow employers that do not take a tip credit to implement mandatory nontraditional tip pools, as long as those tip pools do not include employers, managers, or supervisors. These changes are consistent with the 2018 amendments to the FLSA and the text of section 3(m)(2) as a whole. Section 3(m)(2)(A) expressly prohibits employers that take a tip credit from including employees that do not customarily and regularly receive tips in mandatory tip pools together with employees that do, but it does not place

this prohibition on employers that do not take a tip credit. In addition, as commenters noted, the revised regulations will afford employers flexibility to reward nontipped employees who contribute to the customers' experience and incentivize tipped and nontipped employees alike to improve that experience.[10] As finalized, §§ 531.52, 531.54, and 531.59 expressly allow employers that do not claim a tip credit to implement a mandatory tip pool that includes both employees who receive tips and employees who do not ''customarily and regularly'' receive tips. However, that tip pool may not include any employer, manager, or supervisor.

The Department declines to require that employers institute a process to obtain consent from tipped employees before including them in a mandatory nontraditional tip pool. Nothing in section 3(m)(2) predicates the imposition of a tip pool on employee consent, and there is no textual basis for creating such a requirement with respect to only a nontraditional tip pool. Not only is there no textual basis for such a requirement, a bill introduced to impose such a requirement was neither passed, nor its substance incorporated into the CAA. *See* H.R. 5180, 115th Cong. (2d Sess. 2018). Additionally, this recommendation is outside of the proposed changes, and the public has not had the opportunity to comment on its merits or feasibility.

The Department also declines to modify its proposal in response to commenters' concern that an employer could reduce the cash wages paid to a nontipped employee who participates in a nontraditional tip pool. What matters is not nontipped employees' cash wages, but rather their overall compensation, which includes both cash wages and tips that they may now receive under this final rule. Employers can already reduce nontipped employees' overall compensation by lowering cash wages, but this requires tradeoffs: Morale and productivity would fall, and it would become more difficult to recruit and retain qualified workers. Allowing nontraditional tip pools does not alter these tradeoffs and thus would not make employers more able or willing to reduce nontipped employees' overall compensation. While employers that share tips with nontipped employees under this rule could reduce cash wages paid to those same employees, economic reality makes it unlikely that they would do so in a way that reduces overall compensation unless the employer was already able and willing to reduce the employees' overall compensation for reasons unrelated to this rule.

On the other hand, the nontraditional tip pools allowed under this rule give employers a new way to increase nontipped employees' overall compensation and thereby improve morale, productivity, recruitment, and retention. Some employers will do so by keeping nontipped employees' cash wages the same while allowing them to share in tips. Others may reduce cash wages but share tips that, on average, more than offset the reduction in cash wages so that the net effect on overall compensation will be positive. Regardless of the approach, a nontipped employee's overall compensation will increase.

Additionally, it would be difficult, if not impossible, to develop and enforce a prohibition on employers' adjusting a nontipped employee's cash wage when the employer complies with the FLSA's minimum wage and overtime requirements. Given the fungible nature of money and the innumerable lawful reasons why an employer might set, raise, reduce, or maintain an employee's compensation, it would be difficult to distinguish between lawful reductions to compensation and unlawful ''keeping'' of ''tips received by its employees.'' And although nontraditional tip pooling arrangements may affect pay decisions for nontipped workers who participate in a nontraditional pool—including by allowing employers to pay a lower cash wage to retain or hire an employee in the non-tipped position—the Department disagrees with commenters' claims that any benefit an employer receives from a mandatory tip pool constitutes ''keeping'' tips in violation of 3(m)(2)(B). Indeed, for decades in what is currently section 3(m)(2)(A), Congress has expressly authorized mandatory traditional tip pools that afford employers similar indirect benefits. Congress also implicitly authorized these nontraditional tip pools when it suspended the Department's regulations prohibiting them, undercutting any claim that such tip pools were actually prohibited by the CAA.

Ultimately, the Department believes that employers will rarely reduce the cash wages of nontipped employees who participate in a nontraditional tip pool. Economic realities limit employers' practical ability to reduce compensation significantly and simultaneously retain employees. Further, employers are constrained by wage and hour laws. Because back-of-the-house and other employees who receive tips through a nontraditional tip pool are not employed in an occupation in which they customarily and regularly receive tips, an employer may not take a tip credit for these workers, and must pay them at least the full Federal minimum wage. *See* 29 U.S.C. 203(m)(2), 206(a); *see also* S. Rep. No. 93–690, at 43 (1974); WHD Opinion Letter FLSA2008–18 (Dec. 19, 2008). And, in many workplaces, state and local laws require employers to pay nontipped workers a minimum wage that exceeds the Federal minimum wage.

Further, though employers could theoretically do so, an ability under the rule to decrease nontipped employees' wages is unlikely, by itself, to motivate an employer to adopt a nontraditional tip pool. An employer that currently takes a tip credit that institutes a nontraditional tip pool would lose the tip credit and be required to pay tipped workers at least the full minimum wage. Accordingly, the wage obligations required under a nontraditional tip pool could result in an increased transfer from employers to employees.

Finally, the Department declines to restore to § 531.52 the statement that a customer ''has the right to determine who shall be the recipient'' of a tip. This language is confusing in the context of section 3(m)(2) and the Department's tip regulations, which expressly permit employers to require employees to pool tips with each other regardless of which employee or employees the customer intended to receive the tip.

For these reasons, the Department finalizes the relevant changes to §§ 531.52, 531.54, and 531.59 as proposed. An employer may implement a nontraditional tip pool that includes tipped and nontipped employees, provided the pool does not include any employers, managers, or supervisors, and so long as the employer does not take a tip credit and pays the full minimum wage to both the tipped employees who contribute to the pool and the nontipped employees who receive tips from the pool.

C. Recordkeeping Requirements for Employers That Have Employees Who Receive Tips—Section 516.28

Section 516.28 imposes certain recordkeeping requirements on only those employers that take a tip credit. Among other things, § 516.28(a) requires

[10] Given this flexibility afforded to employers to reward nontipped employees, the Department need not resolve disagreement between commenters as to whether customers tip based only on the specific performance of one or more tipped employees or, instead, on an assessment of the customer's broader experience. The intention(s) behind individual customers' tipping likely varies depending on context, customer, and circumstances.

that the employer identify each employee for whom the employer takes a tip credit (*see* § 516.28(a)(1)) and maintain records regarding the weekly or monthly amount of tips received, as reported by the employee to the employer (*see* § 516.28(a)(2)). The employer may use information on IRS Form 4070 (Employee's Report of Tips to Employer) to satisfy the requirements under § 516.28(a)(2).[11]

The Department proposed revisions to the recordkeeping requirements in § 516.28 to improve consistent and effective administration of section 3(m)(2)(B). The revisions would require similar recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. Proposed § 516.28(b)(1) would require these employers to identify on their payroll records each employee who receives tips. Proposed § 516.28(b)(2) would also require those employers to keep records of the weekly or monthly amount of tips received by each employee, as reported by the employee to the employer (this may consist of reports from the employees to the employer on IRS Form 4070).

The Department received only two comments concerning the proposed recordkeeping requirements for employers that do not take a tip credit but still collect employees' tips to operate a mandatory tip pool. One commenter recommended that the Department require additional recordkeeping beyond the proposed requirements, while the other argued that the proposed recordkeeping was not required. The proposed recordkeeping requirements would help the Department determine whether employers are complying with their tip pooling obligations. Accordingly, the Department adopts the addition of §§ 516.29(b)(1) and 516.28(b)(2) as proposed.

D. Dual Jobs—Section 531.56(e)

i. Summary of the Final Rule

Section 531.56(e) addresses instances in which an employer employs an employee in both a tipped occupation, for which the employer may take a tip credit, and a non-tipped occupation, for which the employer may not take a tip credit. The Department proposed to amend § 531.56(e) to codify its recent subregulatory guidance regarding when an employer can take a tip credit for hours that a tipped employee performs non-tipped duties related to his or her tipped occupation. *See* WHD Opinion Letter FLSA2018–27 (Nov. 8, 2018); FAB No. 2019–2 (Feb. 15, 2019). Before it was amended to reflect this recent guidance, the FOH had stated that an employer may not take a tip credit for non-tipped duties related to an employee's tipped occupation if the time spent on those duties exceeds 20 percent of the employee's workweek. As described above, stakeholders and courts sometimes referred to this guidance as the ''80/20 rule,'' although it was not, in fact, a regulation. However, as the Department observed in the NPRM, this policy was difficult for employers to administer and led to confusion, in part because the guidance did not explain how employers could determine whether a particular non-tipped duty is ''related'' to the tip-producing occupation and in part because the monitoring surrounding the 80/20 approach on individual duties was onerous for employers.

The final rule, which (with the exception of two changes) adopts the changes to § 531.56(e) as proposed and clarifies, consistent with the Department's current guidance, that an employer may take a tip credit for all non-tipped duties an employee performs that meet two requirements. First, the duties must be related to the employee's tipped occupation; second, the employee must perform the related duties contemporaneously with the tip-producing activities or within a reasonable time immediately before or after the tipped activities. This updated approach to the related-duties standard is consistent with the plain text of the FLSA, which permits employers to take a tip credit based on whether an employee is engaged in a tipped ''occupation,'' not on whether the employee is performing certain kinds of duties within the tipped occupation.

To facilitate the administration of this approach, the final rule also complements the examples already in § 531.56(e) by adopting the Occupational Information Network (O*NET) as a source of guidance for determining when a tipped employee's non-tipped duties are related to his or her tipped occupation. As explained in more detail below, the final rule states that a non-tipped duty is presumed to be related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET. As the Department explained in the NPRM, O*NET is a comprehensive database of worker attributes and job characteristics, and is available to the public at *www.onetonline.org.* O*NET includes information on work activities for more than 900 occupations based on the Standard Occupational Classification system, a statistical standard used by Federal agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data.

ii. Comments Regarding the Updated Related Duties Approach

The Department received many comments expressing support for the proposed changes to § 531.56(e). Those commenters suggested that the updated related duties approach is a substantial improvement over the 80/20 approach because it is more consistent with the FLSA's text, structure, and purpose; and it is a more practical and administrable approach. *See, e.g.,* Inspire Brands; the Center for Workplace Compliance; Littler Mendelson.

On the first point, several commenters observed that the Department's proposal aligns the tip credit regulations with the plain language of the FLSA. For example, Littler stated that ''the FLSA says nothing about slicing an employee's duties into creditable and non-creditable categories, nor does it say anything about capping an employee's related duties at 20%.'' Instead, the statutory language ''suggests that all work within the tipped occupation is eligible for a credit—not just some arbitrary percentage of the work.'' Inspire Brands stated that the Department's proposal parallels other FLSA regulations. In particular, ''in the context of the FLSA's white collar exemptions, the Department long ago abandoned any notion that employees must spend a specific amount of time performing exempt work to qualify for an exemption.'' *See* 29 CFR 541.700(b) (''The amount of time spent performing exempt work can be a useful guide . . . , [but] time alone . . . is not the sole test'').[12] Inspire Brands also stated that the Department's proposal best approximates ''what Congress intended to achieve when it first amended the FLSA to include tip credit rules. Specifically, when Congress amended sections 203(m) and 203(t) in 1966, it did so to permit 'the continuance of existing practices with respect to tips' in the hotel and restaurant industries[,] S. Rep. No. 89–1487 (1966),'' and there was no evidence that employers in 1966 had an ''existing practice'' of paying servers or bartenders full minimum wages whenever related non-tipped duties exceeded a specific time limit.

[11] For information regarding IRS Form 4070, *see https://www.irs.gov/businesses/small-businesses-self-employed/tip-recordkeeping-and-reporting.*

[12] The Department maintains a proportion-of-time standard in other contexts. That standard is not appropriate in the dual jobs context because of the fluid nature of the work required in many tipped occupations.

On the second point, a number of commenters observed that the Department's proposal is easier to administer than the 80/20 approach. Employers noted they will no longer feel that they have to try to track their employees minute by minute or task by task. Nor will they have to wrestle with which duties are related to their employees' tipped work. Instead, they can refer to the list of tasks for that occupation in O*NET. An employer that does so may take a tip credit for the employee's entire shift (as long as any non-tipped duties are performed contemporaneously with or for a reasonable time immediately before or after tipped work). This approach increases compliance, reduces employer costs, and avoids litigation. *See, e.g.,* Littler; Center for Workplace Compliance; Inspire Brands; Bloomin' Brands; *cf. Pellon* v. *Bus. Representation Int'l, Inc.,* 528 F. Supp. 2d 1306, 1314 (S.D. Fla. 2007), *aff'd,* 291 F. App'x 310 (11th Cir. 2008) (describing the practical difficulties of administering the contrary 80/20 approach). Inspire Brands stated that under the proposed rule, employers will no longer need to devote significant time to monitoring duties performed by tipped employees or tracking employees' time spent on various specific duties, and ''in the place of such activities,'' supervisors will be able to spend ''more time tending to customers'' and helping servers and bartenders with non-tipped work, such as cleaning tables and stocking stations. Since a tipped employee ''would have otherwise performed such tasks,'' Inspire Brands also stated that tipped employees will be able to ''use that time savings to interact with customers and generate more in tips.'' Bloomin' Brands noted that the proposal remedied a ''particularly unrealistic unintended consequence'' of the existing regulation, which required employers to ''evaluate[ ] a tipped employee's entitlement to the tip credit on a task-by-task basis.'' Littler commended the Department's proposal for ''solv[ing] . . . in one stroke'' the monitoring problems associated with the 80/20 approach. The Center for Workplace Compliance stated that by ''not focusing on the specific amount of time spent on various tasks,'' the proposal ''will be easier to understand and will make compliance simpler.''

The Department also received several comments skeptical of or opposed to its proposal or recommending that the Department adopt a different approach. The National Restaurant Association, for example, suggested that the Department loosen the proposed limitations on non-tipped work and ''specify in the Final Rule that so long as [non-tipped] work occurs during the same shift or workday in which the employee engages in the main duties of a tipped occupation, the tip credit is available for the entire shift or workday.'' In contrast, several commenters, including those representing employees, 19 State Attorneys General, and Democratic Members of Congress, expressed concern that the updated related duties approach was not sufficiently stringent and would allow an employer to take a tip credit even when a tipped employee spends a substantial amount of time performing non-tipped work. These commenters urged the Department to return to the 80/20 approach (or adopt a more protective standard), and stated that a return to the 80/20 approach would be more workable than the proposed approach. They also argued that the Department has not sufficiently explained why the new standard would be more easily administrable than the 80/20 approach.

In addition, Senator Murray and Representative DeLauro asserted that the Department's proposal violates newly added section 3(m)(2)(B), which prohibits employers from keeping any portion of employees' tips for any purposes. They contended that to read section 3(m)(2)(B) as permitting a tip credit for any time an employee spends on non-tipped duties (whether related or unrelated) would produce an ''absurd result''; that is, it would allow employers to reassign non-tipped workers' duties to tipped workers and use tips to fulfill their minimum wage obligations for that work.

After considering the comments, the Department finalizes § 531.56(e)(2) as proposed (with the exception of one word that was changed for consistency). The Department disagrees that the updated related duties test allows an employer to take a tip credit when a tipped employee performs a substantial amount of non-tipped work and agrees with other commenters that a return to the 80/20 approach would be unwise for several reasons.

First, the updated related duties test does not permit employers to take a tip credit when tipped employees are, in fact, engaged in a non-tipped occupation. Instead, an employer may take a tip credit for non-tipped related duties only when those duties are performed ''contemporaneously with or for a reasonable time immediately before or after'' tipped work. As a result, when a tipped employee engages in a substantial amount of separate, non-tipped related duties, such that he or she has effectively ceased to be engaged in a tipped occupation, the tip credit is no longer available. Thus, an employer could not take a tip credit for the entire shift when a tipped employee spends ''five hours, or more'' of a 6-hour shift doing non-tipped work, *see* NELA, nor could it claim the tip credit for all hours worked by a dishwasher who picks up a few serving shifts per week, *see* Patriotic Millionaires. In these examples, the employee would not be performing the non-tipped related duties contemporaneously with or for a reasonable time immediately before or after performing tipped work. By contrast, an employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties. Rather, such duties are generally properly considered a part of the employee's tipped occupation, as is consistent with the statute.

Second, the Department disagrees that the proposed rule's language is not specific enough to furnish useful guidance. The requirement that related duties be performed contemporaneously with tipped duties is not difficult to administer in practice. For example, a barber who cleans the combs she is using as she is cutting a customer's hair is performing that duty during the same time as—contemporaneously with—the tip-producing work. The regulatory term ''contemporaneously'' does not necessarily mean that the employee must perform tipped and non-tipped duties at the exact same moment in time.

Moreover, the allowance for related duties performed ''for a reasonable time immediately before or after'' a tipped duty creates a sufficiently intelligible distinction between employees engaged in tipped occupations and non-tipped occupations. It is true that this limit does not create as bright a line as a firm cap on the amount of time an employee may spend on particular duties (although the 80/20 approach creates significantly greater uncertainty in other ways as discussed below). But the concept of reasonableness is a cornerstone of modern common law and is familiar to employers in a variety of contexts. *See, e.g., Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687–88 (1946) (factfinder may base FLSA back wages award on reasonable estimates); 29 CFR 825.302(a) (requiring employee to furnish notice of need for FMLA leave ''as soon as practicable''); 42 U.S.C. 12112(a), (b)(5)(A) (requiring reasonable accommodations for disabled employees); 29 U.S.C. 1108(b)(2), (c)(2) (ERISA fiduciaries are entitled to

receive reasonable compensation from a plan for services provided); 29 CFR 1604.11(a) (conduct is sexual harassment if it unreasonably interferes with an individual's work performance); *Burlington N. & S.F. Ry. Co.* v. *White,* 548 U.S. 53, 67–68 (2006) (Title VII prohibits employers from taking actions that a reasonable employee would find to be materially adverse); *Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742, 765 (1998) (employer is vicariously liable under Title VII unless it took reasonable steps to prevent and correct harassing behavior); *Green* v. *Brennan,* 136 S. Ct. 1769, 1776–78 (2016) (constructive discharge occurs when a reasonable employee would feel compelled to resign). Reasonableness balances a flexible accounting of circumstances with a sufficiently definite limit on acceptable conduct in those contexts. This flexible approach is appropriate to apply to the question of whether particular duties are a part of an employee's tipped occupation.

For example, consider the following scenario: A hotel bellhop continuously performs tipped duties such as carrying luggage to guests' rooms during a busy 8-hour shift and then works for an additional 2 hours performing related non-tipped duties such as cleaning, organizing, and maintaining bag carts in storage. The 2 hours of related non-tipped duties would not be ''for a reasonable time'' after the performance of tipped duties. Accordingly, the bellhop was engaged in a tipped occupation (bellhop) for 8 hours and a non-tipped occupation (cleaner) for 2 hours.

On the other hand, consider a second scenario in which this hotel employee works a 10-hour shift that is less busy. Because there are fewer hotel guests to assist, there are times during the bellhop's shift when he is not transporting bags for customers. Rather, every hour, he transports bags for customers for approximately 48 minutes and in between transporting bags, spends approximately 12 minutes performing related non-tipped duties, such as sweeping and mopping the entrance and cleaning bag carts. At the end of the shift, the employee in this scenario would have spent a total of 8 hours on tipped duties and 2 hours on non-tipped related duties—the same amounts as in the first scenario. But unlike in the first scenario, each period of related non-tipped duties would have been performed ''for a reasonable time immediately before or after'' the performance of tipped duties. As such, the employee would have been engaged in a tipped occupation (bellhop) for the entire 10-hour shift.

Even though the two above scenarios are different, the previous 80/20 approach drew no distinction between them because it focused solely on the precise ratio of time spent on tipped versus related non-tipped duties. But that focus obscures the relevant question of whether an employee is functionally engaged in one occupation or two. To answer this question, it is necessary to examine the context in which time is spent on tipped versus related non-tipped duties. If tipped and related non-tipped duties were performed at distinct times that never overlap, the employee would be engaged in two distinct occupations, even if the tipped-to-related-non-tipped ratio were more than 80/20. Conversely, if tipped and related non-tipped duties were performed alongside each other, the employee would be engaged in a single occupation, even if the tipped-to-related-non-tipped ratio were less than 80/20. The final rule's ''reasonable time'' standard considers the critical context in which tipped and related non-tipped duties are performed and focuses on the key issue of whether non-tipped duties form a substantial, segregable part of an employee's work. The 80/20 approach does not adequately address this issue.

Third, the guidance establishing the 80/20 approach did not adequately consider the practical difficulties in complying with a hard quantitative cap. To do so, employers attempted to track the amount of time employees spend performing duties that are not tip-producing but are related to each employee's tipped occupation. *See* Littler. But as several commenters explained, this proved extremely difficult, if not impossible. Inspire Brands, for example, stated that it implemented policies within its timekeeping system intended to allow employees to switch between different job codes when engaging in different duties, but found that doing so ''required substantial managerial resources'' and that it was impossible to ''keep track of tipped versus non-tipped duties at such a micro level.'' Another commenter representing employers stated, ''[t]imekeeping systems are not designed to deal with that level of granularity,'' nor ''do tipped employees' jobs allow them sufficient time to constantly clock in under a different code when finishing one task but before starting another.'' This is especially true ''when the tasks are often measured in seconds and are frequently part of a 'multi-tasking' approach.'' *See* Johnson Jackson. The practical difficulties of complying with the 80/20 approach are also evident in case law. For example, as the District Court for the Southern District of Florida observed in a decision affirmed by the Eleventh Circuit, the non-tipped duties performed by the employees at issue were so ''intertwined with indirect tip-producing tasks throughout the day'' that determining precisely how much time was spent on non-tipped related duties was indeed ''infeasible.'' *Pellon,* 528 F. Supp. 2d at 1314.

The updated related duties test, in contrast, does not require employers to attempt a minute-by-minute accounting of tipped employees' work to ensure that non-tipped related work does not exceed a quantitative cap. Each employee can instead perform the related, non-tipped work of his or her tipped occupation as needed in conjunction with his or her tipped work—either contemporaneously with or for a reasonable time immediately before or after the tipped work—and employers may confidently take a tip credit without precisely tracking the time spent by the employee as he or she moves between duties.

Fourth, the 80/20 approach was difficult to administer because it required employers to distinguish with precision between non-tipped duties (which were subject to the 20 percent cap) and tipped duties (which were not). In general, determining whether a duty is tip-producing is straightforward; WHD and courts ask whether the task involves direct interaction with customers. *See* WHD Opinion Letter FLSA2018–27 (referring to tipped duties as those ''involv[ing] direct customer service''); *Barnhart* v. *Chesapeake Bay Seafood House Assocs., L.L.C.,* No. CV JFM–16–01277, 2017 WL 1196580, at *6 (D. Md. Mar. 31, 2017) (''tasks that involve direct customer interaction would fall squarely into the tip-producing category, and tasks that are not customer-facing would not''); *Belt* v. *P.F. Chang's China Bistro, Inc.,* 401 F. Supp. 3d 512, 519–20 (E.D. Pa. 2019) (considering tasks that ''did not involve interacting with, nor serving food and beverages to customers'' to be untipped work). But the 80/20 approach requires precision, not generality, and, as commenters noted, the precise minute when an employee ceases to perform a tip-producing duty and begins performing a non-tipped, related duty (and vice-versa) is not always clear. *See, e.g.,* Inspire Brands. One court, for example, observed that applying the 80/20 approach to the plaintiff skycaps, who ''me[t] airline travelers at the curb and assist[ed] them with their luggage,'' would require it to determine, ''for instance, how far from the curb could

Plaintiffs even walk before they are too far to be considered tipped employees[.]'' *Pellon,* 528 F. Supp. 2d at 1315.

The updated related duties approach adopted in this final rule continues to distinguish between tip producing and non-tip producing duties. But because the updated test eschews a numerical analysis, it no longer requires precise parsing of whether tasks performed in close conjunction with one another are tipped duties or are non-tipped related duties that must be aggregated against a 20 percent cap. Instead, an employer may take a tip credit whether an employee is performing a tipped duty or is performing a related duty contemporaneously with or for a reasonable time immediately before or after tipped duties. In addition, as discussed further below, by using O*NET to identify duties related to the tipped occupation, courts will be able to better and more consistently apply the dual jobs regulation.

Fifth, the Department disagrees that the 80/20 approach is more administrable than the proposed rule. An 80/20 approach may well be easy to administer once the precise amount of time an employee has spent on various tasks has been tabulated, but it is the categorizing of tasks and tracking of each employee's time that makes the 80/20 approach difficult to administer.

Sixth, the updated related duties test better effectuates the text of section 3(m) than did the 80/20 approach. Section 3(m) permits employers to take a tip credit based on whether an employee is engaged in a tipped ''occupation,'' not whether the employee is performing certain kinds of duties or tasks within the tipped occupation. *See* 29 U.S.C. 203(m) and (t). Because the 80/20 approach imposed a hard cap on related non-tipped work, regardless of the context, applying this policy sometimes precluded an employer from taking the tip credit, even for time when a tipped employee arguably continued to be engaged in his or her tipped ''occupation.'' By permitting the tip credit for the time an employee spends performing non-tipped related duties contemporaneously with or for a reasonable time immediately before or after tipped work, the updated approach better approximates the point at which a tipped employee has ceased to be engaged in his or her tipped occupation and becomes engaged in a non-tipped occupation.

The updated related duties test also draws this line more effectively than the alternative proposed by the National Restaurant Association, which would permit an employer to take a tip credit for a full shift when an employee performs any tipped work during the course of the shift. For example, under that approach an employer could take a tip credit for the entire shift of a cook or dishwasher whom it had directed to perform a token amount of tipped work during the shift.[13] This is inconsistent with the commonsense understanding of the statutory term ''occupation'' in the FLSA, which permits an employer to take a tip credit only for the hours that an employee spends working in a tipped occupation, not for all hours worked by an employee who spends part of his or her time working in a tipped occupation. Removing the rigid 20 percent limitation, but permitting an employer to take a tip credit for time spent on non-tipped work only when that work is related to the tipped occupation and performed in conjunction with tipped work, reasonably interprets the statutory text while striking a balance that is both protective of employees and manageable for employers.

Seventh, it is not clear what time frame should be used to determine compliance with the 80/20 approach. As commenters noted, there was confusion with how the 80/20 approach would be determined on a workweek basis. Nor is it clear whether a workweek approach would, in the dual jobs context, produce results consistent with the FLSA's language that allows an employer to take a tip credit based on hours worked, not a workweek. Consider a casino that requires its card dealers to make periodic security rounds at their pit in order to allow other employees to focus fully on the tip-producing work of dealing. Over the course of an 8-hour shift each week, a card dealer is required to make six half-hour rounds monitoring gaming tables to ensure the security of the game (for a total of 3 hours over the course of her shift). The hours she spends monitoring gaming tables constitute more than 20 percent of her shift devoted to non-tipped related duties, but less than 20 percent of her workweek. If the workweek were applied as the standard of measurement, then the casino would be permitted to take a tip credit for the time spent on security rounds—even if that task consumed a substantial portion of the card dealer's designated work day that she could have devoted to tip-producing work. If the 80/20 approach were applied on a shift basis, the employer would be denied the tip credit for all eight hours the employee worked even though she was working in her tipped occupation for the entire shift. This lack of clarity and potential for unintended outcomes counsels against continued use of the 80/20 approach and in favor of the updated related duties test.

Eighth, the Department disagrees with some commenters' argument that the updated related duties approach violates section 3(m)(2)(B) by allowing employers to use tips to meet their minimum wage obligations for non-tipped work. Section 3 of the FLSA makes clear that an employer that takes a tip credit in compliance with section 3(m)(2)(A) does not ''keep'' tips in violation of section 3(m)(2)(B). This is because the two sections must be read in harmony with each other to avoid internal contradiction. Section 3(m)(2)(A) permits an employer to take a tip credit for ''tipped employee[s],'' defined under section 3(t) as those ''engaged in an occupation'' in which they ''customarily and regularly receive tips.'' When a tipped employee performs non-tipped duties related to the employee's tipped occupation either contemporaneously with or for a reasonable time immediately before or after the employee's tipped duties, the employee continues to be ''engaged'' in the tipped occupation under section 3(t). As a result, an employer that takes a tip credit for this time does so in compliance with section 3(m)(2)(A) and thus does not violate section 3(m)(2)(B).

As long as an employee's direct cash wage plus tips equals the minimum wage (and the employer has met the other criteria for taking a tip credit) section 6 of the FLSA is satisfied. If tipped employees do not receive sufficient tips to cover the minimum wage, the employer must supplement the cash wage payment. Compliance with the FLSA's minimum wage requirement, therefore, requires sufficient tip-generating activity to satisfy that minimum wage obligation. It is consistent with the FLSA for an employer to use tips to cover an employee's non-tipped work that is related to the tipped occupation, so long as that employee is engaged in a tipped occupation when performing the non-tipped work and earns at least the minimum wage for all hours worked. This is the exact result envisioned by the FLSA's scheme of satisfying the minimum wage with a mixture of a direct cash wage and tips.

Ninth, the Department disagrees with commenters' suggestions that a return to the 80/20 approach is appropriate given that some Federal courts have concluded the Department did not sufficiently explain its reasoning for the updated related duties test in its 2018

[13] The employee would also need to earn at least $30 per month in tips to meet the full criteria set forth in 29 U.S.C. 203(t).

subregulatory guidance. *See Williams* v. *Bob Evans Rests., LLC,* No. 18–01353, 2020 WL 4692504, at *9 (W.D. Pa. Aug. 13, 2020); *Reynolds* v. *Chesapeake & Del. Brewing Holdings, LLC,* No. 19–2184, 2020 WL 2404904 (E.D. Pa. May 12, 2020); *Sicklesmith* v. *Hershey Entm't & Resorts Co.,* No. 19–1675, 2020 WL 902544 (M.D. Pa. Feb. 25, 2020); *O'Neal* v. *Denn-Ohio, LLC,* No. 19–280, 2020 WL 210801 (N.D. Ohio Jan. 14, 2020); *Belt,* 401 F. Supp. 3d at 512; *Spencer* v. *Macado's, Inc.,* 399 F. Supp. 3d 545 (W.D. Va. 2019); *Cope* v. *Let's Eat Out, Inc.,* 354 F. Supp. 3d 976 (W.D. Miss. 2019); *Esry* v. *P.F. Chang's China Bistro, Inc.,* 373 F. Supp. 3d 1205 (E.D. Ark. 2019); *Berger* v. *Perry's Steakhouse of Ill., LLC,* No. 14–8543, 2019 WL 7049925 (N.D. Ill. Dec. 23, 2019); *Flores* v. *HMS Host Corp.,* No. 18–3312, 2019 WL 5454647 (D. Md. Oct. 23, 2019). *But see Shaffer* v. *Perry's Rests., Ltd.,* No. 16–1193, 2019 WL 2098116, at *1 (W.D. Tex. Apr. 24, 2019). The Department has now explained through this notice-and-comment rulemaking process its reasoning for replacing the 80/20 approach with the updated related duties test.

In sum, the Department adopts the changes to § 531.56(e) as proposed, with minor exceptions. First, to ensure that it is read consistently with § 531.59(b), which makes the tip credit available ''only for hours worked by the employee,'' the Department replaces the phrase ''amount of time'' in the fourth sentence of proposed § 531.56(e)(2) with ''hours.'' This correction for consistency does not change the meaning of the proposed language. Thus, the fourth sentence of § 531.56(e)(2) as adopted reads: ''An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.'' Second, as discussed in more detail below, the Department does not use O*NET's list of duties for an occupation to definitively limit the non-tipped duties that are related to that occupation. Rather, it refers to O*NET as the source of a list of non-tipped duties that are presumed to be related to a tipped occupation.

iii. Comments Regarding the Use of O*NET

The Department received several comments on proposed § 531.56(e)(3), which would use O*NET as a source for defining which non-tipped duties are related to a tipped occupation. Some commenters representing employers stated that using O*NET to define related duties would make the tip credit easier to administer. Littler, for example, stated that employers can ''simply check O*NET and assign the duties appearing on that list. Upon doing that, employers can take a tip credit for the employee's entire shift.'' The Center for Workplace Compliance also supported the proposed update to the regulations, stating that it would ''make compliance simpler.''

The Department also received several comments expressing concerns about using O*NET to define related duties. Some commenters, including Littler, Fisher Phillips, and NELP, expressed concern about the fact that O*NET's listings and identified job duties are subject to change and could ''even disappear in the future.'' Some commenters were concerned that the list of related duties could expand without limit or be manipulated, and some commenters recommended incorporating the O*NET definitions in place as of the date of this final rule. The National Restaurant Association and another commenter requested that the Department state that a task's appearance on O*NET is sufficient but not necessary to demonstrate that it is related to the occupation. Some commenters advocated for the Department to state that a tipped worker's related duties may encompass the duties of any tip-producing occupation within the same industry. Finally, State Attorneys General and some other commenters disputed whether further clarity regarding related duties was necessary, pointing to numerous court cases applying the Department's prior guidance, which did not comprehensively define related duties.

After considering the comments, the Department finalizes § 531.56(e)(3) largely as proposed but with an addition to account for concerns raised by commenters. Specifically, the Department adds the phrase ''presumed to be'' in two locations in § 531.56(e)(3), so that the section now states that a non-tipped duty is presumptively related to a tip-producing occupation if it is listed as a task of the tip-producing occupation in O*NET.

O*NET is the most current and comprehensive source of descriptive occupational information in the United States. O*NET has conducted extensive research and collects occupational data from multiple sources: Incumbent workers, occupational experts, employers, and trade and professional associations.[14] This multiple-method approach ensures high quality data, which facilitates O*NET's ability to identify new and emerging occupations in high-growth industries, and new and changing skills requirements in existing occupations. O*NET also uses a flexible, common language-based system to describe the world of work, making it accessible and understandable. In addition to serving job seekers and students, O*NET is used by state workforce agencies and the Department's Employment and Training Administration. Therefore, the Department believes that O*NET is the best way to give employers and employees clear, comprehensible information on related duties that will remain current, even in a changing economy. As noted by commenters, employers may simply check O*NET and take the tip credit for time spent by their employees performing the related duties appearing on the list.

Although some commenters expressed concern that O*NET will not be maintained in perpetuity, the Department has no intention of making O*NET unavailable at any time in the near future. O*NET has existed for more than 20 years and replaced a similar product, the *Dictionary of Occupational Titles,* which had existed since the 1930s. Should O*NET be discontinued, the Department would revisit the regulation. The Department also declines to incorporate O*NET's current list of tasks into the regulation because doing so would limit its usefulness with regard to both changing and emerging occupations. In addition, this would require the Department to expend substantial resources to identify which of the nearly 1,000 occupations in O*NET are tipped and which are not, without the benefit of stakeholder input in making these determinations.

Moreover, some commenters suggested that adopting O*NET by reference is problematic because automatic updates to the database would not go through notice and comment. However, in response to those comments and others concerned with changes to O*NET, and in recognizing that O*NET is updated using occupational data from various sources and may not accurately capture all related non-tipped duties, the Department is not adopting the O*NET listings as binding requirements. Rather, the Department is adopting O*NET only to assist in determining when a tipped employee's non-tipped duties are related to his or her tipped occupation. Specifically, the final rule explains that the Department will look to the tasks listed within the tip-producing occupation in O*NET as guidance on

[14] More detailed information about O*NET's data collection can be found at *https://www.onetcenter.org/ombclearance.html.*

whether a particular non-tipped duty is related to a tipped occupation. In other words, a non-tipped duty listed as a task of a tip-producing occupation in O*NET indicates that this duty can be treated as related to the tipped occupation. However, if industry-wide practices and trends demonstrate that a listed duty is not actually related to the tipped occupation, or that an unlisted duty is actually related to that occupation, then employers would not be able to rely on O*NET as a compliance assistance tool in that particular case. In sum, because any updates to O*NET will not result in additional legal requirements for affected parties, those changes are not subject to notice and comment.

Adopting fluctuating databases and standards as guidance is a common regulatory practice. For example, the Department refers to the *Dictionary of Occupational Titles,* O*NET's predecessor, when determining whether a public employee's volunteer activity is in the ''same type of services'' that he is paid to perform. *See* 29 CFR 553.103; FLSA2008–16 at *3 (Dec. 18, 2008) (clarifying that referring to O*NET for this determination is also acceptable). Other Federal agencies also use this approach in a variety of contexts. Social Security Administration regulations, for instance, refer to the Department's Dictionary of Occupational Titles, several Census publications, and the Occupational Outlook Handbook published by the Bureau of Labor Statistics to rule on benefits applications. *See* 20 CFR 416.966(d). Meanwhile, the Department of Education requires postsecondary schools to be accredited, but outsources those accrediting decisions to accrediting bodies, each of which makes its own accreditation rules. *See* 34 CFR part 602.

Although some commenters expressed concerns about potential manipulation of O*NET, the Department is confident that O*NET, upon which numerous stakeholders and governmental entities depend, is reliable. O*NET's data collection process ensures this reliability by incorporating, among other methods, surveying and random sampling, data cleaning, weighting, and the use of experts and occupational analysts.

Several commenters asked the Department to allow employers to deem as ''related'' to a tipped occupation additional duties that are neither included in the O*NET duties list for the occupation nor as examples in the regulation. The Department does not believe that this explicit approach is necessary. Under § 531.56(e)(3) as proposed, O*NET's list of non-tipped duties for an occupation was exhaustive; non-tipped duties were not related to the occupation unless they appeared in the O*NET list of duties. But under § 531.56(e)(3) as adopted, O*NET's lists are no longer exhaustive—O*NET lists duties that are presumed to be related to the tipped occupation, but that list is no longer exhaustive.

The Department disagrees with the commenters who dispute the need for further clarity regarding related duties. The extensive litigation over the 80/20 approach attests to the difficulty in determining whether particular non-tipped duties were related to an employee's tipped occupation. In many of these cases, courts declined to dismiss at the pleading stage the plaintiffs' claims that they performed unrelated duties for which they were improperly compensated because facts developed through discovery could ultimately show that those duties were related to the plaintiffs' tipped occupations. *See, e.g., Knox* v. *Jones Grp.,* 201 F. Supp. 3d 951, 959 (S.D. Ind. 2016) (citing precedent in reasoning that ''the division between permissible, related duties and impermissible, unrelated duties is not categorical''; the court would ultimately need to consider ''the qualitative and quantitative nature of the allegedly unrelated duties''); *Stokes* v. *Wings Inv., LLC,* 213 F. Supp. 3d 1097, 1102 (S.D. Ind. 2016) (''After conducting discovery, Defendant might be able to show that all of the duties identified by Plaintiff are related to her tipped occupation[.]''). Using O*NET to identify non-tipped duties that are presumed to be related to particular tipped occupations will make it simpler for employers, employees, and courts alike to distinguish related duties for which employers can take a tip credit from unrelated duties for which for which they cannot. Section 531.56(e)(3) as adopted may not furnish as much certainty as that section did as proposed, but it furnishes much more certainty than the regulatory text prior to this final rule, which identified few duties as related or unrelated. Additionally, the Department sought and received comment on the use of O*NET as a tool for identifying non-tipped duties that would be related to a tipped occupation, and the majority of commenters agreed that using the database would be useful and would provide much-needed clarity.

Finally, the Department declines commenters' requests to expand the related duties for a particular occupation beyond the O*NET tasks associated with that occupation to include any tasks associated with any other tipped occupation in the same industry. One commenter, by way of example, noted an overlap in a number of tasks shared by bartenders and servers. That example itself demonstrates why adopting that same-industry standard would be inappropriate. As reflected in O*NET, the North American Industrial Classification System (NAICS) places bartenders and servers within the Accommodation and Food Services industry—an industry that also includes occupations such as hotel maids and gaming dealers. It is not part of a hotel bartender's tipped occupation to equip rooms with linens, nor is it part of a hotel maid's tipped occupation to deal cards or collect wagers.

In light of these considerations, the Department finalizes the regulation to include the O*NET database as a source of non-tipped duties that are presumed to be related to a tipped occupation. The Department will continue to evaluate and refine its approach with respect to O*NET to address concerns that may arise.

E. Civil Money Penalties

i. Civil Money Penalties for Violations of Section 3(m)(2)(B)

Section 1201(b)(3) of the CAA amended FLSA section 16(e)(2) by adding new penalty language: ''Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed $1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).'' The Department's current enforcement policy states that the CAA amendments give the Department discretion to impose civil money penalties (CMPs) up to $1,100 [15] when employers unlawfully keep employee tips (including when they allow managers or supervisors to keep any portion of employees' tips). *See* FAB 2018–3. The Department currently follows its normal procedures for FLSA CMPs with regard to violations of section 3(m)(2)(B), ''including by determining whether the violation is repeated or willful.'' *See id.*

The Department proposed to incorporate this current guidance into the regulations: To use the same

[15] The CMP amounts in this rule are adjusted for inflation as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, sec. 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, sec. 701).

guidelines and procedures that it follows for assessing CMPs for violations of the minimum wage (section 6) and overtime (section 7) requirements of the FLSA as it does for violations of section 3(m)(2)(B). That means the Department proposed to assess CMPs for violations of section 3(m)(2)(B) only when it determines the violation is repeated or willful.

Some commenters generally supported the proposal regarding CMPs. The National Federation of Independent Business (NFIB) noted that the Department ''has taken into account the practical realities of labor compliance for small businesses'' by proposing to exercise its discretion by assessing CMPs for ''violations of section 3(m)(2)(B) only if committed repeatedly or willfully.'' Other commenters, such as the National Employment Lawyers Association, the National Women's Law Center, and NELP, opposed the proposal, arguing that because ''Congress used the words 'repeatedly or willfully' for minimum wage and overtime violations [in section 16(e)(2)] but omitted such words with respect to section 3(m)(2)(B),'' that ''demonstrates Congress' clear intent that civil penalties for this latter section do not require a repeated or willful violation.'' Senator Murray and Representative DeLauro stated that the relevant language ''clearly provides for a civil penalty . . . against 'any person' and for 'each' violation of the tip-protection language'' and argued that the Department's proposal was ''in direct contravention of this plain language.''

The CAA amendments state that ''[a]ny person who violates section 203(m)(2)(B) of this title shall be subject to a civil penalty not to exceed $1,100 for each such violation, *as the Secretary determines appropriate* . . . .'' 29 U.S.C. 216(e)(2) (emphasis added). The plain meaning of this language is that the Department has the discretion to determine when civil penalties are appropriate. While Senator Murray and Representative DeLauro's comment acknowledged that this language gives the Secretary discretion, they argued ''that discretion is to be used to determine the amount of the penalty up to $1,100 depending on the particular circumstances,'' rather than whether to assess a CMP at all. The Department does not see any inconsistency with its approach here. Effectively, the Department is exercising its discretion ''to determine the amount of the penalty . . . depending on the particular circumstances''; it has determined to assess a CMP of $0 for violations that are not repeated or willful. Section 216(e) also authorizes the Department to assess CMPs ''not to exceed'' a specified amount in the context of child labor, minimum wage, and overtime violations, and the Department has long used such discretion to determine the amount of penalties assessed in those areas. Unlike the CAA, however, those authorizations do not include the language ''as the Secretary determines appropriate.'' Therefore, the CAA language granting the Secretary discretion to determine the appropriateness of CMPs for violations of section 3(m)(2)(B) must refer to the Secretary's discretion to determine whether to assess CMPs at all.

The Department in the 2019 NPRM proposed to explain in the regulations its intent to exercise its discretion by limiting the assessment of CMPs to repeated and willful violations of section 3(m)(2)(B). Assessing CMPs only when an employer has repeatedly or willfully violated section 3(m)(2)(B), as opposed to doing so for a first-time violation, is consistent with how the Department enforces other FLSA wage violations. The Department has been assessing CMPs for repeated or willful violations of the minimum wage and overtime requirements of the FLSA using the guidelines in part 578 and procedures in part 580 for nearly three decades. This consistency of approach creates familiarity with the Department's requirements in both the public and in the Department's staff, in turn engendering consistency of compliance among employers and consistency in enforcement by the Department's staff, and ultimately improves public trust in the law and the Department's enforcement of it. For these reasons, the Department finalizes the revisions to the regulations at 29 CFR 578.1, 578.4, 579.1, 580.2, 580.3, 580.12, and 580.18 as proposed.

In addition to clarifying the circumstances under which it will seek CMPs, the Department proposed to revise 29 CFR 578.3 and 579.2 to clarify how it determines whether a violation is willful for purposes of assessing CMPs. *See* 84 FR 53964–65. As explained in the NPRM, the Department's definition of a ''willful'' violation in §§ 578.3 and 579.2 is based on *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988), which held that a violation is willful if the employer ''knew or showed reckless disregard'' for whether its conduct was prohibited by the FLSA. Sections 578.3(c)(1) and 579.2 incorporate this holding and state that ''[a]ll of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.'' The Department proposed no changes to this language.

Previous §§ 578.3(c)(2) and (3) and 579.2 stated that ''an employer's conduct shall be deemed knowing'' if the employer received advice from WHD that its conduct is unlawful. These sections further stated that ''an employer's conduct shall be deemed to be in reckless disregard'' of the FLSA's requirements ''if the employer should have inquired further'' into whether its conduct complied with the FLSA ''and failed to make adequate further inquiry.'' In the NPRM, the Department discussed concerns with this language that two appellate courts had identified. *See* 84 FR 53964–65 (discussing *Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030–32 (D.C. Cir. 2016), and *Baystate Alt. Staffing, Inc.* v. *Herman,* 163 F.3d 668, 680–81 (1st Cir. 1998)). Those courts noted the inconsistency between the regulation's language, on the one hand, that conduct ''shall be deemed knowing'' if the employer was previously advised by WHD that the conduct was unlawful, and its language, on the other hand, derived from *Richland Shoe* that WHD shall take into account ''[a]ll of the facts and circumstances surrounding the violation'' when determining willfulness. *See id.* The Department explained in the NPRM that it does evaluate all of the facts and circumstances surrounding a violation when litigating willfulness and that while an employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to prove willfulness, notwithstanding the regulatory language that appears to be to the contrary, it would not necessarily be so. *See* 84 FR 53965. In light of the appellate courts' opinions and the Department's acknowledgement of how it litigates willfulness, the NPRM proposed to revise §§ 578.3(c)(2)–(3) and 579.2 to clarify that, in considering all of the facts and circumstances, an employer's receipt of advice from WHD that its conduct is unlawful and its failure to inquire further regarding the legality of its conduct are each ''a relevant fact and circumstance'' in determining willfulness. *See* 84 FR 53978.

Some commenters supported the proposed revision. The Center for Workplace Compliance (CWC) explained that, under the proposal, ''advice from [WHD] about the lawfulness of conduct would be a relevant factor in determining willfulness, but would not automatically trigger the standard.'' CWC stated that the proposed revision ''more closely aligns with federal court precedent'' and is ''a more practical

interpretation that recognizes that employers should not be automatically subject to civil money penalties where legitimate questions exist concerning coverage of the FLSA.'' Fisher Phillips described the proposed revision as ''vague'' but asserted that ''there is [often] a legitimate dispute with the Department's position''—suggesting that an employer's receipt of advice from WHD that its conduct was unlawful should not always mean that the violation was willful.

Other commenters, such as Texas RioGrande Legal Aid and NELA, opposed the proposed revision. They described § 578.3(c) as stating ''longstanding, bright line rules'' that ''promote consistency in application and certainty for employers.'' They asserted that, ''in redefining willfulness, the Department is using the need to implement new worker protections in the FLSA as a pretext to weaken worker protections—in this case, far beyond the context of tipped occupations.'' They stated that the Department ''is misguided at best . . . to apply a vaguer, weaker standard to the new statutory provision at hand, and it is beyond the pale to apply the same proposal to minimum wage, overtime, and child labor standards that are not at issue in this rulemaking.'' They criticized the proposed revision as treating, in Texas RioGrande Legal Aid's words, ''an employer's decision to ignore advice from the Department as a mere factor to be considered rather than'' evidence that is ''sufficient'' to show that the violation was willful. Finally, NELA stated that the Department did not furnish adequate notice of its intent to change ''nontip'' portions of the regulations and that the NPRM's statement that § 578.3(c) contradicts Supreme Court precedent was considered and rejected when it was promulgated in 1992.

Having considered the comments, the Department adopts the proposed revisions with some modifications. The final rule revises § 578.3(c)(2) and corresponding language in § 579.2 to state that, in considering all of the facts and circumstances, an employer's receipt of advice from WHD that its conduct was unlawful can be sufficient to show that the violation is willful but is not automatically dispositive. This revision addresses concerns raised by commenters that one fact should not automatically result in a violation being willful but that the fact identified in § 578.3(c)(2) can be ''sufficient'' for a violation to be willful. In addition, the final rule deletes § 578.3(c)(3) and corresponding language in § 579.2. Upon further consideration, § 578.3(c)(3) does not just identify a fact and address how that fact impacts a willfulness finding (like § 578.3(c)(2) does). Instead, it addresses a scenario—should have inquired further but did not do so adequately—that is tantamount to reckless disregard. *See Davila* v. *Menendez,* 717 F.3d 1179, 1185 (11th Cir. 2013). Accordingly, revising § 578.3(c)(3) in the same manner as § 578.3(c)(2) did not seem helpful, and retaining § 578.3(c)(3) without modifying it would not resolve the concerns raised by the appellate decisions discussed above.

These modified revisions, including deleting § 578.3(c)(3) and corresponding language in § 579.2, resolve the tensions identified within the Department's regulations and with the Supreme Court's decision and comport more precisely with how the Department litigates willfulness than did the original proposed revisions. An employer's receipt of advice from WHD that its conduct is unlawful is a relevant, and may be a determining, factor regarding that employer's willfulness—but the law also requires examining all facts and circumstances surrounding the violation. Among other situations, proof that an employer should have inquired further into whether its conduct was in compliance with the Act and failed to make adequate further inquiry is only one indicium of reckless disregard. Finally, the Department gave adequate notice of its intent to revise §§ 578.3(c)(2)–(3) and 579.2, and the *Rhea Lana* and *Baystate* decisions give a sufficient basis for reconsidering its regulations on willfulness.

F. Additional Proposed Regulatory Revisions

In the NPRM, the Department proposed to revise § 531.50 to reflect the language that the CAA added to the FLSA. The Department also proposed to update §§ 531.50, 531.51, 531.52, 531.55, 531.56, 531.59, and 531.60 to reflect the new statutory citation to the FLSA's existing tip credit language, previously cited as section 3(m), as section 3(m)(2)(A). Additionally, the Department proposed to clarify references in §§ 531.56(d), 531.59(a) and (b), and 531.60 to the amount an employer can take as a tip credit under current section 3(m)(2)(A). The Department's regulations currently state that an employer can take a tip credit for each employee equal to the difference between the minimum wage required by section 6(a)(1) of the FLSA (currently $7.25 an hour) and $2.13 an hour. To ensure that the Department's regulations clearly state employers' obligations under the FLSA, the Department proposed to revise §§ 531.56(d), 531.59(a) and (b), and 531.60 to state, consistent with the text of the statute, that the tip credit permitted by section 3(m)(2)(A) is equal to the difference between the Federal minimum wage and the cash wage paid by the employer. That cash wage must be at least $2.13 per hour, but the statute does not preclude an employer from paying more.

The Department received little comment on these proposed regulatory revisions, which merely update the regulations to reflect the new statutory language and citations added by the CAA amendments and clarify other references consistent with the statutory text. Accordingly, the Department adopts as proposed the updates to §§ 531.50, 531.51, 531.52, 531.55, 531.56, 531.59, and 531.60 to reflect the new statutory citation to the FLSA's existing tip credit language, previously cited as section 3(m), as section 3(m)(2)(A) and to revise § 531.50 to reflect the language that the CAA added to the FLSA. Additionally, the Department adopts as proposed the clarifying references in §§ 531.56(d), 531.59(a) and (b), and 531.60 to the amount an employer can take as a tip credit under section 3(m)(2)(A).

In the NPRM, the Department proposed to amend the tip language of its Executive Order 13658 regulations. Executive Order 13658 raised the hourly minimum wage paid by contractors to workers performing work on or in connection with covered Federal contracts. *See* E.O. 13658, 79 FR 9851 (Feb. 12, 2014). The Executive order also established a tip credit for workers covered by the Order who are tipped employees pursuant to section 3(t) of the FLSA. Section 4(c) of the Executive Order encourages the Department, when promulgating regulations under that Order, to incorporate existing ''definitions, procedures, remedies, and enforcement processes'' from a number of laws that the agency enforces, including the FLSA, and the Department's current Executive Order 13658 regulations are modeled after the Department's current FLSA tip regulations. The Department proposed to amend § 10.28, consistent with its proposed rescissions to portions of the Department's FLSA regulations, to remove restrictions on an employer's use of nontraditional tip pools and to otherwise align those regulations with the authority in the Executive Order. The Department also proposed to amend § 10.28, consistent with its proposed revisions to § 531.56(e), to reflect its current guidance on when an employee

performing non-tipped work constitutes a tipped employee for the purposes of 3(t). The Department received few comments on the proposal to amend § 10.28. The Center for Workplace Compliance indicated that they ''support DOL's corresponding revisions to the regulations implementing the federal contractor minimum wage.'' The Department continues to believe that since many Federal contractors also are subject to the FLSA regulations proposed, it is important to align the corresponding regulations in part 10. Accordingly, in this final rule the Department adopts § 10.28 as proposed, with these exceptions: As with the fourth sentence in § 531.56(e)(2), the Department replaces the phrase ''amount of time'' in the fourth sentence of § 10.28(b)(2)(ii) with ''hours,'' so that sentence as adopted reads: ''An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.'' Additionally, as with the changes to § 531.56(e)(3), the Department adds the phrase ''presumed to be'' in two locations in § 10.28(b)(2)(iii).

The Department attempted to use gender-neutral phrasing in its proposed regulations. Texas RioGrande Legal Aid appreciated the Department's efforts but noted some omissions. In response, the Department has made revisions to §§ 531.54(a) and 531.56(a), (c), and (e) to make these sections gender-neutral.

Finally, in this final rule the Department corrects a typographical error in the NPRM, identified by the NFIB. In the authority section of the regulatory text, the Department corrects the authority to cite Title 5, not Title 4. The Department also corrects an additional typographical error in § 10.28(b)(2)(iii) referencing examples described in paragraph (b)(2)(ii).

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the impact of paperwork and other information collection burdens imposed on the public. This final rule will revise the existing information collection burden estimates previously approved under OMB control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) because employers may choose to pay the full Federal minimum wage and not take a tip credit, and collect tips to operate an employer-required, mandatory tip pooling arrangement, thereby triggering the new recordkeeping requirement in § 516.28(b).

In accordance with the PRA, the Department solicited comments on the FLSA information collections in the NPRM published October 8, 2019, *see* 84 FR 53956, as the NPRM was expected to impact these collections. 44 U.S.C. 3506(c)(2). The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the FLSA information collections, in accordance with 44 U.S.C. 3507(d). The Department opened OMB control number 1235–0NEW for this action and OMB assigned control number 1235–0030 for this action.[16] As the PRA requires, the Department submitted the information collection revisions to OMB for review to reflect changes that would result from this final rule. The Department reports a slight burden increase for employers keeping records concerning employees who receive tips. OMB asked the Department to resubmit the information collection request upon promulgation of the final rule and after considering public comments on the proposed rule.

Circumstances Necessitating Collection: FLSA section 11(c) requires covered employers to make, keep, and preserve records of employees and their wages, hours, and other conditions of employment, as prescribed by regulation. The Department's regulations at 29 CFR part 516 establish the basic FLSA recordkeeping requirements. Section 516.28(a) currently requires employers to keep certain records concerning tipped employees for whom the employer takes a tip credit under the FLSA. Among other things, § 516.28(a) requires that the employer identify each employee for whom the employer takes a tip credit, identify the hourly tip credit for each such employee, and maintain records regarding the weekly or monthly amount of tips received (which may consist of IRS Form 4070) as reported by the employee to the employer. The new recordkeeping regulations found at § 516.28(b)(1) and (2) require an employer that does not take a tip credit, but that collects employees' tips to operate a mandatory tip pooling arrangement, to indicate on its pay records each employee who receives tips and to maintain records of the weekly or monthly amount of tips that each such employee receives (this may consist of reports that the employees make to the employer on IRS Form 4070). The increase in the number of respondents and, accordingly, the burden hours associated with records to be kept under § 516.28(b)(1)–(2), is attributable to an expanding economy increasing the number of establishments employing individuals who receive tips since the last PRA revision of this recordkeeping requirement.

Public Comments: The Department sought public comments regarding the burdens imposed by information collections contained in the NPRM. The Department received few comments relevant to the PRA. The Pennsylvania Department of Labor and Industry expressed support for the § 516.28 requirement ''that employers who take a tip credit must record which employees are tipped employees.''

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information-collection contained in the NPRM to OMB for review under the PRA for control number 1235–0030. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised FLSA information collections to OMB for approval, and intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at *http://www.reginfo.gov* or by contacting the Wage and Hour Division as shown in the For Further Information Contact section of this preamble.

Total annual burden estimates, which reflect both the existing and new responses for the recordkeeping information collection, are summarized as follows:

Type of Review: Revision of a currently approved collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Records to be Kept by Employers—Fair Labor Standards Act.

OMB Control Number: 1235–0030.

Affected Public: Private Sector: Businesses or other for-profits, farms, and not-for-profit institutions; State, local and tribal governments; and individuals or households.

Estimated Number of Respondents: 3,763,890 (29,296 from this rulemaking).

[16] The NPRM for this final rule cited 1235–0NEW as the OMB control number for revising information collection burdens previously approved under control number 1235–0018. A different control number was needed for this action because a revision of 1235–0018 was already under review for another of the Department's rulemakings. The creation of a new control number allowed OMB to process this action. On December 10, 2019, OMB issued a notice of action assigning new control number 1235–0030. Upon conclusion of this action by OMB, the Department will submit a nonsubstantive change request to combine the control numbers 1235–0018 with 1235–0030.

Estimated Number of Responses: 43,709,493 (703,104 from this rulemaking).

Estimated Burden Hours: 983,359 hours (1,953 from this rulemaking).

Estimated Time per Response: Various (unaffected by this rulemaking).

Frequency: Various (unaffected by this rulemaking).

Other Burden Cost: $0.

V. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improved Regulation and Regulatory Review

A. Introduction

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.[17] Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. Because the annual effect of this rule would be greater than $100 million, this rule is economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and states that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

B. Economic Analysis

i. Introduction

In March 2018, Congress amended section 3(m) and sections 16(b), (c), and (e) of the FLSA to prohibit employers from keeping their employees' tips, to permit recovery of tips that an employer unlawfully keeps, and to suspend the operations of the portions of the 2011 final rule that restricted tip pooling when employers do not take a tip credit. This analysis examines the economic impact associated with the Department's implementation of those amendments. Specifically, it examines the possible transfers resulting from employers who implement a new nontraditional tip pool that includes ''back-of-the-house'' employees (*i.e.,* janitors, chefs, dishwashers, and food-preparation workers) who formerly either did not claim a tip credit and previously did not have a mandatory tip pool, or who only had a traditional tip pool limited to ''front-of-the-house'' employees. The Department is also amending its ''dual jobs'' regulation to replace the 80/20 approach with the updated related duties test. The Department qualitatively discusses potential economic impacts of this update but does not quantify them due to lack of data and the wide range of possible responses by market actors that cannot be predicted with specificity. Commentators provided neither needed data nor a reliable quantitative estimate of economic impacts that the Department could use. The Department quantified rule familiarization costs and qualitatively discusses additional costs, cost savings, and benefits. To perform the quantitative analysis, the Department compared the impact relative to a pre-statutory baseline (*i.e.,* before Congress amended the FLSA in March 2018). If the Department were to look at economic impacts relative to a post-statutory baseline, there would likely be no impact of the tip pooling aspect of the final rule, aside from rule familiarization costs, as the transfers arise from the changes put forth in the statute.

The economic analysis covers employees in two industries and in two occupations within those industries. The two industries are classified under the North American Industry Classification System (NAICS) as 722410 (Drinking Places (Alcoholic Beverages)) and 722511 (Full-service Restaurants); referred to in this analysis as ''restaurants and drinking places.'' The two occupations are classified under Bureau of Labor Statistics (BLS) Standard Occupational Classification (SOC) codes SOC 35–3031 (Waiters and Waitresses) and SOC 35–3011 (Bartenders).[18] The Department understands that there are other occupations beyond servers and bartenders with tipped workers, such as SOC 35–9011 (Dining room and Cafeteria Attendants and Bartender Helpers), SOC 35–9031 (Hosts and Hostesses, Restaurant, Lounge, and Coffee Shop), and others, as well as other industries that employ workers who receive tips, such as NAICS 722515 (snack and nonalcoholic beverage bars), NAICS 722513 (limited service restaurants), NAICS 721110 (hotels and motels), and NAICS 713210 (casinos). Nonetheless, the Department concentrates its analysis on the above two occupations because they constitute a large percentage of total tipped workers and more than half (56.5 percent) of the workers in these occupations receive tips (*see* Table 1 for shares of workers in these occupations who report receiving tips).

The analysis presents its estimates over a 10-year time horizon. When summarizing the costs and transfers of the rule, the Department presents the first year's impact, as well as the 10-year annualized costs and transfers with 3 percent and 7 percent discounting.[19]

Since the Department's analysis relies on data collected before 2020, it reflects the state of the economy prior to the COVID–19 pandemic. The Department acknowledges that data on tipped workers will possibly look different following the economic effects of the pandemic, and discusses potential effects here.

The COVID–19 pandemic has greatly affected the restaurant industry and tipped workers. The unemployment rate for the Food Services and Drinking Places industry jumped from 5.7 percent in February 2020 to 35.4 percent in April 2020. Although the rate has fallen by more than half of its peak, 16.4 percent of these workers were still unemployed as of September 2020.[20] Even as restaurants begin to reopen across the nation, and tipped workers return to their jobs, uncertainty exists

[17] 58 FR 51735 (Sept. 30, 1993).

[18] In the Current Population Survey, these occupations correspond to Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110). The industries correspond to Restaurants and Other Food Services (Census Code 8680) and Drinking Places, Alcoholic Beverages (Census Code 8690).

[19] Discount rates are directed by OMB. *See* Circular A–4, OMB (Sept. 17, 2003).

[20] BLS Current Population Survey, *https://data.bls.gov/timeseries/LNU04034262/?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true.*

regarding the long-term impacts. Even in areas with limited pandemic-related restrictions, business may be affected as some customers may remain reluctant to eat at restaurants due to the pandemic. As a result, employers may not be hiring or staffing at pre-pandemic levels, at least in the near term. In a survey of full service restaurant operators conducted by the National Restaurant Association from August 26 through September 1, 2020, staffing plans were mixed—26 percent of operators said they plan to add employees and 25 percent said they plan to lay off or furlough employees.[21] During the short term, as the economic effects of the pandemic linger, the labor market for tipped workers will be less predictable, and aggregate tips may be reduced, though the amount of tips per employee may or may not be impacted. Because unemployment in tipped industries is still higher than it was at the beginning of the year, the transfer estimate for the first year of the RIA's time horizon could be reduced. The Department lacks data to determine how much the transfer estimate will be reduced, and believes that this effect will be temporary.

The Department acknowledges these changes in the industry but believes that the justifications for the Rule remain as strong as—if not more so than—before the pandemic. More flexibility in compensation and labor allocation will help businesses retain workers and maintain capacity. Further, the increased cooperation and efficiency that the final rule promotes will help businesses maintain quality of service—and therefore support tipped-employee compensation and provide increased certainty to tipped workers—at a time when the industry as a whole is struggling.

ii. Estimated Transfers

Under this regulation, transfers could arise when employers that already pay the full Federal minimum wage and previously did not have a mandatory tip pool or had only a traditional tip pool institute nontraditional tip pools in which tipped employees, such as servers and bartenders, are required to share tips with employees who do not customarily and regularly receive tips, such as cooks and dishwashers. The Department believes that including back-of-the-house workers in tip pools could help promote cooperation and collaboration among employees. This increased cooperation and flexibility could lead to Pareto improvement: Efficiencies that allow employers to engage in tip-pooling without decreasing wages for anyone while increasing wages for some. However, even in the event that tip-pooling requires a transfer from the front-of-the-house, directly observable transfers will mainly occur among employees because the statute prohibits employers from keeping employee tips.

It is possible that there will be subsequent transfers after the initial tip pooling and redistribution takes place. Because back-of-the-house workers could now be receiving tips, employers may offset this increase in total compensation by reducing the direct wage that they pay back-of-the-house workers (as long as employers do not reduce the employees' direct wages below the applicable minimum wage), and such an outcome is what is modeled to produce the quantitative estimate of transfers. However, there are reasons to believe this may not be common in practice. Consider a pastry chef currently making $20 per hour. The Department assumes that, in practice, this established wage would restrict an employer's ability to reduce the total compensation wage (*i.e.,* wages plus pooled tips) below that rate. The chef, who last year was paid $20 per hour in Georgia, could in theory, with this rule, have her direct wage reduced to the Federal minimum wage of $7.25, with tip pooling adding to that wage and bringing the total take-home to near or above $20. However, even if the pooled tips amounted to $15 per hour, the minimum wage would prevent the employer from reducing her direct wage to $5. If pooled tips account for only $3 per hour on average, it is unlikely the employer would be able to reduce her hourly wage rate below $17, more than twice as much as is allowed by law, because of the market effects impacting wages.

A number of commenters raised the prospect that employers could use tip pooling to ultimately transfer tips to themselves by reducing the base wages of back-of-the-house workers since those workers would now be earning tips to offset the wage reduction. However, employers in states that permit tip credits—which is a majority of states—may already transfer to themselves up to the full amount of the tip credit (up to $5.12 per hour) directly from front-of-the-house workers without first initiating a system of tip pooling for back-of-the-house workers by taking the credit and paying those front-of-the-house workers the lower direct cash wage (at least $2.13 per hour).

The analysis assumes that employers will institute nontraditional tip pools with employees who do not customarily and regularly receive tips only in situations that are beneficial to them. Accordingly, it assumes that employers will include back-of-the-house employees in their tip pools only if they believe that they can do so without losing their front-of-the-house staff and without reducing the overall quality of the customer experience. To attract and retain the tipped workers that they need, employers must pay these workers as much as their ''outside option,'' which is the hourly earnings that they could receive from another employer in a non-tipped job with a similar skill level requirement to their current position. For each tipped worker, the Department assumes a transfer could occur only if their total earnings, including tips, is greater than the predicted outside-option wage from a non-tipped job. While the Department identified serious methodological faults with a commenter's outside option analyses, which are discussed later in this document, the approach comports in principle to expected market behavior, and therefore the Department built an outside option calculation into this analysis to frame the potential upper bound of total transfers.

The transfer calculation herein excludes workers who are paid a direct cash wage below the full FLSA minimum wage of $7.25, because under the amended statute and the Department's rule, employers who take a tip credit are still subject to section 3(m)(2)(A)'s restrictions on tip pools. Some employers may begin paying their tipped workers a direct cash wage of at least the full FLSA minimum wage to institute a tip pool with back-of-the-house workers. The potential transfer due to this scenario is not quantified due to uncertainty regarding how many employers would choose to no longer use the tip credit. Choosing to no longer take a tip credit would require a change to employers' payroll systems and methods of compensation to which employers and employees are accustomed, and it would increase the employers' out of pocket payroll expenses, both of which could discourage employers from making this change.

The transfer calculation also excludes workers who are paid a direct cash wage by their employers, exclusive of any tips received, that exceeds the applicable minimum wage (either the Federal or applicable state minimum wage). The Department assumes that because these employers are already paying more than required under applicable law for these

[21] National Restaurant Association, Restaurant Employment Recovery is in Danger of Stalling, Sept. 4, 2020, *https://restaurant.org/articles/news/restaurant-employment-recovery-is-in-danger.*

workers, any reduction in compensation would result in these workers leaving that employment. These employees would therefore not have their tips redistributed through a nontraditional tip pool.

The Department does not attempt to definitively interpret individual states' laws. However, some servers and bartenders work in states that either prohibit mandatory tip pooling or impose stricter limits on who can participate in a mandatory tip pool than are in this rule,[22] or in states in the Tenth Circuit where, as a result of *Marlow,* 861 F.3d at 1159, employers that do not take a tip credit were already permitted to institute nontraditional tip pools at the time Congress amended the FLSA. The transfer estimate excludes tipped employees in these states whom the changes in this rule may not affect.[23] The Department first determined total transfers for all servers and bartenders using the method described above. The Department then excluded workers whom the changes would not affect due to their respective state laws. Finally, the Department further reduced the total transfer amount to account for the uncertain number of employers who are expected to decline to change their tip pooling practices because it will require changes to practices to which employers and employees are accustomed, including payroll and recordkeeping changes.

To compute potential tip transfers, the Department used individual-level microdata from the 2017 Current Population Survey (CPS), a monthly survey of about 60,000 households that is jointly sponsored by the U.S. Census Bureau and BLS. Households are surveyed for four months, excluded from the survey for eight months, surveyed for an additional four months, and then permanently dropped from the sample. During the last month of each rotation in the sample (month 4 and month 16), employed respondents complete a supplementary questionnaire in addition to the regular survey. These households and questions form the CPS Merged Outgoing Rotation Group (CPS–MORG) and give more detailed information about those surveyed.[24] Because the CAA went into effect in March 2018, the Department used CPS data from 2017, the most recent full year of data that predates the CAA, to calculate the transfer. In this analysis, 2017 wage data are inflated to 2019 dollars using the GDP deflator. For purposes of rule familiarization costs, the Department used the most recent year of data (2019) to reflect employers reading the rule after it is published.

The CPS asks respondents whether they usually receive overtime pay, tips, and commissions (OTTC), which allows the Department to estimate the number of bartenders and wait staff in restaurants and drinking places who receive tips.[25] CPS data are not available separately for overtime pay, tips, and commissions, but the Department assumes very few bartenders and wait staff at restaurants and drinking places receive commissions, and the number who receive overtime pay but not tips is also assumed to be minimal.[26] Therefore, when bartenders and wait staff responded affirmatively to this question, the Department assumed that they receive tips. Based on CPS data, the Department identified 2,546 observations (unique data points), which based on the survey's methodology represent 2.2 million individuals, of respondents claiming to fall in the two categories of Waiters and Bartenders. The number of observations decreases as the analysis refines the universe of applicable employees.

All data tables in this analysis include estimates for the year 2017 as the baseline. To identify the relevant population, the Department removed from the analysis workers who do not receive tips. Table 1 presents the estimates of the share of bartenders and wait staff in restaurants and drinking places who reported that they usually earned OTTC in 2017. Approximately 64 percent of bartenders and 55 percent of wait staff reported usually earning OTTC in 2017. These numbers include workers in all states, including states where the changes in this rule are assumed not to affect. These numbers also include workers who are paid a direct cash wage below the full FLSA minimum wage of $7.25 (that is, employees whose employers are using a tip credit). Both these populations are excluded from the transfer calculation. Only 56.5 percent of workers in these occupations report earning tips, which may be low and could result in an underestimation of transfers. The Department did not adjust for this possibility because it lacked the data to do so and also estimates there is sufficient downward pressure on the total transfer estimate due to other factors that were not adjusted for. Discussions of these can be found in section V.B.ii (Estimated Transfers and Outside-Option Wage Calculation).

TABLE 1—SHARE OF BARTENDERS AND WAITERS/WAITRESSES IN RESTAURANTS AND DRINKING PLACES WHO EARNED OVERTIME PAY, TIPS, OR COMMISSIONS

Occupation	Total workers (millions)	Workers responding to question on OTTC (millions)	Report earning OTTC	
			Workers (millions)	Percent
Total	2.21	1.92	1.08	56.5
Bartenders	0.34	0.27	0.17	63.5

[22] *See, e.g.,* Minn. Stat. sec. 177.24, subd. 3 (''No employer may require an employee to contribute or share a gratuity received by the employee with the employer or other employees or to contribute any or all of the gratuity to a fund or pool operated for the benefit of the employer or employees.''); Mass. Gen. Laws ch. 149, sec. 152A(c) (''No employer or person shall cause, require or permit any wait staff employee, service employee, or service bartender to participate in a tip pool through which such employee remits any wage, tip or service charge, or any portion thereof, for distribution to any person who is not a wait staff employee, service employee, or service bartender.'')

[23] Arkansas, California, Colorado, Delaware, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Utah, and Wyoming.

[24] *See* Current Population Survey, U.S. Census Bureau, *https://www.census.gov/surveys/cps.html* (last visited Aug. 13, 2019); CPS Merged Outgoing Rotation Groups, NBER, *http://www.nber.org//.html* (last visited Aug. 13, 2019).

[25] This question is asked only of hourly employees and nonhourly workers are consequently excluded from the transfer estimate. The Department did not quantify transfers from nonhourly workers because without knowing the prevalence of tipped income among nonhourly workers, the Department cannot accurately estimate potential transfers from these workers. However, the Department believes the transfer from nonhourly workers will be small because only 13 percent of wait staff and bartenders in restaurants and drinking places are nonhourly workers, whom the Department believes may have a lower probability of receiving tips.

[26] According to BLS Current Population Survey data, in 2017, workers in service occupations worked an average of 35 hours per week. *See https://www.bls.gov/cps/aa2017/cpsaat23.htm.*

TABLE 1—SHARE OF BARTENDERS AND WAITERS/WAITRESSES IN RESTAURANTS AND DRINKING PLACES WHO EARNED OVERTIME PAY, TIPS, OR COMMISSIONS—Continued

Occupation	Total workers (millions)	Workers responding to question on OTTC (millions)	Report earning OTTC	
			Workers (millions)	Percent
Waiters/Waitresses	1.88	1.65	0.91	55.4

Source: CEPR, 2017 CPS–MORG.
Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).
Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

Of the 1.08 million bartenders and wait staff who receive OTTC, only 688,000 reported the amount received in OTTC. Therefore, the Department imputed OTTC for those workers who did not report the amount received in OTTC. As shown in Table 2, 54 percent of bartenders' earnings (an average of $281 per week) and 49 percent of waiters' and waitresses' earnings (an average of $238 per week) were from overtime pay, tips, and commissions in 2017. For workers who reported receiving tips but did not report the amount, the ratio of OTTC to total earnings for the sample who reported their OTTC amounts (54 or 49 percent) was applied to their weekly total income to estimate weekly tips. Nonhourly workers, who are not asked the question on receipt of OTTC, are assumed to not be tipped employees.

TABLE 2—PORTION OF INCOME FROM OVERTIME PAY, TIPS, AND COMMISSIONS FOR BARTENDERS AND WAITERS/WAITRESSES IN RESTAURANTS AND DRINKING PLACES

Occupation	Those who report the amount earned in OTTC			
	Workers	Average weekly earnings	Average weekly OTTC	Percent of earnings attributable to OTTC
Total	688,171	$486.95	$244.48	50
Bartenders	105,787	521.51	280.61	54
Waiters/Waitresses	582,384	480.67	237.91	49

Source: CEPR, 2017 CPS–MORG, inflated to $2019 using the GDP deflator.
Occupations: Bartenders (Census Code 4040) and Waiters and Waitresses (Census Code 4110).
Industries: Restaurants and other food services (Census Code 8680) and Drinking places, alcoholic beverages (Census Code 8690).

1. Outside-Option Wage Calculation

As discussed above, to determine potential transfers of tips, the Department assumes that employers will redistribute tips from tipped employees to employees who are not customarily and regularly tipped in a nontraditional tip pool only if the tipped employee's total earnings, including the tips the employee retains, are greater than the ''outside-option wage'' that the tipped employee could earn in a non-tipped job. To model a worker's outside-option wage, the Department used quantile regression analysis to attempt to predict the wage that these workers would earn in a non-tipped job. Hourly wage was regressed on age, age squared, age cubed, education, gender, race, ethnicity, citizenship, marital status, veteran status, metro area status, and state for a sample of non-tipped workers.[27] The Department restricted the regression sample to workers earning at least the Federal minimum wage of $7.25 per hour (inclusive of OTTC), and those who are employed. This analysis excludes states where the law prohibits non-tipped back-of-the-house employees from being included in the tip pool and states governed by the *Marlow* decision.

In calculating the outside-option wage for tipped workers, the Department developed a model that defined the comparator sample for tipped workers in two different ways: (1) All non-tipped workers (*i.e.,* workers who are either not waiters, waitresses, or bartenders, or do not work in restaurants or drinking places), and (2) Non-tipped workers in a set of occupations that are likely to represent outside options. The Department selected the list of relevant occupations by exploring the similarity between the knowledge, activities, skills, and abilities required by the occupation to that of servers and bartenders. The Department searched the Occupational Information Network (O*NET) system for occupations that share important similarities with waiters and waitresses and bartenders—the occupations had to require ''customer and personal service'' knowledge and ''service orientation'' skills.[28] The list was further reduced by eliminating occupations that are not comparable to the waitress and bartender occupations in terms of education and training, as waiter and waitress and bartender occupations do not require formal education or

[27] For workers who had missing values for one or more of these explanatory variables we imputed the missing value as the average value for tipped/non-tipped workers.

[28] For a full list of all occupations on O*NET, *see https://www.onetcenter.org/taxonomy/2010/updated.html.*

training.[29] *See* Appendix Table 1 for a list of these occupations.[30]

The transfer estimates presented in this analysis use this sample of limited occupations to predict each tipped worker's outside-option wage, that is, the wage that the tipped worker could earn in a non-tipped job. The Department also ran the regression to predict the outside-option wage using all non-tipped workers as the outside-option sample, and found that transfers are approximately 30 percent lower in that specification. This implies that the resulting transfer estimate is likely a significant overestimate.

The regression calculates a distribution of outside-option wages for each worker. The Department considered two methods: (1) Using the 50th percentile and (2) using the same percentile for each worker as they currently earn in the distribution of wages for wait staff and bartenders in restaurants and drinking places in the state where they live.[31] The second method accounts for the fact that two workers may have the exact same characteristics (age, race, education, etc.), but one worker may have a higher or lower outside-option wage because he or she is a more or less effective employee. This method assumes that a worker's position in the wage distribution for wait staff and bartenders in restaurants and drinking places reflects his or her position in the wage distribution for the outside-option occupations. The Department believes this method is more appropriate than the 50th percentile method.[32]

To calculate the outside option wage, the Department first calculated the hourly wage decile (including tips) for each of the tipped workers identified above (*i.e.,* in a tipped occupation/industry and report earning OTTC), relative to other tipped workers.[33] Second, the Department ran quantile regressions of the hourly wages of workers in non-tipped occupations that are similar to the tipped workers' occupations (Appendix Table 1). The regressions controlled for state dummy variables, education level, sex, age, race, citizenship status, marital status, veteran status, and metropolitan area status. Workers reporting an hourly wage with overtime, tips, and commissions of less than $7.25 were excluded from this analysis.[34] The regression results are included in Appendix A. Third, based on the regression estimates, the Department calculated a predicted wage in a non-tipped occupation for each worker in a tipped occupation, for each of the ten deciles. The Department then used the predicted wage from the decile regression applicable to each tipped worker (*i.e.,* based on his or her wage percentile) as his or her outside wage. Lastly, for the workers in tipped occupations, the Department removed some that did not have applicable data, including workers as follows:

- Without wage data,
- with negative or zero tips (after removing overtime pay),
- with hourly wages including tips less than or equal to than their outside option wage, and
- with hourly wages including tips less than the state minimum wage.

After making these exclusions, the analysis includes 237 observations.[35] Upon adjusting the universe of observations for employees who report earning tips, residing in states that may be impacted by this rule, individuals reporting wages lower than the applicable minimum wage, and those reporting wages higher than the minimum wage, only 37 observations remain, representing 24,743 workers.[36] The Department does not know the degree to which the reduced sample size may impact the findings of its analysis. Nonetheless, the Department remains confident that the outside option calculation is of sufficient merit to retain it in the analysis, insofar as it is instructive in setting an approximate upper bound for the potential total transfers due to tip pooling.

The Institute for Policy Integrity (IPI), in their comment, asserted that the assumptions used to calculate the Department's outside option were flawed because they do not account for the search and travel costs that an employee would incur when deciding to change jobs. According to IPI, this caused the Department to overestimate the value of the outside-option wage for affected workers, leading to an underestimate in the overall size of the transfer. The Department acknowledges that search and travel costs are part of an employee's decision to leave his or her current job, but believes these costs to be relatively minimal (due to being time-limited) and highly variable from employee to employee and location to location. The Department does not have data to estimate these and other highly individualized costs employees might face in considering their outside option nor does the commenter provide or address them. Instead, the Department's outside option regression controls for location and other factors that may relate to differences in these costs.

2. Per Worker Transfer Calculation

After determining each tipped worker's outside-option wage, the Department calculated the potential transferrable tips as the lesser of the following four numbers:

A. The positive differential between a worker's current earnings (wage plus tips) and his or her predicted outside-option wage,

B. The positive differential between a worker's current earnings and the state minimum wage,

C. The total tips earned by the worker, or

D. Zero if the worker currently earns a direct cash wage above the full applicable minimum wage.

The second number is included for cases where the outside-option wage predicted by the analysis is below the

[29] Approximately 14 percent of waiters and waitresses and 16 percent of bartenders have college degrees, even though a degree is not generally required to obtain such positions. According to research, the degree itself may carry an earnings premium for these workers. Therefore, excluding outside option occupations based on education attainment inflates the transfer estimates produced from this analysis because it compares these workers to artificially suppressed wage alternatives (*e.g.,* only those positions for which at least this 14 percent of servers would be over-qualified). However, since in most cases servers and bartenders are not required to have degrees, and it is unclear the degree to which including additional occupations in the outside option pool may skew the results, the Department opted to exclude these comparator occupations and simply highlight this fact here. BLS data on the share of workers with bachelor's degrees working in jobs that only require a high school diploma are presented in a study by Vedder, R., Denhart, C., and Robe, J. (2013), available here: *https://eric.ed.gov/?id=ED539373.*

[30] The Appendix and data tables are included in the rulemaking docket at *www.regulations.gov.*

[31] Because of the uncertainty in the estimate of the percentile ranking of the worker's current wage, the Department used the midpoint percentile for workers in each decile. For example, workers whose current wage was estimated to be in the zero to tenth percentile range were assigned the predicted fifth percentile outside-option wage, those with wages estimated to be in the eleventh to twentieth percentile were assigned the predicted fifteenth percentile outside-option wage, etc.

[32] The 50th percentile method results in a higher transfer estimate ($176 million, compared to $109 million).

[33] All workers in tipped occupations/industries earning at least $7.25/hour when including tips were broken into deciles. This sample included about 1,500 observations (representing approximately 1.3 million workers) in the non-excluded states.

[34] The quantile regressions using non-tipped workers in comparable occupations included 21,086 observations.

[35] Based on the original CPS methodology, these observations were calculated to represent 205,170 individuals. Due to the subsequent calculations conducted in this analysis, the Department remains confident in its findings but recognizes methodological constraints may impact the ability to extrapolate the findings across the originally representative universe with as much accuracy.

[36] The same constraints apply to this extrapolation as described in the previous footnote, to an even greater degree.

state minimum wage, because the worker will not earn less than his or her applicable state minimum wage. The third number is included because the maximum potential tips that can be transferred from an employee cannot be greater than his or her total tips. Total tips for each worker were calculated from the OTTC variable in the CPS data. For hourly-paid workers, the Department subtracted predicted overtime pay to better estimate total tips.[37] For workers who reported receiving overtime, tips, and commissions, but did not report the amount they earned, the Department applied the ratio of tipped earnings to total earnings for all waiters and waitresses and bartenders in their state (*see* Table 2).

The Department set the transfer to zero if the worker currently earns a direct cash wage above the full applicable minimum wage. If the employer is paying a tipped employee a direct cash wage above the required full minimum wage, this indicates the wage is set at the market clearing wage and any reduction in the wage (*e.g.,* by requiring tips to be transferred to back-of-the-house workers) would cause the employee to quit and look for other work commensurate with the value they provide. Therefore, where an employer is paying a tipped employee above the full applicable minimum wage, the Department assumes the employer would generally not require the employee to contribute tips to a nontraditional tip pool.

The Department includes an example to demonstrate how the outside option and the hourly transfers are calculated. Suppose a worker, with tips, earns $16.82 per hour. She earns a direct cash wage of $8.33 per hour, which is the relevant state minimum wage (both values adjusted to 2019 dollars using the GDP deflator), and $8.49 per hour in tips. The outside option wage for her wage decile is $15.44. We then calculate the following values:

- Hourly wage ($16.82) minus state minimum wage ($8.33): $8.49
- hourly wage ($16.82) minus outside option wage ($15.44): $1.38
- hourly tips ($16.82 minus $8.33): $8.49

The lesser of these three numbers is $1.38 per hour; therefore, hourly transfers are determined to be $1.38.

One notable constraint to this methodology is that it does not account for variations in total number of hours worked or the number of weeks worked per year, which have a direct impact on compensation.[38] If the averages of usual hours differ between a restaurant service job and an outside option, not adjusting the resultant figures accordingly could present a transfer estimate above or below reality. For example, a bartender working 4 hours per night and 5 days per week might make $30 per hour, but work only 20 hours per week (earning $600 per week). Comparing that wage to her outside option wage, set at $20 per hour but with 40 hours per week, would result in a $10 per hour loss, totaling $200 per week. Yet in reality she would earn more in the outside option role than in the original restaurant service role ($800 total, or $200 more), and the transfer calculation could be drastically overestimated. Conversely, the outside option transfer calculation would be underestimated if the same bartender works five 12-hour shifts at the same wage rate. The Department recognizes this as a constraint to its approach. It nonetheless maintains that the resultant transfer estimate is instructive.

3. Total Annual Transfer

Next, the Department estimates total weekly transfers. Estimated per worker hourly transfers were multiplied by usual hours to estimate weekly transfers per worker (on average $192.40 per week). Estimated weekly transfers were then aggregated over the relevant population (24,743 workers, based on the 37 CPS observations in the refined employee universe).

To determine the potential annual total tip transfer, the Department first multiplied the estimated weighted sum of weekly tip transfers for all wait staff and bartenders who work at full-service restaurants and bars in the United States by 45.2 weeks—the average weeks worked in a year for waiters and waitresses and bartenders in the 2017 CPS Annual Social and Economic Supplement. Using this methodology, the maximum possible transfer from front-of-the-house employees is estimated not to exceed $217.2 million (24,743 workers × $194.20 per week × 45.2 weeks).[39] This represents the total transfers that the Department estimates would occur in the extremely unlikely situation where every employer that does not take a tip credit institutes tip pools that include back-of-the-house workers and where none of the front-of-the-house workers see an increase in total tips. In reality, even when it is seemingly economically beneficial when considering the wage dimension, many employers may not change their tip pooling practices because it would require changes to current practices to which they and their employees are accustomed, including their payroll and recordkeeping systems.

The Department was unable to determine what proportion of the total tips estimated to be potentially transferred from these workers will realistically be transferred. For a range of reasons presented in this analysis, the Department expects that the potential transfers fall significantly below the above-calculated $217.2 million, and therefore considered the midpoint between this amount and zero to be a reasonable estimate of the potential transfers. The Department accordingly estimates that transfers of tips from front-of-the-house workers will be $109 million in the first year that this rule is effective. Assuming these transfers occur annually, and there is no real wage growth, this results in 10-year annualized transfers of $109 million at both the 3 percent and 7 percent discount rates. These transfers, in and of themselves, could have benefits which are discussed further below.

The $217 million transfer amount could also be an overestimation because employers do not have perfect information about employees' outside option wages. Employers could decide not to implement a nontraditional tip pool in order to ensure that they do not lose any of their front-of-the-house workers.

The earnings reduction for front-of-house workers could also be reduced if instituting a nontraditional tip pool leads to increased cooperation and productivity among workers, which the Department expects will occur. This, in turn, could lead to better service for customers, and higher tip amounts. Such effects would be categorized as benefits of the rule, rather than transfers, so please *see* section V.B.iii.3. for further discussion of these potential benefits.

As noted above, the Department acknowledges that it is possible some employers might choose to respond to

[37] Predicted overtime pay is calculated as (1.5 × base wage) × weekly hours worked over 40.

[38] On average, from the dataset employed for the regression analysis, the tipped workers included in the outside option calculation usually work 14 percent fewer hours per week than the non-tipped workers included in the regression (30 hours versus 35 hours).

[39] An additional source of uncertainty with regard to the magnitude of the estimated transfers is due to sampling error, the use of sample data to make inferences about the population. The estimated standard error on the point estimate of total potential tip transfers per year is large. The 95 percent confidence interval around this estimate is $128.6 million to $305.3 million, a 41 percent swing either higher or lower than the provided estimate. Additionally, this confidence interval itself is too narrow due to the inability to take into account the stratified sampling design of the CPS, which means the spread is likely larger.

the rule by decreasing back-of-the-house workers' wages, as the rule will allow these employees' wages to be supplemented with tips, and such an outcome is what is modeled to produce the $109 million estimate of transfers from front-of-house employees to employers. (The Department notes that, because employers cannot take a tip credit for employees in nontraditional tip pools, an employer who institutes such a program would be precluded from taking a tip credit for their front-of-the-house workers and would have to pay those workers at least the full minimum wage.)

Furthermore, although some employers may consider implementing a tip pooling system that substitutes back-of-the-house workers' hourly wages for tips, tips fluctuate at any given time. Thus, employers' ability to do so would be limited by market forces, such as, potentially, workers' aversion to risk and the endowment effect (workers potentially valuing their set wages more than tips of the same average amount). Furthermore, the minimum wage limits an employer's ability to decrease back-of-the-house wages. In the NPRM, the Department stated that it lacked data to quantify the extent to which this will occur, and this remains true. The Department requested information during the comment period on this point and received no applicable data.

In its comment, IPI asserted that the Department's transfer calculation wrongly assumes the restaurant industry is perfectly competitive. According to IPI's comment, the assumption of perfect competition underestimates the degree to which employers will be able to transfer wages from employees and understates the total volume of transfers. The Department acknowledges that, the less competitive the labor market, the greater the ability of employers to reduce worker wages to an amount near the minimum wage.[40] However, the Department does not have sufficient information to estimate the magnitude of this effect beyond the controls it already applied in its outside-options regression, and maintains that existing data on average wages indicate that employers face constraints consistent with market competition.

Some commenters asserted that the Department failed to provide a quantitative analysis of the potential transfer between employees and employers. For example, IPI suggested that, ''DOL could, using its already stated assumptions, isolate the subset of employers that would be able to capture the transfer. The Department could then construct a range of values for that subset using the same data sources and methods used to construct the overall transfer estimate.'' The Department acknowledges that employers could ultimately capture some transfers, as stated above. Employers would be more able to lower the base wages of back-of-the-house employees, and therefore capture the transfer, over a longer time horizon. It is unlikely that they could immediately lower wages of existing employees. Importantly, by instituting a nontraditional tip pool, employers would disqualify themselves from taking a tip credit for front-of-the-house workers, which is already permitted by law. Moreover, it is probably less complex and more direct for employers to continue such established arrangements than it is to set up a new nontraditional tip pool to reduce overall employee wages, if that is their objective.

Finally, even if employers are able to lower the base wages of back-of-the-house employees, it is possible that they would reinvest these wage savings back into the business, or use it to generate additional efficiencies. This, in turn, could lead to improvements in the overall customer experience, which could lead to customers leaving higher tips. This increase in tips would ultimately benefit all employees in the tip pool.

Employers face a strong incentive to take action that will boost productivity and maximize long-term profits. The Department did not attempt to account for this point in the outside option analysis, but nonetheless holds that employers face real incentives. All of the employers in the population sample used for the regression analysis are eligible to take a tip credit, and therefore already have means by which to transfer tips to themselves via reduced wait staff wages if that were their goal. Thus, the employers who decide to implement tip pooling will likely do so because they believe it will boost productivity and profits. If employees have the incentive for greater cooperation because they all share in the tip pool, it is quite possible the quality of service will increase and result in a higher absolute value of tips in the pool. Consider a cook who, motivated by his participation in a tip pool, walks past a table and decides to stop and chat for a minute to ask about how the patrons are enjoying the food—this would likely be well received and may very well result in higher tips in the pool, in which the cook would now be eligible to partake. Conceivably, such quality and efficiency improvements could result in back-of-the-house and front-of-the-house workers all receiving higher tipped wages.

One commenter, IPI, said that the Department should consider social costs and transfers when promulgating this rule, such as an increase in reliance on public benefits and adverse health consequences. If total compensation were reduced and if that reduction caused individual workers to rely on public benefits, then the transfers described as being borne by front-of-house workers would instead be partially borne by the Federal, state, or local government funding the benefits program. However, such an outcome is uncertain, and an attempted analysis of it would be characterized by lack of data. The Department notes that these same or newly hired workers may receive more compensation due to the rule and thus there could be a reduction in any reliance they presently have on social welfare benefits.

iii. Estimated Costs, Cost Savings, and Benefits

In this subsection, the Department addresses costs attributable to the rule, by quantifying regulatory familiarization costs and qualitatively discussing additional recordkeeping costs. The Department qualitatively discusses benefits and cost savings associated with the rule. Lastly, the Department qualitatively discusses the potential costs, transfers, and benefits associated with the revisions to § 531.56(e).

1. Regulatory Familiarization Costs

Regulatory familiarization costs represent direct costs to businesses associated with reviewing the new regulation. It is not clear whether regulatory familiarization costs are a function of the number of establishments or the number of firms.[41] Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple restaurants, and may also require chain restaurants to familiarize themselves with the regulation at the establishment level. To

[40] The Department further notes, however, that even a worker who receives minimum wage and also participates in the tip pool will in every conceivable scenario make more than a worker whose sole compensation is the minimum wage.

[41] An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment is in contrast to a firm, or a company, which is a business and may consist of one or more establishments, where each establishment may participate in a different predominant economic activity. *See* BLS, ''Quarterly Census of Employment and Wages: Concepts,'' *https://www.bls.gov/opub/hom/cew/concepts.htm.*

reduce the chance of underestimating costs, the Department used the number of establishments in its cost estimate—which is larger than the number of firms—and assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

The Department assumes that all establishments will incur some regulatory familiarization costs regardless of whether the employer decides to change its tip pooling practices as a result of the rule.[42] There may be differences in familiarization cost by the size of establishments; however, our analysis does not compute different costs for establishments of different sizes. To estimate the total regulatory familiarization costs, the Department used (1) the number of establishments in the two industries, Drinking Places (Alcoholic Beverages) and Full-Service Restaurants; (2) the wage rate for the employees reviewing the rule; and (3) the number of hours that it estimates employers will spend reviewing the rule. Table 3 shows the number of establishments in the two industries. To estimate the number of potentially affected establishments, the Department used data from BLS's Quarterly Census of Employment and Wages (QCEW) for 2019.

TABLE 3—NUMBER OF ESTABLISHMENTS WITH TIPPED WORKERS

Industry	Establishments
NAICS 722410 (Drinking Places (Alcoholic Beverages))	42,912
NAICS 722511 (Full-service Restaurants)	250,056
Total	292,968

Source: QCEW, 2019.

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) with a mean wage of $33.58 per hour in 2019 will review the rule.[43] Given the change in this rule, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further, the change effected by this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment is $13.68 for 15 minutes of review time. The number of establishments in the selected industries was 292,968 in 2019. Therefore, regulatory familiarization costs in Year 1 are estimated to be $4.01 million ($13.68 × 292,968 establishments), which amounts to a 10-year annualized cost of $469,902 at a discount rate of 3 percent or $570,700 at a discount rate of 7 percent. Regulatory familiarization costs in future years are assumed to be *de minimis.*

2. Other Costs

The Department also assumes that there will be a minimal increase in recordkeeping costs associated with this rule. Under the Department's previous regulations, employers were only required to keep records of which employees receive tips, the hours those employees worked, and how much each employee receives if the employer takes a tip credit. Some employers also kept records of the time employees spent on tipped duties and non-tipped duties to demonstrate compliance with the Department's 80/20 approach to enforcing the dual-jobs regulation. Under this rule, employers that do not take a tip credit but collect tips to institute a mandatory tip pool must keep records showing which employees are included in the tip pool, and the amount of tips they receive, as reported by employees to the employer. As those records are already required under IRS Form 4070, there will be minimal additional recordkeeping costs for employers that pay the full Federal minimum wage in direct cash wages and choose to institute a nontraditional tip pool.

Employers may incur some training costs associated with familiarizing first line managers and staff with the rule; however, the Department believes these costs will be *de minimis.*

3. Benefits

In their comment, IPI stated that the Department should better support its assertions regarding the proposed rule's benefits. In response, the Department has further elaborated on the benefits discussed in this section.

Section 3(m)'s tip credit language allows an employer to meet a portion of its Federal minimum wage obligation from the tips customers give employees. If an employer takes a tip credit, section 3(m)(2)(A) applies, along with its requirement that only employees who customarily and regularly receive tips be included in any mandatory tip pool. When an employer does not take a tip credit, however, the rule would allow the employer to act in a manner currently prohibited by regulation—that is, by distributing tips to employees who are employed in occupations in which they do not customarily and regularly receive tips (*e.g.,* cooks or dishwashers) through a tip pool. The rule, therefore, gives employers greater flexibility in determining their pay policies for tipped and non-tipped workers. Allowing employers and employees to structure tip pools in a manner that fits the needs of their business will improve efficiency and enhance cooperation amongst employees. By creating an atmosphere of cooperation, diminishing incentives for employees to unduly compete amongst themselves, and allowing workers at all levels to profit directly from quality service, employers with nontraditional tip pools may realize efficiencies and take on more business and more tips. This could cause an overall increase in business, employment, tips, and wages for all workers, not to mention increased job security and job satisfaction.

The Department conducted a literature review of relevant academic studies that address the nexus of service quality and remuneration. One analysis

[42] This includes establishments in states excluded from the transfer calculation.

[43] A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, ''13–1141 Compensation, Benefits, and Job Analysis Specialists,'' *https://www.bls.gov/oes-current-oes131141.htm* (last visited July 27, 2020).

has suggested that tip pooling promotes and rewards cooperation among employees as serving customers is often a cooperative endeavor among front- and back-of-the-house employees; this study further suggests that tip pooling leads to uniformly better service, which in turn, leads to increased patronage and increased tipping.[44] Another study indicates that tip pooling may foster customer-focused service, promote employee camaraderie, and increase productivity.[45] Additionally, under the changes in this rule and per the transfer analysis discussed above, the employer will be able to distribute customer tips to back-of-the-house employees like cooks and dishwashers, possibly resulting in increased earnings for those employees. This would allow employers to hire more or higher quality workers for those roles. Finally, the Department believes that allowing employers to expand tip pools beyond customarily and regularly tipped workers like servers and bartenders could help incentivize back-of-the-house workers to perform better, which may improve the customer's experience.

As noted above, Estreicher and Nash (2018) assert that tip pooling leads to uniformly better service, which in turn, leads to increased tipping.[46] The potential for increased tipping deserves some additional consideration. Theoretically, if the tip pool amount increases due to improved service, then the possible reduction in earnings noted in the transfer analysis for front-of-the-house workers could be overestimated. The Department conducted a literature review of both (1) the direct relationship between tip pooling and tips and (2) the indirect relationship between dining experience and tips received. The Department did not identify studies that show a direct empirical relationship between tip pooling and tip levels, although studies such as Estreicher and Nash (2018) present related findings. There is some literature on the relationship between dining quality (*e.g.,* service quality, food quality) and tip amounts. However, much of this literature is based on relatively small, locality-specific, non-representative samples. That does not mean their findings are inaccurate, but tempers the Department's interest in extrapolating the findings across the U.S. economy. Several particularly applicable papers are briefly described here. The key takeaway is the relationship between dining quality and tip amount varies, so, despite having relative confidence in the direction of the impact (*i.e.,* improved quality leads to higher tips), the amount non-traditional tip pooling may impact tips is unknown.

The literature generally found a positive but small to moderate impact of quality of service on tips. The following are examples:

- Conlin, Lynn, and O'Donoghue (2003) find that a one-point increase in service quality (on scale from 1 to 5) increases tip percent by either 1.43 or 1.464 percentage points (depending on the model, both statistically significant).[47] The average tip percent is 17.56 percent so this is approximately an 8 percent increase. A one-point increase in food quality (which may improve after implementation of a non-traditional tip pool) increased the tip percent by either 0.585 or 1.481 percentage points (depending on the model; only the latter is statistically significant).
- Lynn (2003) finds that service ratings explained an average of less than two percent of the variation in a restaurant's tip percentages.[48] Although the paper cites empirical findings of increases in tips for servers who take certain actions (*e.g.,* smiling, writing ''thank you'' on check, drawing a picture such as a smiley face on check), actions taken by back-of-the-house workers may also increase tips.
- Bodvarsson and Gibson (1997) estimated that within the seven central Minnesota restaurants in their survey, a one unit increase in service quality (on a scale of 1–5) was associated with slightly higher tips (0.44 to 0.54 percent of the bill or $0.14 on average).[49]
- Whaley, Kim, and Kim (2019) find that tipping size is positively related to server quality, food quality, and ambiance (although indirectly and occur through an intermediary variable of customer value).[50] However, the magnitudes of these impacts on tips are relatively small.

4. Cost Savings

The cost savings associated with this rule would result in part from the increased earnings for back-of-the-house employees. Higher earnings for these employees could result in reduced turnover, which reduces hiring and training costs for employers. This rule will also give employers greater flexibility for tip pooling, and could reduce effort spent ensuring that the tip pool is limited to only customarily and regularly tipped employees. The Department believes that the cost savings would outweigh any increased rule-familiarization and recordkeeping costs.

This rule may also reduce deadweight loss. Deadweight loss is the loss of economic efficiency that occurs when the perfectly competitive equilibrium in a market for a good or service is not achieved. Minimum wages may prevent the market from reaching equilibrium and thus result in fewer hours worked than would otherwise be efficient. Allowing nontraditional tip pools may cause a shift in the labor demand or supply curves for wait staff and bartenders. This could result in the market moving closer to the competitive market equilibrium. Although deadweight loss reductions are most commonly thought about in quantitative terms, such as new hiring or expanded hours for existing workers, quality could be how it manifests itself; in this case, deadweight loss reduction would be another term for some of the same benefits discussed elsewhere in this regulatory impact analysis.

The Department did not quantify the potential reduction in deadweight loss because of uncertainty (*e.g.,* what the appropriate demand and supply elasticities may be).

5. Costs, Benefits, and Potential Transfers Associated With Revision to Dual Jobs Regulation

The Department is amending its dual jobs regulation to reflect its recent guidance replacing the 80/20 approach with the updated related duties test.

In the NPRM, the Department stated the removal of the arbitrary 20 percent cap on tasks that are not directly tied to receipt of a tip may result in tipped workers such as wait staff and

[44] Samuel Estreicher & Jonathan R. Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation,* 59 B.C.L. Rev. 1 (2018), *http://lawdigitalcommons.bc.edu/bclr/vol59/iss1/2.*

[45] Ofer H. Azar, *The Implications of Tipping for Economics and Management,* 30 (10) Int'l J. Soc. Econ., 1084–94 (2003), *http://individual.utoronto.ca/diep/c/azar2003.pdf.*

[46] Samuel Estreicher & Jonathan R. Nash, *The Case for Tipping and Unrestricted Tip-Pooling: Promoting Intrafirm Cooperation,* 59 B.C.L. Rev. 1 (2018), *http://lawdigitalcommons.bc.edu/bclr/vol59/iss1/2.*

[47] Conlin, M., Lynn, M., and O'Donoghue, T. (2003). The Norm of Restaurant Tipping. Retrieved October 16, 2020 from Cornell University, School of Hospitality Administration site: *http://scholarship.sha.cornell.edu/articles/133.*

[48] Lynn, M. (2003). Tip Levels and Service: An Update, Extension, and Reconciliation. Cornell Hotel and Restaurant Administration Quarterly. October–December.

[49] Bodvarsson, B. and Gibson, W.A. (1997). Economics and Restaurant Gratuities: Determining Tip Rates. The American Journal of Economics and Sociology, 56(2): 187–203, *https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1536-7150.1997.tb03460.x.*

[50] Whaley, J., Kim, S., and Kim, Y. (2019). Drivers and Impact of Restaurant Tipping Behavior, Journal of Foodservice Business Research, 22:2, 117–131, *https://www.tandfonline.com/doi/abs/10.1080/15378020.2019.1570773.*

bartenders performing more non-tipped related duties such as ''cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses.'' Consequently, employment of workers currently performing these duties, such as dishwashers and cooks, may fall on the margin. In addition, the Department acknowledged that one possibility from taking on related, non-tipped duties would be that tipped workers might lose tipped income by spending more of their time performing duties where they are not earning tips, while still receiving cash wages of less than minimum wage (total compensation would nonetheless remain at or above the minimum wage). However, the Department did not suggest that this was the only possible outcome; another distinct possibility, for instance, is that these ''non-tipped'' activities could result in greater overall tips for the worker.[51]

The Department stated that it lacked the data to quantify any potential reduction in tips or employment, because data does not exist on the amount of time that tipped employees currently spend on tipped duties or related, non-tipped duties.[52] Several commenters criticized the Department's lack of a quantitative analysis, but did not themselves provide data on the amount of time that tipped employees currently spend on tipped or related, tipped duties. *See, e.g.,* NELP, NELA; State Attorneys General; National Women's Law Center; Leadership Conference on Civil and Human Rights. The Economic Policy Institute (EPI), in particular, asserted that the removal of the 20 percent cap on related duties could cost workers millions each year. In its comment, EPI cited to a blog post where it had published an analysis claiming, ''the proposed rule would cost workers more than $700 million annually if finalized.'' [53] EPI argued that employers will ''exploit'' this new regulation by shifting non-tipped work from traditionally non-tipped to tipped staff, paying an hourly rate less than the full minimum wage for that work, and then applying a tip credit from tips received by the tipped staff for tipped work. The blog post estimates the change in total earnings that could occur if this shift took place. The Department carefully considered EPI's blog analysis, but concluded that flaws in EPI's premise and methodology render the analysis an inadequate estimate of any potential transfer.[54]

The Department conducted additional sensitivity analyses of the outside-options estimate conducted in the tip pooling section. For example, two variations were evaluated that more closely align with the EPI's outside option wage regression used to estimate the impacts of the 80/20 provision. When EPI's linear regression model is used instead of a quartile regression, estimated transfers are approximately 42 percent higher, but this analysis did not include control variables, which the Department believes would better analyze whether location is simply being captured by the transfer calculation rather than regional variability. The Department believes a quantile regression is more appropriate because it compares more similar workers. In addition, EPI did not include veteran status and metro status as control variables in the regression; when these are removed from the Department's model, the results are essentially unchanged. Furthermore, EPI did not provide information on the methodological specifications, including details on central assumptions, upon which their analysis relied.

The analysis described in EPI's blog post does not consider the amount of time tipped employees currently spend on tipped versus related, non-tipped duties or how this final rule would affect that amount. Instead, it assumes that the final rule would enable certain duties-shifting practices that employers may use to reduce tipped employees' earnings and estimates the amount of that reduction. This assumption, which undergirds EPI's entire analysis, proceeds from a fundamental misunderstanding of this final rule and the 80/20 approach it replaces.

According to the blog post, EPI is concerned that replacing the 80/20 approach with the final rule would enable the following type of duties-shifting practice: ''a restaurant that employs a cleaning service to clean the restaurant each night'' could avoid paying a direct cash wage of at least the full Federal minimum wage of $7.25 per hour for cleaning services by ''requir[ing] servers to spend an extra hour or two performing such work and only pay them the tipped minimum wage of $2.13 per hour,'' and then applying a tip credit to make up the difference. However, taking a tip credit under these circumstances is clearly prohibited under this final rule. Consistent with the discussion in Section III.D.ii, an employee who performs related, non-tipped duties for ''an extra hour or two'' each night after the end of a shift would not be performing those related, non-tipped duties contemporaneously with tipped duties or for a reasonable time immediately before or after tipped duties. As such, the employer could not take a tip credit for time spent on the related, non-tipped duties performed well after tipped duties. Moreover, the practice that EPI is concerned about is presently permitted under the 80/20 approach, which allows a restaurant to apply a tip credit to time a server spends cleaning each night at the end of his or her shift if the arbitrary ratio is maintained. For example, a restaurant could apply a tip credit where it requires its servers to clean the dining area for up to 2 hours after finishing an 8-hour shift.

As a second example, EPI's blog post envisions a situation in which a restaurant that needs three dishwashers would purposefully employ only a single dishwasher and ''require all servers to wash dishes periodically over the course of their shifts'' to fill the expected gap. Again, this practice is permitted under the 80/20 approach, as long as the restaurant maintains the arbitrary ratio between tipped service duties and non-tipped dishwashing duties. A restaurant with a dozen servers could easily require them to perform the work of two dishwashers and still maintain the 80/20 ratio

[51] For example, if cleaning and setting tables helps a restaurant turn over tables more quickly and the server is able to wait on one additional party at each table during a shift, the ''non-tipped'' work may, in fact, result in an increase in the total tip and total compensation that the employee receives for a shift.

[52] Note that the Department quantified a potential transfer in the tip pooling portion of this analysis, unlike the impacts due to the related duties test, because the Department has greater confidence in the ability to model a simpler system (*i.e.,* interplay between the minimum wages with and without a tip credit, for front-of-the-house workers) than the complexities of the related duties system (*e.g.,* ambiguous baseline, competing incentives of market actors, uncertain magnitudes of changes, etc.). It is consistent for the Department to not attempt to quantify impacts for a portion of the regulation for which it has less confidence in accurately estimating the input variables for a more dynamic interplay of factors. The Department requested comments and data to inform these approaches, and while it received a number of comments, none of them provided data or sufficient methodological parameters to increase the Department's confidence in a quantitative analysis.

[53] The Department notes that the comment itself lacks any specificity to replicate the estimates it purports to support the conclusions. To better understand the basis for these assertions, the Department reviewed the blog post at one point in time (and is unaware whether the post was modified at any time during the notice and comment period or thereafter) which itself lacks certain data and calculations necessary to reproduce it and evaluate its rigor. Further, because the comment itself merely concludes without the blog's analysis that transfers would occur, the Department treats those conclusions as unsupported assertions. However, because the comment pointed to the blog post and the blog post itself contains a number of errors, which color the conclusions cited in the comment, the Department evaluates the blog post here.

needed to apply a tip credit to the dishwashing work. But this same practice would actually not be feasible under the final rule, which requires related non-tipped dishwashing duties to be performed contemporaneously or for a reasonable time immediately before or after tipped service duties. To be sure, a restaurant could theoretically micromanage servers to ensure that they perform dishwashing and service duties in close temporal proximity, but that effort would likely be prohibitively costly. The restaurant would have to hire managers to supervise servers' minute-by-minute tasks, and major business disruptions would result because servers' use of time would be dictated by maintaining temporal proximity between serving and dishwashing, rather than by any actual need to serve customers or wash dishes.[55] No rational restaurant would bear these managerial expenses and business disruptions just to save a maximum of approximately $5 per hour on dishwashing.[56] As such, it would be highly infeasible for a restaurant to shift dishwashing duties onto servers as contemplated by EPI under the final rule. Furthermore, this does not even begin to address the shock this supposed shift in duties would deliver to the underlying business model that relies on many duties occurring simultaneously to provide quality of service concentrated around common meal times, which would make it impossible for wait staff and bartenders to take on the full scope of additional duties that EPI hypothesized.

In sum, EPI's calculation is based entirely on the premise that replacing the 80/20 approach with this final rule would increase certain duties-shifting practices that it deems exploitative. But the opposite may very well be true because those ''exploitative'' practices are permitted under the 80/20 approach and prohibited under the final rule. The Department does not believe it is possible to overcome the flawed premise that is central to EPI's attempt to quantify the potential transfers occasioned by the rule. That said, the Department acknowledges that such transfers could occur in some cases, but believes that employees will nonetheless benefit from this rule. For instance, replacing the 80/20 approach with this final rule would prevent the exploitative practices described in EPI's blog post. And employees may receive higher earnings as a result of the efficiencies that this rule advances.

As explained in the NPRM, the Department believes there will be considerable cost savings and efficiencies associated with this change. In particular, the Department believes—and several commentators agreed—that by eliminating the cost to scrutinize employees' time to demonstrate compliance with the 80/20 approach, employers will see a reduction in regulatory cost and be able to adopt work arrangements that better serve customers, leading to more business and greater tips. Additionally, the revisions add clarity by referring to the list of duties presumed to be related on O*NET. The Department anticipates that the cost of occasionally referring to O*NET to ensure that employees' non-tipped duties are related to their tipped duties will be significantly less than the cost of continually monitoring the time employees have spent performing particular tasks.

iv. Summary of Transfers and Costs

Below is a summary table of the quantified transfers and costs for the RIA. Transfer costs in years two through ten are assumed to be the same as in Year 1.

TABLE 4—SUMMARY OF TRANSFERS AND COSTS CALCULATIONS

[2019 Dollars]

	Potential tip transfers (millions)	Regulatory familiarization costs (millions)
	$108.6 (range: $0 to $217.2)	$4.0
10-Year Annualized Estimates		
3% Discount Rate	$108.6 (range: $0 to $217.2)	0.5
7% Discount Rate	$108.6 (range: $0 to $217.2)	0.6

VI. Regulatory Flexibility Act Analysis—Certification

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (1996), requires Federal agencies engaged in rulemaking to consider the impact of their rules on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Accordingly, the Department examined the regulatory requirements of the rule to determine whether they would have a significant economic impact on a substantial number of small entities.

In its analysis, the Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status.[57] According to the 2017 standards, Full-service Restaurants (NAICS 722511) and Drinking Places (Alcoholic Beverages) (NAICS 722410) have a size standard of $7.5 million in annual revenue.[58] The Department used this number to estimate the number of small entities. Any establishments with

[55] The second example in EPI's blog post is distinguishable from the Department's example in section III.D.ii explaining that the final rule would permit a hotel to take a tip credit for time when a bellhop performing related, non-tipped duties in between serving guests during a slow shift. In the Department's example, the natural pace of business needs dictates when the bellhop performs related, non-tipped duties versus tipped customer service duties. By contrast, in EPI's example, maintaining close temporal proximity between non-tipped and tipped duties, as oppose to actual business needs, dictates when servers perform service versus dishwashing duties. The restaurant would need to direct servers' minute-by-minute tasks to ensure this artificial objective is given priority over the restaurant's actual business needs of serving customers and washing dishes.

[56] According to EPI's blog post, the duties-shifting enables a restaurant to pay $2.13 per hour for non-tipped duties instead of the Federal minimum wage of $7.25 per hour, thus achieve labor cost saving of $5.12 per hour for the non-tipped duties.

[57] SBA, Summary of Size Standards by Industry Sector, 2017, *www.sba.gov/document/support--table-size-standards.*

[58] *Id.,* Subsector 722.

annual sales revenue less than this amount were considered small entities.

The Department used the U.S. Census Bureau's 2012 Economic Census to obtain the number of establishments (operating the entire year) and annual sales/receipts for the two industries in the analysis: Full-service Restaurants and Drinking Places (Alcoholic Beverages).[59] From annual receipts/sales, the Department can estimate how many establishments fall under the size standard. Table 5 shows the number of private, year-round establishments in the two industries by revenue.[60]

The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) with a mean wage of $33.58 per hour in 2019 will review the rule.[61] Given the change in this rule, the Department assumes that it will take on average about 15 minutes to review the final rule. The Department has selected a small time estimate because it is an average for both establishments making changes to their compensation structure and those who are not (and consequently will have negligible or no regulatory familiarization costs). Further, the change effected by this regulation is unlikely to cause major burdens or costs. Assuming benefits are paid at a rate of 46 percent of the base wage, and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $54.74; thus, the average cost per establishment is $13.68 for 15 minutes of review time. The Department applied this cost to all sizes of establishments since each establishment would incur this cost regardless of the number of affected workers. Finally, the impact of this rule was calculated as the ratio of annual cost per establishment to average sales receipts per establishment. As shown, the annual cost per establishment is less than 0.02 percent of average annual sales for establishments in all small entity size classes. The impact of this rule on small establishments will be *de minimis.* The Department certifies that the rule will not have a significant economic impact on a substantial number of small entities.

TABLE 5—COSTS TO SMALL ENTITIES

Annual revenue/sales/receipts	Number of establishments [a]	Average annual sales per establishment ($) [b]	Annual cost per establishment ($) [c]	Annual cost per establishment as percent of sales/receipts
722511 Full-Service Restaurants				
<$100,000	10,211	$69,548	$13.68	0.02
$100,000 to $499,999	28,651	197,202	13.68	0.01
$250,000 to $499,999	39,554	412,801	13.68	0.00
$500,000 to $999,999	46,793	806,378	13.68	0.00
$1,000,000 to $2,499,999	45,173	1,759,168	13.68	0.00
$2,500,000 to $4,999,999	17,039	3,816,221	13.68	0.00
$5,000,000 to $9,999,999	3,531	7,252,978	13.68	0.00
722410 Drinking Places (Alcoholic Beverages)				
<$100,000	4,622	70,992	13.68	0.02
$100,000 to $249,999	11,610	192,269	13.68	0.01
$250,000 to $499,999	9,059	394,111	13.68	0.00
$500,000 to $999,999	5,138	775,656	13.68	0.00
$1,000,000 to $2,499,999	3,386	1,694,767	13.68	0.00
$2,500,000 to $4,999,999	755	3,772,747	13.68	0.00
$5,000,000 to $9,999,999	164	7,445,953	13.68	0.00

[a] Limited to establishments operated for the entire year.
[b] Inflated to $2019 using the GDP deflator.
[c] The annual cost per establishment is the regulatory familiarization cost per establishment calculated in section V.B.iii.1.

VII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. This rulemaking is not expected to affect state, local, or tribal governments. While this rulemaking would affect employers in the private sector, it is not expected to result in expenditures greater than $100 million in any one year. *See* section V.B for an assessment of anticipated costs and benefits to the private sector.

VIII. Executive Order 13132, Federalism

The Department has reviewed this final rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications. The final rule would not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of

[59] U.S. Census Bureau, 2012 Economic Census, Accommodation and Food Services: Subject Series—Estab. & Firm Size: Summary Statistics by Sales Size of Establishments for the U.S., 2012, *https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml.*

[60] The small-business size standard for the two industries is $7.5 million in annual revenue. However, the final size category reported in the table is $5 million–$9 million. This is a data limitation because the 2012 Economic Census reported this category of $5 million–$9 million and not $5 million–$7.5 million. Thus, the total number of firms shown may be slightly higher than the actual number of small entities.

[61] A Compensation/Benefits Specialist ensures company compliance with Federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. *See* BLS, ''13–1141 Compensation, Benefits, and Job Analysis Specialists,'' *https://www.bls.gov/oes/current/oes131141.htm* (last visited July 27, 2020).

power and responsibilities among the various levels of government.

IX. Executive Order 13175, Indian Tribal Governments

This final rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

29 CFR Part 10

Administrative practice and procedure, Construction industry, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages.

29 CFR Part 516

Minimum wages, Reporting and recordkeeping requirements, Wages.

29 CFR Part 531

Wages.

29 CFR Part 578

Penalties, Wages.

29 CFR Part 579

Child labor, Penalties.

29 CFR Part 580

Administrative practice and procedure, Child labor, Penalties, Wages.

Signed in Washington, DC, this 21st day of December, 2020.

Cheryl M. Stanton,

Administrator, Wage and Hour Division.

For the reasons set forth above, the Department amends title 29, parts 10, 516, 531, 578, 579, and 580 of the Code of Federal Regulations as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

■ 1. The authority citation for part 10 is revised to read as follows:

Authority: 5 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851, 3 CFR, 2014 Comp., p. 219; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 2. Amend § 10.28 by revising paragraphs (b)(2), (c), (e), and (f) to read as follows:

§ 10.28 Tipped employees.

* * * * *

(b) * * *

(2)(i) In some situations an employee is employed in a dual job, as, for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than $30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(ii) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee, and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(iii) In addition to the examples described in paragraph (b)(2)(ii) of this section, a non-tipped duty is presumed to be related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at *www.onetonline.org.* Occupations not listed in O*NET may qualify as tipped occupations. For those occupations, duties usually and customarily performed by employees are presumed to be related duties as long as they are included in the list of duties performed in similar O*NET occupations.

(c) *Characteristics of tips.* A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. Customers may present cash tips directly to the employee or may designate a tip amount to be added to their bill when paying with a credit card or by other electronic means. Special gifts in forms other than money or its equivalent such as theater tickets, passes, or merchandise, are not counted as tips received by the employee for purposes of determining wages paid under the Executive order.

* * * * *

(e) *Tip pooling.* Where tipped employees share tips through a tip pool, only the amounts retained by the tipped employees after any redistribution through a tip pool are considered tips in applying the provisions of FLSA section 3(t) and the wage payment provisions of section 3 of the Executive order. There is no maximum contribution percentage on mandatory tip pools. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(f) *Notice.* An employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit. The employer must inform the tipped employee of the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section; the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a tip pooling arrangement; and that the tip credit shall not apply to any worker who has not been informed of the requirements in this section.

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

■ 3. Revise the authority citation for part 516 to read as follows:

Authority: Sec. 11, Pub. L. 75–718, 52 Stat. 1066, as amended (29 U.S.C. 211). Section 516.28 also issued under 29 U.S.C. 203(m), as amended by sec. 2105(b), Pub. L. 104–188, 110 Stat. 1755; sec. 8102(a), Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348. Section 516.33 also issued under Pub. L. 75–718, 52 Stat. 1060, as amended (29 U.S.C. 201 *et seq.*). Section 516.34 also issued under Sec. 7, Pub. L. 101–157, 103 Stat. 944 (29 U.S.C. 207(q)).

■ 4. Amend § 516.28 by revising the section heading and adding paragraph (b) to read as follows:

§ 516.28 Tipped employees and employer-administered tip pools.

* * * * *

(b) With respect to employees who receive tips but for whom a tip credit is not taken under section 3(m)(2)(A), any employer that collects tips received by employees to operate a mandatory tip-pooling or tip-sharing arrangement shall maintain and preserve payroll or other records containing the information and

data required in § 516.2(a) and, in addition, the following:

(1) A symbol, letter, or other notation placed on the pay records identifying each employee who receive tips.

(2) Weekly or monthly amount reported by the employee, to the employer, of tips received (this may consist of reports made by the employees to the employer on IRS Form 4070).

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

■ 5. Revise the authority citation for part 531 to read as follows:

Authority: 29 U.S.C. 203(m) and (t), as amended by sec. 3(m), Pub. L. 75–718, 52 Stat. 1060; sec. 2, Pub. L. 87–30, 75 Stat. 65; sec. 101, sec. 602, Pub. L. 89–601, 80 Stat. 830; sec. 29(B), Pub. L. 93–259, 88 Stat. 55 sec. 3, sec. 15(c), Pub. L. 95–151, 91 Stat 1245; sec. 2105(b), Pub. L. 104–188, 110 Stat 1755; sec. 8102, Pub. L. 110–28, 121 Stat. 112; and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348.

■ 6. Revise § 531.50 to read as follows:

§ 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m)(2)(A) provides that, in determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(1) The cash wage paid such employee which for purposes of such determination shall not be less than the cash wage required to be paid such an employee on August 20, 1996 [*i.e.,* $2.13]; and

(2) An additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (a)(1) of this section and section 6(a)(1) of the Act.

(b) Section 3(m)(2)(A) also provides that an employer that takes a tip credit against its minimum wage obligations to its tipped employees must inform those employees of the provisions of that subsection, and that the employees must retain all of their tips, although the employer may require those employees to participate in a tip pool with other tipped employees that customarily and regularly receive tips.

(c) Section 3(m)(2)(B) provides that an employer may not keep tips received by its employees for any purposes, including allowing managers and supervisors to keep any portion of employees' tips, regardless of whether the employer takes a tip credit under section 3(m)(2)(A).

(d) ''Tipped employee'' is defined in section 3(t) of the Act as any employee engaged in an occupation in which he or she customarily and regularly receives more than $30 a month in tips.

■ 7. Revise the first sentence of § 531.51 to read as follows:

§ 531.51 Conditions for taking tip credits in making wage payments.

The wage credit permitted on account of tips under section 3(m)(2)(A) may be taken only with respect to wage payments made under the Act to those employees whose occupations in the workweeks for which such payments are made are those of ''tipped employees'' as defined in section 3(t). * * *

■ 8. Revise § 531.52 to read as follows:

§ 531.52 General restrictions on an employer's use of its employees' tips.

(a) A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. An employer that takes a tip credit against its minimum wage obligations is prohibited from using an employee's tips for any reason other than that which is statutorily permitted in section 3(m)(2)(A): As a credit against its minimum wage obligations to the employee, or in furtherance of a tip pool limited to employees who customarily and regularly receive tips. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a ''tipped employee'' within the meaning of the Act and in applying the provisions of section 3(m)(2)(A) which govern wage credits for tips.

(b) Section 3(m)(2)(B) of the Act provides that an employer may not keep tips received by its employees for any purposes, regardless of whether the employer takes a tip credit.

(1) An employer may exert control over an employee's tips only to distribute tips to the employee who received them, require employees to share tips with other employees in compliance with § 531.54, or, where the employer facilitates tip pooling by collecting and redistributing employees' tips, distribute tips to employees in a tip pool in compliance with § 531.54.

(2) An employer may not allow managers and supervisors to keep any portion of an employee's tips, regardless of whether the employer takes a tip credit. A manager or supervisor may keep tips that he or she receives directly from customers based on the service that he or she directly provides. For purposes of section 3(m)(2)(B), the term ''manager'' or ''supervisor'' shall mean any employee whose duties match those of an executive employee as described in § 541.100(a)(2) through (4) or § 541.101 of this chapter.

■ 9. Revise § 531.54 to read as follows:

§ 531.54 Tip pooling.

(a) *Monies counted as tips.* Where employees practice tip splitting, as where waiters give a portion of their tips to the busser, both the amounts retained by the waiters and those given the bussers are considered tips of the individuals who retain them, in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where an accounting is made to an employer for his or her information only or in furtherance of a pooling arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his or her own are counted as his or her tips for purposes of the Act. Section 3(m)(2)(A) does not impose a maximum contribution percentage on mandatory tip pools.

(b) *Prohibition against keeping tips*—(1) *Meaning of ''keep.''* Section 3(m)(2)(B)'s prohibition against keeping tips applies regardless of whether an employer takes a tip credit. Section 3(m)(2)(B) expressly prohibits employers from requiring employees to share tips with managers or supervisors, as defined in § 531.52(b)(2), or employers, as defined in 29 U.S.C. 203(d). An employer does not violate section 3(m)(2)(B)'s prohibition against keeping tips if it requires employees to share tips with other employees who are eligible to receive tips.

(2) *Full and prompt distribution of tips.* An employer that facilitates tip pooling by collecting and redistributing employees' tips does not violate section 3(m)(2)(B)'s prohibition against keeping tips if it fully distributes any tips the employer collects no later than the regular payday for the workweek in which the tips were collected, or when the pay period covers more than a single workweek, the regular payday for the period in which the workweek ends. To the extent that it is not possible for an employer to ascertain the amount of tips that have been received or how tips should be distributed prior to processing payroll, tips must be distributed to employees as soon as practicable after the regular payday.

(c) *Employers that take a section 3(m)(2)(A) tip credit.* When an employer

takes a tip credit pursuant to section 3(m)(2)(A):

(1) The employer may require an employee for whom the employer takes a tip credit to contribute tips to a tip pool only if it is limited to employees who customarily and regularly receive tips; and

(2) The employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

(3) An employer may not participate in such a tip pool and may not include managers and supervisors in the pool.

(d) *Employers that do not take a section 3(m)(2)(A) tip credit.* An employer that pays its tipped employees the full minimum wage and does not take a tip credit may impose a tip pooling arrangement that includes dishwashers, cooks, or other employees in the establishment who are not employed in an occupation in which employees customarily and regularly receive tips. An employer may not participate in such a tip pool and may not include supervisors and managers in the pool.

■ 10. Revise § 531.55(a) to read as follows:

§ 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of sections 3(m)(2)(A) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

* * * * *

■ 11. Amend § 531.56 by revising the second and third sentences in paragraph (a) and paragraphs (c), (d), and (e) to read as follows:

§ 531.56 "More than $30 a month in tips."

(a) * * * An employee employed in an occupation in which the tips he or she receives meet the minimum standard in the preceding sentence is a ''tipped employee'' for whom the wage credit provided by section 3(m)(2)(A) may be taken in computing the compensation due him or her under the Act for employment in such occupation, whether he or she is employed in it full time or part time. An employee employed full time or part time in an occupation in which he or she does not receive more than $30 a month in tips customarily and regularly is not a ''tipped employee'' within the meaning of the Act and must receive the full compensation required by the provisions of the Act in cash or allowable facilities without any deduction for tips received under the provisions of section 3(m)(2)(A).

* * * * *

(c) *Individual tip receipts are controlling.* An employee must him- or herself customarily and regularly receive more than $30 a month in tips in order to qualify as a tipped employee. The fact that he or she is part of a group which has a record of receiving more than $30 a month in tips will not qualify him or her. For example, a server who is newly hired will not be considered a tipped employee merely because the other servers in the establishment receive tips in the requisite amount. For the method of applying the test in initial and terminal months of employment, *see* § 531.58.

(d) *Significance of minimum monthly tip receipts.* More than $30 a month in tips customarily and regularly received by the employee is a minimum standard that must be met before any wage credit for tips is determined under section 3(m)(2)(A). It does not govern or limit the determination of the appropriate amount of wage credit under section 3(m)(2)(A) that may be taken for tips under section 6(a)(1) (tip credit equals the difference between the minimum wage required by section 6(a)(1) and the cash wage paid (at least $2.13 per hour)).

(e) *Dual jobs.* (1) In some situations an employee is employed in a dual job, as for example, where a maintenance person in a hotel also works as a server. In such a situation the employee, if he or she customarily and regularly receives more than $30 a month in tips for his or her work as a server, is a tipped employee only with respect to his or her employment as a server. The employee is employed in two occupations, and no tip credit can be taken for his or her hours of employment in the occupation of maintenance person.

(2) Such a situation is distinguishable from that of an employee who spends time performing duties that are related to his or her tip-producing occupation but are not themselves directed toward producing tips. For example, a server may spend part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Likewise, a counter attendant may also prepare his or her own short orders or may, as part of a group of counter attendants, take a turn as a short order cook for the group. An employer may take a tip credit for any hours that an employee performs related, non-tipped duties contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties.

(3) In addition to the examples described in paragraph (e)(2) of this section, a non-tipped duty is presumed to be related to a tip-producing occupation if the duty is listed as a task in the description of the tip-producing occupation in the Occupational Information Network (O*NET) at *www.onetonline.org.* Occupations not listed in O*NET may also qualify as tipped occupations. For those occupations, duties usually and customarily performed by employees are presumed to be related duties as long as they are included in the list of duties performed in similar O*NET occupations.

■ 12. Revise § 531.59 to read as follows:

§ 531.59 The tip wage credit.

(a) In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m)(2)(A) the amount paid to a tipped employee by an employer is increased on account of tips by an amount equal to the formula set forth in the statute (minimum wage required by section 6(a)(1) of the Act minus cash wage paid (at least $2.13)), provided that the employer satisfies all the requirements of section 3(m)(2)(A). This tip credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m).

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a ''tipped employee.'' Pursuant to section 3(m)(2)(A), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m)(2)(A) of the Act, *i.e.:* The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a tip pooling arrangement limited to employees who

customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of the requirements in this section. The credit allowed on account of tips may be less than that permitted by statute (minimum wage required by section 6(a)(1) minus the cash wage paid (at least $2.13)); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a tip pool limited to employees who customarily and regularly receive tips as described in § 531.54, section 3(m)(2)(A) also requires employers that take a tip credit to permit employees to retain all tips received by the employee.

■ 13. Revise § 531.60 to read as follows:

§ 531.60 Overtime payments.

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee's regular rate of pay is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. (*See* part 778 of this chapter for a detailed discussion of overtime compensation under the Act.) In accordance with section 3(m)(2)(A), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus the cash wage paid (at least $2.13)), the reasonable cost or fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part, and the cash wages including commissions and certain bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the Act.

PART 578—TIP RETENTION, MINIMUM WAGE, AND OVERTIME VIOLATIONS—CIVIL MONEY PENALTIES

■ 14. The authority citation for part 578 is revised to read as follows:

Authority: 29 U.S.C. 216(e), as amended by sec. 9, Pub. L. 101–157, 103 Stat. 938, sec. 3103, Pub. L. 101–508, 104 Stat. 1388–29, sec. 302(a), Pub. L. 110–233, 122 Stat. 920, and sec. 1201, Div. S., Tit. XII, Pub. L. 115–141, 132 Stat. 348; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note), as amended by sec. 31001(s), Pub. L. 104–134, 110 Stat. 1321–358, 1321–373, and sec. 701, Pub. L. 114–74, 129 Stat 584.

■ 15. The heading of part 578 is revised to read as set forth above.

■ 16. Revise § 578.1 to read as follows:

§ 578.1 What does this part cover?

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act to provide that any person who repeatedly or willfully violates the minimum wage (section 6) or overtime provisions (section 7) of the Act shall be subject to a civil money penalty not to exceed $1,100 for each such violation. In 2001, the Wage and Hour Division (WHD) adjusted this penalty for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)). The Genetic Information Nondiscrimination Act of 2008 amended section 16(e) of the Act to reflect this increase. *See* Public aw. 110–233, sec. 302(a), 122 Stat. 920. Section 1201(b)(3) of the Consolidated Appropriations Act, 2018, amended section 16(e) to add that any person who violates section 3(m)(2)(B) of the Act shall be subject to a civil money penalty not to exceed $1,100. The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, section 31001(s)) and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74, section 701), requires that inflationary adjustments be annually made in these civil money penalties according to a specified cost-of-living formula. This part defines terms necessary for administration of the civil money penalty provisions, describes the violations for which a penalty may be imposed, and describes criteria for determining the amount of penalty to be assessed. The procedural requirements for assessing and contesting such penalties are contained in part 580 of this chapter.

■ 17. Revise § 578.3 to read as follows:

§ 578.3 What types of violations may result in a penalty being assessed?

(a) *In general.* (1) A penalty of up to $1,162 per violation may be assessed against any person who repeatedly or willfully violates section 3(m)(2)(B) of the Act.

(2) A penalty of up to $2,074 per violation may be assessed against any person who repeatedly or willfully violates section 6 (minimum wage) or section 7 (overtime) of the Act. The amount of the penalties stated in paragraphs (a)(1) and (2) of this section will be determined by applying the criteria in § 578.4.

(b) *Repeated violations.* An employer's violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be ''repeated'' for purposes of this section:

(1) Where the employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, provided the employer has previously received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act; or

(2) Where a court or other tribunal has made a finding that an employer has previously violated section 3(m)(2)(B), section 6, or section 7 of the Act, unless an appeal therefrom which has been timely filed is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by such appellate tribunal.

(c) *Willful violations.* (1) An employer's violation of section 3(m)(2)(B), section 6, or section 7 of the Act shall be deemed to be ''willful'' for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful.

(2) For purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

■ 18. Revise § 578.4(a) to read as follows:

§ 578.4 Determination of penalty.

(a) In determining the amount of penalty to be assessed for any repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, the Administrator shall consider the seriousness of the violations and the size of the employer's business.

* * * * *

PART 579—CHILD LABOR VIOLATIONS—CIVIL MONEY PENALTIES

■ 19. The authority citation for part 579 is revised to read as follows:

Authority: 29 U.S.C. 203(m), (l), 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary of Labor's Order No. 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 Note.

■ 20. Amend § 579.1 by:
■ a. Revising paragraph (a) introductory text;
■ b. Redesignating paragraph (a)(2) as paragraph (a)(2)(i); and
■ c. Adding paragraph (a)(2)(ii).

The revision and addition read as follows:

§ 579.1 Purpose and scope.

(a) Section 16(e), added to the Fair Labor Standards Act of 1938 (FLSA), as amended, by the Fair Labor Standards Amendments of 1974, and as further amended by the Fair Labor Standards Amendments of 1989, the Omnibus Budget Reconciliation Act of 1990, the Compactor and Balers Safety Standards Modernization Act of 1996, the Genetic Information Nondiscrimination Act of 2008, and the Consolidated Appropriations Act of 2018, provides for the imposition of civil money penalties in the following manner:

* * * * *

(2) * * *

(ii) Any person who repeatedly or willfully violates section 203(m)(2)(B) of the FLSA, relating to the retention of tips, shall be subject to a civil penalty not to exceed $1,162 for each such violation.

* * * * *

■ 21. Amend § 579.2 by revising the definition of ''Willful violations'' to read as follows:

§ 579.2 Definitions.

* * * * *

Willful violations under this section has several components. An employer's violation of section 12 or section 13(c) of the Act relating to child labor or any regulation issued pursuant to such sections, shall be deemed to be *willful* for purposes of this section where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act. All of the facts and circumstances surrounding the violation shall be taken into account in determining whether a violation was willful. In addition, for purposes of this section, the employer's receipt of advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful can be sufficient to show that the employer's conduct is knowing, but is not automatically dispositive.

PART 580—CIVIL MONEY PENALTIES—PROCEDURES FOR ASSESSING AND CONTESTING PENALTIES

■ 22. The authority citation for part 580 continues to read as follows:

Authority: 29 U.S.C. 9a, 203, 209, 211, 212, 213(c), 216; Reorg. Plan No. 6 of 1950, 64 Stat. 1263, 5 U.S.C. App; secs. 25, 29, 88 Stat. 72, 76; Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 5 U.S.C. 500, 503, 551, 559; 103 Stat. 938.

■ 23. Revise the first sentence of § 580.2 to read as follows:

§ 580.2 Applicability of procedures and rules.

The procedures and rules contained in this part prescribe the administrative process for assessment of civil money penalties for any violation of the child labor provisions at section 12 of the Act and any regulation thereunder as set forth in part 579 of this chapter, and for assessment of civil money penalties for any repeated or willful violation of the tip retention provisions of section 3(m)(2)(B), the minimum wage provisions of section 6, or the overtime provisions of section 7 of the Act or the regulations thereunder set forth in 29 CFR subtitle B, chapter V. * * *

■ 24. Revise the first sentence of § 580.3 to read as follows:

§ 580.3 Written notice of determination required.

Whenever the Administrator determines that there has been a violation by any person of section 12 of the Act relating to child labor or any regulation thereunder as set forth in part 579 of this chapter, or determines that there has been a repeated or willful violation by any person of section 3(m)(2)(B), section 6, or section 7 of the Act, and determines that imposition of a civil money penalty for such violation is appropriate, the Administrator shall issue and serve a notice of such penalty on such person in person or by certified mail. * * *

■ 25. Amend § 580.12 by revising the first sentence of paragraph (b) of to read as follows:

§ 580.12 Decision and Order of Administrative Law Judge.

* * * * *

(b) The decision of the Administrative Law Judge shall be limited to a determination of whether the respondent has committed a violation of section 12, or a repeated or willful violation of section 3(m)(2)(B), section 6, or section 7 of the Act, and the appropriateness of the penalty assessed by the Administrator. * * *

* * * * *

■ 26. Amend § 580.18 by revising the third sentence in paragraph (b)(3) to read as follows:

§ 580.18 Collection and recovery of penalty.

* * * * *

(b) * * *

(3) * * * A willful violation of sections 3(m)(2)(B), 6, 7, or 12 of the Act may subject the offender to the penalties provided in section 16(a) of the Act, enforced by the Department of Justice in criminal proceedings in the United States courts. * * *

[FR Doc. 2020–28555 Filed 12–29–20; 8:45 am]

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Federal Register

Vol. 85, No. 250

Wednesday, December 30, 2020

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Presidential Documents	
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FEDERAL REGISTER PAGES AND DATE, DECEMBER

76949–77342 1
77343–77984 2
77985–78196 3
78197–78698 4
78699–78938 7
78939–79116 8
79117–79378 9
79379–79776 10
79777–80580 11
80581–81084 14
81085–81336 15
81337–81776 16
81777–82290 17
82291–82870 18
82871–83404 21
83405–83738 22
83739–84198 23
84199–85490 28
85491–86456 29
86457–86792 30

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1 CFR

Proposed Rules:
12 86514

2 CFR

376 81781
3474 82037

3 CFR

Proclamations:
10121 77343
10122 78193
10123 78195
10124 79375
10125 79377
10126 81329
10127 82871
10128 85491

Executive Orders:
13618 79379
13960 78939
13961 79379
13962 79777
13963 81331
13964 81333
13965 81337
13966 81777
13967 83739
13968 83745

Administrative Orders:
Memorandums:
Memorandum of August 12, 2016 (revoked by Memorandum of December 10, 2020) 81775
Memorandum of December 3, 2020 78945
Memorandum of December 3, 2020 78947
Memorandum of December 9, 2020 81755
Memorandum of December 10, 2020 817753
Notices:
Notice of December 16, 2020 82869
Space Policy Directive–6 of December 16, 2020 8287

5 CFR

Proposed Rules:
351 81839
430 81839
2641 77014

6 CFR

19 82037

Proposed Rules:
5 80667

7 CFR

16 82037
301 ..... 81085, 85947
407 79779
457 79779
984 79383
3565 77985

Proposed Rules:
930 81425

8 CFR

208 ..... 80274, 82260, 84160
214 82750
235 80274
274a 82750
1003 ..... 80274, 81588, 81598, 82750
1103 ..... 81698, 82750
1208 ..... 80274, 81698, 82260, 82750, 84160
1216 82750
1235 ..... 80274, 84160
1240 ..... 81588, 81598, 82750
1244 82750
1245 82750

Proposed Rules:
103 77016
235 77016
1001 78240
1003 78240
1208 78240
1214 78240
1240 78240
1245 78240
1246 78240
1292 78240

9 CFR

201 79779
317 81339
381 81339
416 81340
417 81340
500 81340
590 81340
591 81340

Proposed Rules:
Ch. I 84269
Ch. III 84269
439 80668

10 CFR

50 85503
430 ..... 79802, 81341, 81359, 81558
431 79802
1021 78197

Proposed Rules:
Ch. I 78046, 81849
26 ..... 81847, 82391

30 82950
40 82950
50 ....79434, 81848, 82950
70 82950
72 82950
430 ....77017, 78964, 80982
431 ....78967, 82952

12 CFR

3 ....77345, 80404
4 ....77345, 83686
5 ....80404, 83686
7 ....80404, 83686
34 79385
52 77345
145 83686
160 83686
204 79821
208 77345
209 79389
211 77345
212 77345
213 79390
217 77345
225 77345
226 ....79385, 79394
228 83747
235 77345
238 77345
246 78949
304 77345
324 77345
337 77345
345 83747
347 77345
348 77345
614 ....77364, 82881
615 83749
701 83405
Ch. X 77987
1003 83409
1013 79390
1022 83749
1026 ....79385, 79394, 79400, 79404, 83411, 86308, 86402
1206 82150
1225 82150
1240 82150
1282 82881
1750 82150

Proposed Rules:

24 78258
25 78258
35 78258
192 78258
327 78794
741 78269
1282 82965

13 CFR

103 80581
120 ....78205, 80581
121 80581

Proposed Rules:

120 ....80676, 83837
123 80676

14 CFR

1 79823
25 81782
27 ....79826, 83415
39 ....76949, 76951, 76953, 76955, 77991, 78215, 78699, 78702, 78954, 79408, 79411, 79413, 79415, 79418, 79828, 80589, 80590, 81376, 81378, 81381, 81383, 81385, 81790, 81792, 81795, 82299, 82302, 82305, 82307, 82896, 82899, 82901, 83751, 83753, 83755, 83759, 84199, 84201, 84204, 85557, 85559, 86457, 86459, 86462
61 79823
71 ....76958, 78705, 79117, 79422, 79425, 79833, 79835, 80593, 80594, 80595, 80596, 80598, 81096, 82904, 83762, 83763, 83764, 84206, 85504, 85506
95 82310
97 ....78219, 78221, 84207, 84209
101 79823
107 79823
187 78223
382 79742
399 78707
401 79566
404 79566
413 79566
414 79566
415 79566
417 79566
420 79566
431 79566
433 79566
435 79566
437 79566
440 79566
450 79566
460 79566

Proposed Rules:

39 ....78277, 78279, 78805, 78808, 78971, 78974, 78977, 79435, 79438, 79440, 79443, 79930, 80686, 80689, 80693, 80696, 81157, 81160, 81162, 81427, 81851, 82970, 82972, 82975, 82977, 84275, 82977, 84275, 85562, 85564, 85566, 85568, 86515
71 ....78811, 79446, 79448, 79934, 81167, 81431, 81433, 83839, 85509, 85510

15 CFR

705 81060
738 83765
740 ....83765, 84211
742 83765
744 ....83416, 83765, 83793
745 83765
748 83765
756 83793
758 83765
774 78684

16 CFR

Proposed Rules:

432 82391
801 ....77042, 77053
802 ....77042, 77053
803 ....77042, 77053

17 CFR

3 78718
36 82313
37 82313
200 85512
201 86464
210 80508
230 78224
232 78224
239 83162
240 78224
249 ....78224, 83162
270 ....78224, 83162
274 83162

Proposed Rules:

229 80232
230 ....79936, 80232
239 ....79936, 80232
240 79936

18 CFR

292 86656
385 81798

19 CFR

Ch. I 83432, 83433
361 83804

20 CFR

404 78164
416 78164
702 80601

Proposed Rules:

401 79963
702 80698

21 CFR

1 81781
5 81781
12 81781
14 81781
25 81781
81 81781
101 82332
102 82332
133 81781
172 81781
178 81781
184 81781
201 81781
310 81781
369 81781
501 81781
582 81781
1301 82333
1308 81388
1318 82333

Proposed Rules:

1 82393
152 82395
169 82980
882 82990
1270 82990
1306 78282
1308 ....78047, 79450
1310 82984

22 CFR

120 79836
205 82037
228 81390
Ch. V 79427

Proposed Rules:

181 78813
306 81854

23 CFR

773 84213
778 84213

Proposed Rules:

470 ....80898, 85570
635 ....80898, 85570
655 ....80898, 85570

24 CFR

5 82037
92 82037
100 78957
214 ....78230, 80616
266 83435
578 82037

Proposed Rules:

5 78295
92 78295
93 78295
574 78295
960 78295
966 78295
982 78295

25 CFR

Proposed Rules:

90 78296
150 79965

26 CFR

1 ....76960, 76976, 77365, 77952, 79837, 79853, 81391, 82355, 86481
54 81097
301 83446
602 77952

27 CFR

4 85514
5 85514
7 85514

28 CFR

0 84229
26 76979
38 82037
50 81409
58 82905
79 79118

29 CFR

2 82037
10 86756
20 83816
2509 81658
516 86756
531 86756
2550 ....81658, 82798
578 86756
579 86756
580 86756
2590 81097
4044 ....78742, 81122

30 CFR

Proposed Rules:

250 ....79266, 84230
550 79266
926 81862
938 81864
948 81436
950 81866

31 CFR

1 86511

Proposed Rules:

33 78572
1010 83840
1020 83840
1022 83840

32 CFR

44 84237

117 83300
Proposed Rules:
310 ....81438, 84278

33 CFR

117 ....77994, 82355
165 ....77994, 78232, 79854, 82356, 82357, 82915, 83448, 85520
Proposed Rules:
165 77093
334 85570

34 CFR

75 82037
76 82037
600 79856
602 79856
668 79856
673 79856
674 79856
682 79856
685 79856
Proposed Rules:
300 82994
Ch. II 83862

36 CFR

Proposed Rules:
1224 77095
1225 77095
1236 77095

37 CFR

1 82917
2 81123
42 ....79120, 82923
210 84243
Proposed Rules:
1 86518
303 84279

38 CFR

4 85523
17 84245
50 82037
61 82037
62 82037
Proposed Rules:
36 79142
38 82399

39 CFR

20 83450
111 83450
501 ....78234, 79432
3030 81124
3040 81124
3045 81124
3050 81124
3055 81124

40 CFR

9 78743
19 83818
50 82684
52 ....77996, 79129, 80616
60 78412
63 ....77384, 78412, 84261
79 78412
80 78412
82 79863
83 84130
131 82936
180 ....77999, 78002, 81799, 82939
257 80626
282 79872
320 77384
721 78743
1042 78412
1043 78412
1065 78412
1090 78412
Proposed Rules:
52 ....78050, 82995, 83868, 83877
123 80713
158 78300
174 83880
180 ....82998, 83880
233 80713
257 ....78980, 80718, 83478
282 79972
300 86525

41 CFR

60–1 79324
102–34 82359

42 CFR

2 80626
10 80632
23 81781
51c 81781, 83822
52i 81781
56 81781
57 81781
63 81781
124 81781
400 84472
405 78748
410 ....84472, 85865
411 ....77491, 81781, 85865
412 ....78748, 81781, 85865
413 78748
414 ....78770, 84472, 85869
415 84472
416 85869
417 78748
419 85869
422 81781
423 ....81781, 84472
424 84472
425 84472
426 81781
440 81781
441 81781
447 81781
476 78748
480 78748
482 ....81781, 85865
484 78748
485 ....81781, 85865
486 77898
495 78748
512 ....77404, 85865
1001 77684
1003 77684
1004 81781
1008 81781
Proposed Rules:
431 82586
435 82586
438 82586
440 82586
457 82586
1001 81439

43 CFR

1820 81141
2560 79879
5000 82359
5400 82359
5420 82359
5440 82359
5450 82359
5460 82359
5470 82359
5500 82359

44 CFR

64 ....81142, 84262
Proposed Rules:
206 80719

45 CFR

1 78770
3 81781
63 81781
75 81781
87 81781
147 81097
153 76979
170 78236
305 82037
307 81781
1050 82037
1304 78787
1324 81781
1325 81781
1326 81781
1328 81781
Proposed Rules:
147 78572
150 78572
153 78572
155 78572
156 ....78572, 82586
158 78572
170 82586
184 78572
1225 81854

47 CFR

1 ....78005, 85524
9 78018
13 85524
17 85524
63 84264
73 ....78022, 78028, 84266
76 ....78237, 81805
97 85524
Proposed Rules:
54 78814
64 83000
73 ....83001, 86527
97 78815

48 CFR

302 81781
326 81781
825 84266
Proposed Rules:
2 78815
3 78815
7 78815
13 78815
15 78815
17 78815
52 78792
227 78300
252 78300

49 CFR

26 80646
106 83366
107 ....83366, 85380
171 ....78029, 83366, 85380
172 ....78029, 83366
173 ....78029, 83366, 85380
174 ....78029, 83366
175 ....78029, 83366
176 ....78029, 83366
177 83366
178 ....78029, 83366, 85380
179 83366
180 ....78029, 83366, 85380
218 80544
219 81290
221 80544
225 79130
232 80544
234 80648
240 81290
242 81290
264 84213
571 85533
662 84213
1002 83830
Proposed Rules:
13 83881
192 81440
195 81440
214 79973
236 82400
270 83484
271 83484
385 80745
391 80745
393 85571
399 85571
571 ....78058, 79456
595 84281
1039 78075
1108 78075

50 CFR

17 ....78029, 81144, 81813, 82376
21 85535
217 83451
223 81822
224 81822
424 81411
622 ....78792, 79135
635 ....77007, 79136, 81837, 83832
648 ....79139, 80661, 81152, 81155, 81421, 82944, 82946
660 79880
665 ....77406, 79928
679 ....77406, 78038, 79139, 81155, 82389, 83473, 83834
Proposed Rules:
17 ....77108, 77408
218 83001
223 79980
229 81168
679 ....78076, 78096

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List December 28, 2020

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