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

FARM CREDIT ADMINISTRATION

12 CFR Part 620

RIN 3052–AD37

District Financial Reporting

AGENCY: Farm Credit Administration.

ACTION: Notification of effective date.

SUMMARY: The Farm Credit Administration (FCA or we) is amending our regulations governing how a Farm Credit bank presents information on its related associations when preparing annual bank financial statements on a stand-alone basis. The final rule provides two presentation options when disclosing related association financial information in an annual bank report: By footnote or attached in a supplement.

DATES: The regulation amending 12 CFR part 620 published on October 8, 2020 (85 FR 63428) is effective on December 4, 2020.

FOR FURTHER INFORMATION CONTACT:

Technical information: Joi Neal, Senior Accountant, Office of Regulatory Policy, (703) 883–4223, TTY (703) 883–4056, *nealj@fca.gov.*

Legal information: Laura McFarland, Senior Counsel, Office of General Counsel, (703) 883–4020, TTY (703) 883–4056, *mcfarlandl@fca.gov.*

SUPPLEMENTARY INFORMATION: On October 8, 2020, FCA issued a final rule to improve shareholder access to district financial information by providing an additional method of presenting financial information on a bank's related associations to those banks preparing annual financial statements on a stand-alone basis.

In accordance with 12 U.S.C. 2252(c)(1), the effective date of the rule is no earlier than 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulation is December 4, 2020.

Dated: December 7, 2020.

Dale Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2020–27191 Filed 1–4–21; 8:45 am]

BILLING CODE 6705–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AF08

Portfolio Reconciliation Requirements for Swap Dealers and Major Swap Participants—Revision of ''Material Terms'' Definition

AGENCY: Commodity Futures Trading Commission.

ACTION: Interim final rule; request for comment.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting, and invites comments on, an interim final rule (''Interim Final Rule'') to amend the definition of ''material terms'' to maintain current portfolio reconciliation requirements for swap dealers and major swap participants following the effective date of changes to a recently amended Commission regulation.

DATES:

Effective Date. This interim final rule is effective January 5, 2021.

Comment Date: Comments must be received on or before March 8, 2021.

Comments submitted by mail will be accepted as timely if they are postmarked on or before that date.

ADDRESSES: You may submit comments, identified by RIN 3038–AF08, by any of the following methods:

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this rulemaking and follow the instructions on the Public Comment Form.
- *Mail:* Send to Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street NW, Washington, DC 20581.
- *Hand Delivery/Courier:* Follow the same instructions as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

Instructions: All submissions received must include the agency name and RIN number for this rulemaking. For additional details on submitting comments, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Joshua Sterling, Director, (202) 418–6056, *jsterling@cftc.gov;* Jacob Chachkin, Special Counsel, (202) 418–5496, *jchachkin@cftc.gov;* or Gregory Scopino, Special Counsel, *gscopino@cftc.gov,* 202–418–5175, Market Participants Division (''MPD''), Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Commission regulation 23.502 [1] requires swap dealers (''SDs'') and major swap participants (''MSPs''), as defined in § 1.3 of the Commission's regulations,[2] to reconcile their swap portfolios with one another and provide non-SD and non-MSP counterparties with regular opportunities for portfolio reconciliation.[3] Commission regulation 23.500(i) defines ''portfolio reconciliation'' as any process by which the two counterparties to one or more swaps exchange the material terms and valuations of all swaps in the swap portfolio between the counterparties and resolve any identified discrepancy in such material terms and valuations.[4] Commission regulation 23.500(g) defines ''material terms'' to mean the minimum ''primary economic terms'' of a swap, as defined in appendix 1 of part 45 of the Commission's regulations, with the exception of 24 enumerated terms that were excluded from the definition of ''material terms'' as part of a Commission effort to reduce the regulatory burden on SDs and MSPs by eliminating the need to reconcile data field terms that were static or did not

[1] 17 CFR 23.502. Commission regulations referred to herein are found at 17 CFR chapter I.

[2] 17 CFR 1.3.

[3] 17 CFR 23.502; *see* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55926 (Sept. 11, 2012) (''Portfolio Reconciliation Final Rule'').

[4] 17 CFR 23.500(i).

impact the valuation of swaps.[5] In explaining the rationale for requiring SDs and MSPs to engage in portfolio reconciliation, the Commission noted that portfolio reconciliation can identify and reduce overall risk ''[b]y identifying and managing mismatches in key economic terms and valuation for individual transactions across an entire portfolio.'' [6]

On September 17, 2020, the Commission adopted a final rule revising parts 45, 46 and 49 of its regulations on swap data recordkeeping and reporting requirements for swap data repositories (''SDRs''), derivatives clearing organizations (''DCOs''), swap execution facilities, derivatives contract markets, SDs, MSPs, and swap counterparties that are neither SDs nor MSPs (''SDR Rule'').[7] As part of the SDR Rule, the Commission made significant changes to appendix 1 of part 45 of the Commission regulations, which, as discussed above, is referenced in the definition of ''material terms'' set forth in Commission regulation 23.500(g). As a result of these changes, among other things, the new appendix 1 will no longer use the concept of ''primary economic terms'' and will no longer contain the data fields that are explicitly referenced in § 23.500(g).[8]

II. Interim Final Rule

To maintain the status quo for portfolio reconciliation requirements under § 23.502 and ensure that SDs and MSPs can continue to engage in their required portfolio reconciliation exercises without disruption, in this Interim Final Rule the Commission is copying existing appendix 1 of part 45 as a new appendix 1 to subpart I of part 23, and amending § 23.500(g) to reference appendix 1 to subpart I of part 23 instead of appendix 1 to part 45.[9] By doing so, the Commission will enable SDs and MSPs to avoid having to modify their portfolio reconciliation procedures and practices under § 23.502 despite the changes made by the SDR Rule. By this Interim Final Rule, the Commission is making technical organizational changes to its regulations to ensure that market participants will continue engaging in portfolio reconciliation exercises in their current manner, without disruption. Thus, the goal of these technical amendments is to maintain the Commission's regulatory requirements in connection with portfolio reconciliation without change. Without these amendments, market participants would lack meaningful regulatory reference concerning how to perform portfolio reconciliation exercises in light of changes made to appendix 1 of part 45 by the SDR Rule.

III. Public Participation

The Commission is issuing this Interim Final Rule to maintain the status quo for portfolio reconciliation requirements under § 23.502 and ensure that SDs and MSPs can continue to engage in their required portfolio reconciliation exercises without disruption, as discussed above. This approach enables these regulatory changes to take effect sooner than would be possible with the publication of a notice of proposed rulemaking in advance. Nonetheless, the Commission welcomes public comments from interested persons regarding any aspect of its consideration of, and the changes made by, this Interim Final Rule, as well as the following pertaining to potential additional amendments in the future.

Should the Commission propose modifying appendix 1 to subpart I of part 23 (as adopted by this Interim Final Rule) to make it more consistent with appendix 1 to part 45 (as amended by the SDR Rule) or make other changes? If yes, what specific modifications should the Commission propose and why? In addition, should the Commission provide that the reconciliation of a Unique Product Identifier (''UPI'') constitutes the reconciliation of each other material term that is included in the UPI? Why or why not?

All comments must be submitted in English, or if not, accompanied by an English translation. Please refer to the **ADDRESSES** section above. Except as described below regarding confidential business information, all comments are considered part of the public record and will be posted as received to *http://comments.cftc.gov* for public inspection. The information made available online includes personal identifying information (such as name and address) which is voluntarily submitted by the commenter. You should submit only information that you wish to make available publicly.

If you want to submit material that you consider to be confidential business information as part of your comment, but do not want it to be posted online, you must submit your comment by mail or hand delivery/courier and include a petition for confidential treatment as described in § 145.9 of the Commission's regulations.[10]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the rulemaking record and will be considered as required under the Administrative Procedure Act (''APA'') [11] and other applicable laws, and may be accessible under the Freedom of Information Act.[12]

IV. Related Matters

A. Administrative Procedure Act

The APA generally requires federal agencies to publish a notice of proposed rulemaking and provide an opportunity for public comment before issuing a new rule.[13] However, an agency may issue a new rule without a pre-publication public comment period when it for ''good cause'' finds that prior notice and comment is ''impracticable, unnecessary, or contrary to the public interest.'' [14] The Commission has determined that there is good cause to find that a pre-publication comment period is unnecessary because this Interim Final Rule involves technical, ministerial changes that simply move the placement of the current requirements from one part of the Commission's regulations (part 45) to another (part 23) to retain the status quo for purposes of part 23's mandated portfolio reconciliation exercises.[15] For this

[5] 17 CFR 23.500(g).

[6] Portfolio Reconciliation Final Rule, 77 FR at 55927.

[7] *See* Swap Data Recordkeeping and Reporting Requirements, 85 FR 75503 (Nov. 25, 2020). The SDR Rule did not expressly contemplate making changes to the Portfolio Reconciliation Final Rule for SDs and MSPs.

[8] *See* 17 CFR 23.500(g).

[9] Because appendix 1 to subpart I of part 23 only will be used as a reference in connection with the requirements for portfolio reconciliation exercises, the appendix will include only those terms that SDs and MSPs are required to reconcile under regulation 23.502.

Because § 45.5 is being amended by the SDR Rule and will no longer discuss unique swap identifiers (''USIs''), for clarity the Commission has changed only the explanatory comment in appendix 1 for each USI field from ''As provided in § 45.5.'' to ''The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.'' The Commission believes this change will mitigate possible confusion and serve to maintain current portfolio reconciliation processes for SDs and MSPs.

[10] 17 CFR 145.9.

[11] 5 U.S.C. 553 *et seq.*

[12] 5 U.S.C. 552.

[13] *See* 5 U.S.C. 553(b).

[14] *See* 5 U.S.C. 553(b)(3)(B).

[15] Further, if the Commission were to provide an opportunity for notice and comment prior to the amendments' effectiveness, the SDR Rule may take effect during the intervening period, causing

reason, the Commission finds that it is unnecessary to publish notice of these amendments under section 553(b)(3)(B) of the APA.

For the same reason, the Commission also finds good cause to dispense with the 30-day delayed effective date requirement under section 553(d)(3) of the APA.[16] Accordingly, the amendments will be effective immediately upon publication in the **Federal Register**.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act[17] requires federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities. Because, as discussed above, the Commission is not required to publish a notice of proposed rulemaking for this rule, a regulatory flexibility analysis is not required.[18]

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'')[19] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number.

Because it maintains the status quo under § 23.502, this final rulemaking will not impose any new recordkeeping or information collection requirements, or other collections of information.

D. Consideration of Costs and Benefits

Section 15(a) of the CEA[20] requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

This Interim Final Rule does not impose any substantive regulatory obligations on any person. Rather, the Commission is adopting technical amendments to part 23 of its regulations to maintain the status quo for portfolio reconciliation requirements under § 23.502 and ensure that SDs and MSPs can continue to engage in their required portfolio reconciliation exercises without disruption, as discussed above. Accordingly, relative to the status quo baseline there are no material, quantifiable costs or benefits associated with this rulemaking. This Interim Final Rule does not impact the efficiency, competitiveness, and financial integrity of the futures markets because this Interim Final Rule is nothing more than a technical, administrative action that moves specific requirements from part 45 of the Commission's regulations to part 23.

E. Antitrust Laws

Section 15(b) of the CEA[21] requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA as well as the policies and purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.

The Commission believes that the public interest to be protected by the antitrust laws is the promotion of competition. The Commission has considered this Interim Final Rule to determine whether it is anticompetitive and has identified no anticompetitive effects. Having done so, it also has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 23

Authority delegations (Government agencies), Commodity futures, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 23 as set forth below:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. In § 23.500, revise paragraph (g) to read as follows:

§ 23.500 Definitions.

* * * * *

(g) Material terms means the minimum primary economic terms as defined in appendix 1 of subpart I of part 23 of this chapter.

* * * * *

■ 3. Add Appendix 1 to subpart I of part 23 to read as follows:

Part 23, Subpart I, Appendix 1

EXHIBIT A—MINIMUM PRIMARY ECONOMIC TERMS DATA—CREDIT SWAPS AND EQUITY SWAPS

Data categories and fields for all swaps	Comment
Asset Class	Field values: Credit, equity, FX, interest rates, other commodities.
The Unique Swap Identifier for the swap	The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6, or substitute identifier for a natural person.
An indication of whether the reporting counterparty is a derivatives clearing organization with respect to the swap.	Yes/No.
The Legal Entity Identifier of the non-reporting party	As provided in § 45.6, or substitute identifier for a natural person.
The Unique Product Identifier assigned to the swap	As provided in § 45.7.

confusion regarding SD and MSP portfolio reconciliation requirements.

[16] 5 U.S.C. 553(d)(3).

[17] 5 U.S.C. 601 *et seq.*

[18] *See* 5 U.S.C. 603(a).

[19] 44 U.S.C. 3501 *et seq.*

[20] 7 U.S.C. 19(a).

[21] 7 U.S.C. 19(b).

EXHIBIT A—MINIMUM PRIMARY ECONOMIC TERMS DATA—CREDIT SWAPS AND EQUITY SWAPS—Continued

Data categories and fields for all swaps	Comment
If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system.	
If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository.	
An indication of the counterparty purchasing protection	Field values: LEI, or substitute identifier for a natural person.
An indication of the counterparty selling protection	Field values: LEI, or substitute identifier for a natural person.
Information identifying the reference entity	The entity that is the subject of the protection being purchased and sold in the swap. Field values: LEI, or substitute identifier for a natural person.
Contract type	*E.g.,* swap, swaption, forward, option, basis swap, index swap, basket swap.
Execution venue	The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: LEI of the swap execution facility or designated contract market, or ''off-facility'' if not so executed.
Start date	The date on which the swap starts or goes into effect.
Maturity, termination or end date	The date on which the swap expires.
The price	*E.g.,* strike price, initial price, spread.
The notional amount, and the currency in which the notional amount is expressed.	
The amount and currency (or currencies) of any up-front payment	
Payment frequency of the reporting counterparty	A description of the payment stream of the reporting counterparty, *e.g.,* coupon.
Payment frequency of the non-reporting counterparty	A description of the payment stream of the non-reporting counterparty, *e.g.,* coupon.
Clearing exception or exemption type	The type of clearing exception or exemption being claimed. Field values: End user, Inter-affiliate or Cooperative.
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized.
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap.	Use as many fields as required to report each such term.

EXHIBIT B—MINIMUM PRIMARY ECONOMIC TERMS DATA—FOREIGN EXCHANGE TRANSACTIONS

[Other than cross-currency swaps]

Data fields for all swaps	Comment
Asset Class	Field values: Credit, equity, FX, interest rates, other commodities.
The Unique Swap Identifier for the swap	The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6, or substitute identifier for a natural person.
An indication of whether the reporting counterparty is a derivatives clearing organization with respect to the swap.	Yes/No.
The Legal Entity Identifier of the non-reporting party	As provided in § 45.6, or substitute identifier for a natural person.
The Unique Product Identifier assigned to the swap	As provided in § 45.7.
If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system.	
If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository.	
Contract type	*E.g.,* forward, non-deliverable forward (NDF), non-deliverable option (NDO), vanilla option, simple exotic option, complex exotic option.
Execution venue	The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: LEI of the swap execution facility or designated contract market, or ''off-facility'' if not so executed.
Currency 1	ISO code.
Currency 2	ISO code.
Notional amount 1	For currency 1.
Notional amount 2	For currency 2.
Exchange rate	Contractual rate of exchange of the currencies.
Delivery type	Physical (deliverable) or cash (non-deliverable).
Settlement or expiration date	Settlement date, or for an option the contract expiration date.
Clearing exception or exemption type	The type of clearing exception or exemption being claimed. Field values: End user, Inter-affiliate or Cooperative.

EXHIBIT B—MINIMUM PRIMARY ECONOMIC TERMS DATA—FOREIGN EXCHANGE TRANSACTIONS—Continued

[Other than cross-currency swaps]

Data fields for all swaps	Comment
Indication of collateralization	Is the trade collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized.
Any other term(s) of the trade matched or affirmed by the counterparties in verifying the trade.	*E.g.,* for options, premium, premium currency, premium payment date; for non-deliverable trades, settlement currency, valuation (fixing) date; indication of the economic obligations of the counterparties. Use as many fields as required to report each such term.

EXHIBIT C—MINIMUM PRIMARY ECONOMIC TERMS DATA—INTEREST RATE SWAPS

[Including cross-currency swaps]

Data fields for all swaps	Comment
Asset Class	Field values: Credit, equity, FX, interest rates, other commodities.
The Unique Swap Identifier for the swap	The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6, or substitute identifier for a natural person.
An indication of whether the reporting counterparty is a derivatives clearing organization with respect to the swap.	Yes/No.
The Legal Entity Identifier of the non-reporting counterparty	As provided in § 45.6, or substitute identifier for a natural person.
The Unique Product Identifier assigned to the swap	As provided in § 45.7.
If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system.	
If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository.	
Contract type	*E.g.,* swap, swaption, option, basis swap, index swap.
Execution venue	The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: LEI of the swap execution facility or designated contract market, or ''off-facility'' if not so executed.
Start date	The date on which the swap starts or goes into effect.
Maturity, termination or end date	The date on which the swap expires or ends.
Day count convention	
Notional amount (leg 1)	The current active notional amount.
Notional currency (leg 1)	ISO code.
Notional amount (leg 2)	The current active notional amount.
Notional currency (leg 2)	ISO code.
Payer (fixed rate)	Is the reporting party a fixed rate payer? Yes/No/Not applicable.
Payer (floating rate leg 1)	If two floating legs, the payer for leg 1.
Payer (floating rate leg 2)	If two floating legs, the payer for leg 2.
Direction	For swaps: Whether the principal is paying or receiving the fixed rate. For float-to-float and fixed-to-fixed swaps: Indicate N/A. For non-swap instruments and swaptions: Indicate the instrument that was bought or sold.
Option type	*E.g.,* put, call, straddle.
Fixed rate	
Fixed rate day count fraction	*E.g.,* actual 360.
Floating rate payment frequency	
Floating rate reset frequency	
Floating rate index name/rate period	*E.g.,* USD-Libor-BBA.
Clearing exception or exemption type	The type of clearing exception or exemption being claimed. Field values: End user, Inter-affiliate or Cooperative.
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized.
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap.	*E.g.,* early termination option clause. Use as many fields as required to report each such term.

EXHIBIT D—MINIMUM PRIMARY ECONOMIC TERMS DATA—OTHER COMMODITY SWAPS

Data field for all swaps	Comment
Asset Class	Field values: Credit, equity, FX, interest rates, other commodities.

EXHIBIT D—MINIMUM PRIMARY ECONOMIC TERMS DATA—OTHER COMMODITY SWAPS—Continued

Data field for all swaps	Comment
The Unique Swap Identifier for the swap	The USI is a unique identifier assigned to all swap transactions which identifies the transaction (the swap and its counterparties) uniquely throughout its duration.
The Legal Entity Identifier of the reporting counterparty	As provided in § 45.6, or substitute identifier for a natural person.
An indication of whether the reporting counterparty is a derivatives clearing organization with respect to the swap.	Yes/No.
The Legal Entity Identifier of the non-reporting party	As provided in § 45.6, or substitute identifier for a natural person.
The Unique Product Identifier assigned to the swap	As provided in § 45.7.
If no Unique Product Identifier is available for the swap because the swap is not sufficiently standardized, the taxonomic description of the swap pursuant to the CFTC-approved product classification system.	
If no CFTC-approved UPI and product classification system is yet available, the internal product identifier or product description used by the swap data repository.	
Contract type	*E.g.,* swap, swaption, option, basis swap, index swap.
Execution venue	The swap execution facility or designated contract market on or pursuant to the rules of which the swap was executed. Field values: LEI of the swap execution facility or designated contract market, or ''off-facility'' if not so executed.
Start date	The date on which the swap commences or goes into effect (*e.g.,* in physical oil, the pricing start date).
Maturity, termination, or end date	The date on which the swap expires or ends (*e.g.,* in physical oil, the pricing end date).
Buyer	The counterparty purchasing the product: (*E.g.,* the payer of the fixed price (for a swap), or the payer of the floating price on the underlying swap (for a put swaption), or the payer of the fixed price on the underlying swap (for a call swaption). Field values: LEI, if available, or substitute identifier, for a natural person.
Seller	The counterparty offering the product: (*E.g.,* the payer of the floating price (for a swap), the payer of the fixed price on the underlying swap (for a put swaption), or the payer of the floating price on the underlying swap (for a call swaption). Field values: LEI, or substitute identifier, for a natural person.
Quantity unit	The unit of measure applicable for the quantity on the swap. *E.g.,* barrels, bushels, gallons, pounds, tons.
Quantity	The amount of the commodity (the number of quantity units) quoted on the swap.
Quantity frequency	The rate at which the quantity is quoted on the swap. *E.g.,* hourly, daily, weekly, monthly.
Total quantity	The quantity of the commodity for the entire term of the swap.
Settlement method	Physical delivery or cash.
Price	The price of the swap. For options, the strike price.
Price unit	The unit of measure applicable for the price of the swap.
Price currency	ISO code.
Buyer pay index	The published price as paid by the buyer (if applicable). For swaptions, applies to the underlying swap.
Buyer pay averaging method	The averaging method used to calculate the index of the buyer pay index. For swaptions, applies to the underlying swap.
Seller pay index	The published price as paid by the seller (if applicable). For swaptions, applies to the underlying swap.
Seller pay averaging method	The averaging method used to calculate the index of the seller pay index. For swaptions, applies to the underlying swap.
Grade	If applicable, the grade of the commodity to be delivered, *e.g.,* the grade of oil or refined product.
Option type	Descriptor for the type of option transaction. *E.g.,* put, call, straddle.
Option style	*E.g.,* American, European, European Daily, European Monthly, Asian.
Option premium	The total amount paid by the option buyer.
Hours from through	For electric power, the hours of the day for which the swap is effective.
Hours from through time zone	For electric power, the time zone prevailing for the hours during which electricity is transmitted.
Days of week	For electric power, the profile applicable for the delivery of power.
Load type	For electric power, the load profile for the delivery of power.
Clearing exception or exemption type	The type of clearing exception or exemption being claimed. Field values: End user, Inter-affiliate or Cooperative.
Indication of collateralization	Is the swap collateralized, and if so to what extent? Field values: Uncollateralized, partially collateralized, one-way collateralized, fully collateralized.
Any other term(s) of the swap matched or affirmed by the counterparties in verifying the swap.	Use as many fields as required to report each such term.

* * * * *

Issued in Washington, DC, on November 25, 2020, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Portfolio Reconciliation Requirements for Swap Dealers and Major Swap Participants—Revision of ''Material Terms'' Definition—Voting Summary and Chairman's and Commissioners' Statements

Appendix 1—Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Commissioner Dan M. Berkovitz

I support today's interim final rule that will maintain the continuity of swap portfolio reconciliation requirements for swap dealers. In September 2012, the Commission established in regulation 23.502 the requirement for swap dealers to regularly reconcile key material terms of swaps in portfolios with certain counterparties. These portfolios can include hundreds, thousands, and even tens of thousands of individual swap transactions. Regularly reconciling economic terms that determine the periodic payments made on swap portfolios reduces the likelihood of significant disputes and potential payment shortfalls or interruptions. Reducing these events reduces risk in the financial system, particularly during times of market stress.[1]

On September 17, 2020, the Commission adopted a final rule revising parts 45, 46, and 49 of its regulations on swap data recordkeeping and reporting requirements. In the amendments, significant changes were made to material terms that are cross-referenced in regulation 23.502. The unintended consequence would be to render the portfolio reconciliation requirement ineffective when the swap data regulations go into effect in approximately 60 days. The IFR corrects this unintended consequence by reestablishing the same material economic terms identified for regulation 23.502, thereby maintaining the status quo for the portfolio reconciliation requirement. This is a necessary action to maintain the risk reducing effects of that requirement.

[FR Doc. 2020–26536 Filed 1–4–21; 8:45 am]

BILLING CODE 6351–01–P

[1] *See* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55927 (Sept. 11, 2012).

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038–AF05

Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting amendments (''Final Rule'') to its margin requirements for uncleared swaps for swap dealers (''SDs'') and major swap participants (''MSPs'') for which there is not a prudential regulator (''CFTC Margin Rule''). The Commission is amending the CFTC Margin Rule to revise the calculation method for determining whether certain entities come within the scope of its initial margin (''IM'') requirements for uncleared swaps beginning in the last phase of the phased compliance schedule, which starts on September 1, 2022, and the timing for compliance with the IM requirements after the end of the phased compliance schedule. These amendments align certain aspects of the CFTC Margin Rule with the Basel Committee on Banking Supervision and the International Organization of Securities Commissions' (''BSBS/IOSCO'') Framework for margin requirements for non-centrally cleared derivatives (''BCBS/IOSCO Framework''). The Commission is also amending the CFTC Margin Rule to allow SDs and MSPs subject to the CFTC Margin Rule to use the risk-based model calculation of IM of a counterparty that is a CFTC-registered SD or MSP to determine the amount of IM to be collected from the counterparty and to determine whether the IM threshold amount for the exchange of IM has been exceeded such that documentation concerning the collection, posting, and custody of IM would be required.

DATES: This rule is effective February 4, 2021.

FOR FURTHER INFORMATION CONTACT: Joshua B. Sterling, Director, 202–418–6056, *jsterling@cftc.gov;* Thomas J. Smith, Deputy Director, 202–418–5495, *tsmith@cftc.gov;* Warren Gorlick, Associate Director, 202–418–5195, *wgorlick@cftc.gov;* or Carmen Moncada-Terry, Special Counsel, 202–418–5795, *cmoncada-terry@cftc.gov,* Market Participants Division, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

Section 4s(e) of the Commodity Exchange Act (''CEA'' or ''Act'')[1] requires the Commission to adopt rules establishing minimum initial and variation margin requirements for all swaps[2] that are (i) entered into by an SD or MSP for which there is no prudential regulator[3] (collectively, ''covered swap entities'' or ''CSEs'')[4] and (ii) not cleared by a registered derivatives clearing organization (''uncleared swaps'').[5] To offset the greater risk to the SD[6] or MSP[7] and the financial system arising from the use of uncleared swaps, these requirements must (i) help ensure the safety and soundness of the SD or MSP and (ii) be appropriate for the risk associated with the uncleared swaps held by the SD or MSP.[8]

Pursuant to its rulemaking authority under section 4s(e), the Commission in 2016 promulgated Regulations 23.150 through 23.161, namely the CFTC Margin Rule, which requires CSEs to

[1] 7 U.S.C. 6s(e) (capital and margin requirements).

[2] CEA section 1a(47), 7 U.S.C. 1a(47) (swap definition); Regulation 1.3, 17 CFR 1.3 (further definition of a swap). A swap includes, among other things, an interest rate swap, commodity swap, credit default swap, and currency swap.

[3] CEA section 1a(39), 7 U.S.C. 1a(39) (defining the term ''prudential regulator'' to include the Board of Governors of the Federal Reserve System; the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency). The definition of prudential regulator further specifies the entities for which these agencies act as prudential regulators. The prudential regulators published final margin requirements in November 2015. *See generally* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74840 (Nov. 30, 2015) (''Prudential Margin Rule''). The Prudential Margin Rule is substantially similar to the CFTC Margin Rule, including with respect to the CFTC's phasing-in of margin requirements.

[4] CEA section 4s(e)(1)(B), 7 U.S.C. 6s(e)(1)(B). SDs and MSPs for which there is a prudential regulator must meet the margin requirements for uncleared swaps established by the applicable prudential regulator. CEA section 4s(e)(1)(A), 7 U.S.C. 6s(e)(1)(A).

[5] CEA section 4s(e)(2)(B)(ii), 7 U.S.C. 6s(e)(2)(B)(ii). In Regulation 23.151, the Commission further defined this statutory language to mean all swaps that are not cleared by a registered derivatives clearing organization or a derivatives clearing organization that the Commission has exempted from registration as provided under the CEA. 17 CFR 23.151.

[6] CEA section 1a(49), 7 U.S.C. 1a(49) (swap dealer definition); Regulation 1.3 (further definition of swap dealer).

[7] CEA section 1a(32), 7 U.S.C. 1a(32) (major swap participant definition); Regulation 1.3 (further definition of major swap participant).

[8] CEA section 4s(e)(3)(A), 7 U.S.C. 6s(e)(3)(A).

collect and post IM[9] and variation margin (''VM'')[10] for uncleared swaps.[11] In administering the CFTC Margin Rule, the Commission has identified matters, further described below, that may pose challenges in the implementation of the IM requirements.

A. Calculation Method for Determining Whether Certain Entities Are Subject to the IM Requirements and the Timing for Compliance With the IM Requirements After the End of the Phased Compliance Schedule

Regulation 23.161 sets forth a schedule for compliance with the CFTC Margin Rule, spanning from September 1, 2016, to September 1, 2022.[12] Under the schedule, entities are required to comply with the IM requirements in staggered phases,[13] starting with entities with the largest average aggregate notional amount (''AANA''), calculated on a daily basis, of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps (''covered products'') and then successively with lesser AANA. The last phase of compliance, which begins on September 1, 2022, encompasses CSEs and covered counterparties[14] that did not come into the scope of the IM requirements in prior phases, including financial end users (''FEUs'') with material swaps exposure (''MSE'')[15] of more than $8 billion in AANA of covered products.[16]

The method for determining which entities come within the scope of the CFTC's IM requirements beginning in the last phase of compliance, as set forth in the Commission's regulations, differs from the method set out in the BCBS/IOSCO Framework.[17] More specifically, the BCBS/IOSCO Framework requires that in the last phase of implementation of the IM requirements, which begins on September 1, 2022, entities with €8 billion[18] in average month-end aggregate of notional amount (''month-end AANA'') of non-cleared derivatives, including forex forwards and swaps, during the period of March, April, and May of the current year, to exchange IM beginning on September 1 of each year.

In contrast, under the CFTC Margin Rule, a CSE must exchange IM with an FEU that has MSE with respect to uncleared swaps entered into between the parties beginning in the last phase of compliance, which starts on September 1, 2022. The MSE for the FEU is to be determined on September 1, 2022, based on the FEU's daily average AANA during the period of June, July, and August of the prior year. After the last phase of compliance, the MSE for the FEU is to be determined on January 1 of each calendar year based on its daily average AANA during the June, July, and August period of the prior year, with application of the IM requirements, if the FEU has MSE, required to begin on January 1 of each year.

The BCBS/IOSCO Framework was originally promulgated in September 2013,[19] and then revised in 2015.[20] The 2015 version of the BCBS/IOSCO Framework changed the calculation period of June, July, and August, with an annual implementation date of December 1, to March, April, and May of each calendar year, with an annual implementation date of September 1. The CFTC Margin Rule incorporated the earlier 2013 version of the BCBS/IOSCO Framework by adopting the June, July, and August calculation period for the annual calculation of MSE. As a result, the Commission's existing regulations do not reflect the calculation period of March, April, and May set forth in the revised BCBS/IOSCO Framework published in March 2015.

The Commission also departed from BCBS/IOSCO's month-end AANA calculation for determining whether an entity is subject to the IM requirements. The Commission decided to adopt instead daily AANA averaging to determine whether an FEU has MSE, the finding of which requires a CSE to exchange IM with the FEU, to gather a more comprehensive assessment of the FEU's participation in the swaps market, and to address the possibility that a market participant might ''window dress'' its exposure on an as-of date such as year-end, in order to avoid the Commission's margin requirements.[21]

As a result, the Commission's current method for the annual calculation of MSE, which was adopted in coordination with the U.S. prudential

[9] IM or initial margin is the collateral (calculated as provided by Regulation 23.154) that is collected or posted in connection with one or more uncleared swaps pursuant to Regulation 23.152. IM is intended to secure potential future exposure following default of a counterparty (*i.e.,* adverse changes in the value of an uncleared swap that may arise during the period of time when it is being closed out). *See* CFTC Margin Rule, 81 FR at 683.

[10] VM or variation margin, as defined in Regulation 23.151, is the collateral provided by a party to its counterparty to meet the performance of its obligations under one or more uncleared swaps between the parties as a result of a change in the value of such obligations since the trade was executed or the last time such collateral was provided. 17 CFR 23.151.

[11] *See generally* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016). The CFTC Margin Rule, which became effective April 1, 2016, is codified in part 23 of the Commission's regulations. 17 CFR 23.150 through 23.159, 23.161. In May 2016, the Commission amended the CFTC Margin Rule to add Regulation 23.160, 17 CFR 23.160, providing rules on its cross-border application. *See generally* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements, 81 FR 34818 (May 31, 2016).

[12] *See* Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 71246 (Nov. 9, 2020) (extending the phased compliance schedule for the CFTC's IM requirements for uncleared swaps to September 1, 2022).

[13] The schedule also addresses the VM requirements under the CFTC Margin Rule, providing a compliance period of September 1, 2016, through March 1, 2017. *See* 17 CFR 23.161(a). The compliance period (including a six-month extension to September 1, 2017, through no-action relief) has long expired and all eligible entities are required to comply with the VM requirements.

[14] The term ''covered counterparty'' is defined in Regulation 23.151 as a financial end user with material swaps exposure or a swap entity, including an SD or MSP, that enters into swaps with a CSE. *See* 17 CFR 23.151.

[15] Regulation 23.151 provides that MSE for an entity means that the entity and its margin affiliates have an average daily aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for June, July, or August of the previous calendar year that exceeds $8 billion, where such amount is calculated only for business days. A company is a ''margin affiliate'' of another company if: (i) Either company consolidates the other on a financial statement prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards; (ii) both companies are consolidated with a third company on a financial statement prepared in accordance with such principles or standards; or (iii) for a company that is not subject to such principles or standards, if consolidation as described in paragraph (i) or (ii) of this definition would have occurred if such principles or standards had applied. 17 CFR 23.151.

[16] The determination of MSE requires computing AANA, calculated on a daily basis, of covered products over June, July and August of the previous calendar year. For simplicity purposes, this formulation will be referred to as ''daily average AANA'' to contrast with month-end AANA, which is used for the calculation of AANA under the BCBS/IOSCO Framework.

[17] *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (July 2019), *https://www.bis.org/bcbs/publ/d475.pdf* (''2019 BCBS/IOSCO Framework'').

[18] The U.S. adopted the BCBS/IOSCO threshold, but replaced the 8 billion euro figure with a dollar amount of $8 billion. As a result, there is a small disparity in the threshold amounts given the continuing fluctuation of the dollar-euro exchange rate. The Final Rule does not address this issue.

[19] *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (Sept. 2013), *https://www.bis.org/publ/bcbs261.htm.*

[20] *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (March 2015), *https://www.bis.org/bcbs/publ/d317.htm.*

[21] 81 FR at 645. The potential for mutual funds to alter their portfolios prior to disclosure (''window dressing'') has been documented in the financial economics literature. *See, e.g.,* Musto, D. (1999). ''Investment decisions depend on portfolio disclosures.'' *Journal of Finance* 54, 935–952, or Agarwal, V., Gay G. and Ling, L. (2011). ''Window dressing in mutual funds.'' *Review of Financial Studies,* 27, 3133–3170.

regulators and is similar to the U.S. prudential regulators' method of calculation, is not consistent with the most recent version of the BCBS/IOSCO Framework. Nor is it consistent with requirements in other major market jurisdictions, most of which adopted the 2015 BCBS/IOSCO Framework's month-end AANA calculation using the period of March, April, and May for the purposes of determining whether an entity is subject to the IM requirements beginning in the last phase of implementation.[22]

In a report prepared by a subcommittee established by the CFTC's Global Markets Advisory Committee (''GMAC''), discussed in more detail below, the subcommittee reported that the differences in the methods for determining when an entity comes within the scope of the IM requirements and the timing of compliance after the last phase of compliance may impose an undue burden on market participants' efforts to comply with the CFTC's margin requirements.[23] The report stated that entities have to account for different compliance schedules and set up and maintain separate processes for determining when they meet the thresholds for IM compliance.[24]

B. No-Action Letter No. 19–29 Concerning the Calculation of IM

The Commission's Division of Swap Dealer and Intermediary Oversight[25] issued CFTC No-Action Letter 19–29 in July 2019 in response to a request for relief submitted by Cargill Incorporated (''Cargill''), a CFTC-registered SD and CSE.[26] Cargill sought no-action relief to be able to use the risk-based model calculation of IM of a counterparty that is an SD to determine the amount of IM to be collected from the counterparty. Cargill stated that while its swap activity primarily involved physical agricultural commodities with non-SD counterparties seeking to mitigate commercial risk, it maintained positions that required the collection of IM from SDs. Given the highly specialized and discrete nature of its swaps business, mainly focusing on commodities, Cargill opted to rely on the standardized IM table to calculate IM rather than develop a risk-based model. Because the use of the standardized table could generate higher amounts of IM than a risk-based model, requiring its SD counterparties to post higher amounts of IM, Cargill stated that SD counterparties might choose not to trade with it.

Based on Cargill's representations, MPD stated that it would not recommend enforcement action, subject to specified conditions, if Cargill used the risk-based model calculation of IM of a counterparty that is a CFTC-registered SD as the amount of IM that Cargill was required to collect from the SD and to determine whether the IM threshold amount of $50 million (''IM threshold amount'')[27] had been exceeded, which would trigger the requirement for documentation concerning the posting, collection, and custody of IM collateral.

C. Market Participant Feedback

As previously mentioned, the CFTC's GMAC established a subcommittee of market participants in January 2020 to consider issues raised by the implementation of margin requirements for non-cleared swaps, identify challenges associated with forthcoming implementation phases, and prepare a report with recommendations. The subcommittee issued the Margin Subcommittee Report and submitted the Report to the GMAC.[28] The GMAC adopted the Report and recommended to the Commission that it consider adopting the Report's recommendations.

Among other things, the Margin Subcommittee Report recommended the alignment of the CFTC Margin Rule with the BCBS/IOSCO Framework with respect to the method for calculating AANA for determining whether an entity comes within the scope of the IM requirements and the timing of compliance after the end of the phased compliance schedule.[29] The Report also recommended the codification of Letter 19–29.[30]

In response to feedback from market participants, in particular the GMAC subcommittee's recommendations, the Commission issued a notice of proposed rulemaking (''Proposal''), published in the **Federal Register** on September 23, 2020, proposing amendments to the CFTC Margin Rule. The Commission proposed to align the CFTC Margin Rule with the BCBS/IOSCO Framework with respect to the method for calculating AANA for determining whether certain entities come within the scope of the IM requirements and the timing of compliance after the end of the phased compliance schedule, noting that BCBS/IOSCO is the global standard setter for margin requirements for non-centrally cleared derivatives and that the proposed amendments would promote international harmonization in the application of the IM requirements. The Commission stated that the disjunction between the CFTC and BCBS/IOSCO concerning the calculation of AANA and the timing of compliance with the IM requirements does not further any regulatory purpose, noting, in particular, the foreseeability of calculation errors resulting from differences in the calculation methods.[31]

The Commission also proposed to amend the CFTC Margin Rule to permit CSEs to use the risk-based IM calculation of a counterparty that is a

[22] *See, e.g.,* Commission Delegated Regulation (EU) 2016/2251 Supplementing Regulation (EU) No. 648/2012 of the European Parliament and of the Council of July 4, 2012 on OTC Derivatives, Central Counterparties and Trade Repositories with Regard to Regulatory Technical Standards for Risk-Mitigation Techniques for OTC Derivative Contracts Not Cleared by a Central Counterparty (Oct. 4, 2016), Article 28(1), *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R2251&from=EN.* Financial Services Agency of Japan (JFSA) Cabinet Office Ordinance on Financial Instruments Business (Cabinet Office Ordinance No. 52 of August 6, 2007), as amended (March 31, 2016), Article 123(11)(iv); Office of the Superintendent of Financial Institutions Canada (OSFI) Guideline No. E–22, Margin Requirements for Non-Centrally Cleared Derivatives (April 2020), Section 5, 71, *https://www.osfi-bsif.gc.ca/Eng/Docs/e22.pdf.*

[23] *See Recommendations to Improve Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps,* Report to the CFTC's Global Markets Advisory Committee by the Subcommittee on Margin Requirements for Non-Cleared Swaps, May 2020 at, 48–54, *https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download* (''Margin Subcommittee Report'' or ''Report'').

[24] *Id.*

[25] Pursuant to a Commission plan of reorganization, the Division of Swap Dealer and Intermediary Oversight was renamed Market Participants Division (''MPD'') effective November 8, 2020. The Division is referred to as MPD hereinafter.

[26] CFTC Letter No. 19–29, Request for No-Action Relief Concerning Calculation of Initial Margin (Dec.19, 2019) (''Letter 19–29''), *http://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/19-29.pdf.*

[27] Under Regulation 23.154(a)(3), SDs and MSPs subject to the Commission's regulations are not required to post or collect IM until the initial margin threshold amount has been exceeded. *See* 17 CFR 23.154(a)(3). The term ''initial margin threshold amount'' is defined in Regulation 23.151 to mean an aggregate credit exposure of $50 million resulting from all uncleared swaps between an SD and its margin affiliates (or an MSP and its margin affiliates) on the one hand, and the SD's (or MSP's) counterparty and its margin affiliates on the other. *See* 17 CFR 23.151.

[28] *See supra* note 23.

[29] *See* Margin Subcommittee Report at 48–54.

[30] *See* Margin Subcommittee Report at 34–36.

[31] The possibility of calculation errors may be mitigated by substituted compliance, as described in Regulation 23.160, if the parties are non-U.S. entities and substituted compliance is available, as the parties may be able to avail themselves of the rules in the foreign jurisdiction and may therefore not face the concern about different calculation methods. However, while the changes to the method of calculation of AANA under the Final Rule will align the CFTC's method of calculation with BCBS/IOSCO's approach, the Commission acknowledges that the changes will result in a divergence from the U.S. prudential regulators' approach, which may increase the potential for calculation errors for entities located in the United States.

CFTC-registered SD or MSP, in line with the terms of Letter 19–29. The Commission stated that this amendment would promote legal certainty and clarity, facilitating efforts by market participants to take the application of the Commission's regulations into account in planning their uncleared swaps business, without undermining the effectiveness of the CFTC Margin Rule.

The Commission stated that the more widespread availability of the relief provided by Letter 19–29 would promote efficient risk hedging by smaller CSEs that offer swaps services to smaller entities that are neither SDs nor MSPs. The Commission further noted that having the ability to use the risk-based IM calculation of a counterparty that is an SD or MSP would allow smaller CSEs to engage SDs and MSPs that otherwise might be disincentivized from trading with the CSEs. That is because for such CSEs, the single method of IM calculation available may be the standardized IM table, as the CSEs, given the discrete and limited nature of their swaps business, may find it uneconomical to develop and maintain a proprietary model. As a result, swap entity counterparties may be required to post higher amounts of IM to the CSEs, as the table-based method of calculation does not account for portfolio composition, diversification and hedges.

In the preamble to the Proposal, the Commission sought comment from the public on the proposed amendments.[32] The comment period for the Proposal closed on October 23, 2020, and nine comment letters were received: one from an SD in the gas and electric power industry;[33] one from an SD in the oil and gas industry;[34] one from a life insurance trade association;[35] one from a group of swaps and financial industry advocates;[36] one from a futures industry group representing members active in the physical commodities markets;[37] one from a managed fund industry group;[38] one from a regulated funds association;[39] one from a representative of the asset management industry;[40] and one from a group of commercial firms in the energy industry.[41]

II. Final Rule, Summary of Comments and Commission Response

The Commission is adopting revisions to the method for calculating AANA for determining whether an FEU has MSE and the timing for compliance with the IM requirements after the end of the last phase of compliance to align these aspects of the CFTC Margin Rule with the BCBS/IOSCO Framework, as proposed. The Commission is also amending Regulation 23.154(a), consistent with the terms of Letter 19–29, and thus allowing CSEs to use the risk-based model calculation of IM of counterparties that are CFTC-registered SDs or MSPs (''swap entities'')[42] to determine the amount of IM to be collected from such counterparties.

All the comment letters received on the Proposal generally expressed support for the proposed amendments[43] and the Commission's efforts to identify and address challenges in the implementation of the CFTC's margin requirements as the phased compliance schedule nears conclusion.[44] Commenters expressed support for the Proposal even in the absence of parallel action by the U.S. prudential regulators, while urging the CFTC to continue coordination with the prudential regulators and encourage corresponding amendments to the prudential regulators' margin rules so that prudentially regulated SDs and MSPs and their counterparties are not disadvantaged by requirements that are neither globally nor domestically harmonized.[45]

A. Regulation 23. 151—Amendments to MSE Definition

As noted above, a CSE must exchange IM with respect to uncleared swaps with a counterparty that is an FEU that has MSE beginning in the last phase of the phased compliance schedule, which will start on September 1, 2022.[46] Regulation 23.151 provides that an entity has MSE if it has more than $8 billion in AANA, calculated on a daily basis, during June, July, and August of the prior year.[47] An FEU that has MSE based on the calculation of AANA over June, July, and August of 2021 would come within the scope of the IM requirements beginning on September 1, 2022. In subsequent calendar years after September 1, 2022, however, because the base year for calculating AANA is the prior year, the annual determination of MSE, which triggers the applicability of the IM requirements, would be January 1 of each year,[48] using the

[32] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 FR 59702 (Sept. 23, 2020). The comment letters for the Proposal are available at: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=4157*.

[33] Letter from Jennifer Minnis, BP Energy Company (Oct. 23, 2020) (BPEC 10/23/2020 Letter).

[34] Letter from Scott Earnest, Shell Trading Risk Management, LLC (Oct. 23, 2020) (STRM 10/23/2020 Letter).

[35] Letter from Michael Lovendusky, American Council of Life Insurers (Oct. 23, 2020) (ACLI 10/23/2020 Letter).

[36] Letter from Tara Kruse, James Kemp, and Kyle Brandon for International Swaps and Derivatives Association (ISDA), Global Foreign Exchange Division (GFXD) of the Global Financial Markets Association, and Securities Industry and Financial Markets Association, respectively, (collectively, ''Associations'') (Oct. 22, 2020) (Associations 10/22/2020 Letter).

[37] Letter from Allison Lurton, Financial Industry Association (Oct. 22, 2020) (FIA 10/22/2020 Letter).

[38] Letter from Jennifer W. Han, Managed Funds Association (Oct. 22, 2020) (MFA 10/22/2020 Letter).

[39] Letter from Sarah A. Bessin, Investment Company Institute (Oct. 22, 2020) (ICI 10/22/2020 Letter).

[40] Letter from Jason Silverstein, Asset Management Group of the Securities Industry and Financial Markets Association (Oct. 22, 2020) (SIFMA AMG 10/22/2020 Letter).

[41] Letter from Alexander S. Holtan, Commercial Energy Working Group (Oct. 22, 2020) (Working Group 10/22/2020 Letter).

[42] Regulation 23.151 defines the term ''swap entity'' as a person that is registered with the Commission as an SD or MSP under the CEA.

[43] *See* ACLI 10/23/2020 Letter at 1; Associations 10/22/2020 Letter at 1; BPEC 10/23/2020 Letter at 2; FIA 10/22/2020 Letter at 2–3; ICI 10/22/2020 Letter at 1; MFA 10/22/2020 Letter at 1; SIFMA AMG 10/22/2020 Letter at 1; STRM 10/23/2020 Letter at 1; Working Group 10/22/2020 Letter at 3. A commenter stated that the Proposal reflects the realities of the marketplace and further aligns the U.S. regulations with the global regulators. *See* ACLI 10/23/2020 Letter at 2. Other commenters stated that the Proposal would enable the implementation of the IM requirements in a practical and efficient manner, as market participants prepare for forthcoming compliance dates, reducing complexity and burden associated with implementation and would foster greater liquidity and contribute to the lowering of hedging costs, particularly in the last phases of the compliance schedule. *See* BPEC 10/23/2020 Letter at 2; MFA 10/22/2020 Letter at 2.

[44] While expressing support for the Proposal, commenters asked the Commission to consider other issues raised by the CFTC Margin Rule, including whether to exclude commodity swaps from the CFTC's uncleared margin requirements, the need to harmonize the definition of financial entity under section 2(h)(7) of the CEA and the definition of financial end user under the CFTC Margin Rule, whether treasury affiliates of an SD should be exempt from the CFTC's uncleared margin requirements, and other topics raised in prior communications to the Commission. *See* FIA 10/22/2020 Letter at 2; MFA 10/22/2020 Letter at 2. The commenters also asked the Commission to consider other recommendations from the Margin Subcommittee Report not addressed in the Proposal. *See* ACLI 10/23/2020 Letter at 2; Associations 10/22/2020 Letter at 1; SIFMA AMG 10/22/2020 Letter at 4. The Commission will not currently act on these additional matters as they fall outside the scope of the Proposal. The Commission is aware of these issues and will continue to consider them and monitor pertinent developments to determine whether further Commission action concerning these matters is appropriate in the future.

[45] ACLI 10/23/2020 Letter at 1; Associations 10/22/2020 Letter at 4; MFA 10/22/2020 Letter at 2.

[46] *See* 17 CFR 23.161(a)(7) (requiring CSEs to comply with the CFTC's IM requirements with respect to uncleared swaps with counterparties that are FEUs with MSE beginning on September 1, 2022).

[47] For definition of MSE, *see supra* note 15.

[48] January 1 is not explicitly set out in the Commission's regulations as the determination date for MSE after the last phase of compliance. However, absent the Final Rule, Regulation

AANA for June, July, and August of the prior year. If the FEU has MSE on January 1 of a given year, the FEU would come within the scope of the IM requirements on January 1 of such year. As such, a CSE would be required to exchange regulatory IM beginning on such January 1 for its uncleared swaps with such FEU.

As proposed, the Commission is amending the definition of MSE in Regulation 23.151 by replacing ''June, July and August of the previous calendar year'' with ''March, April and May of that year.'' The period for calculating AANA for determining whether an FEU has MSE will thus be March, April, and May of ''that year.'' ''That year'' will be understood to mean the year the MSE status for an FEU is assessed for the purpose of determining whether a CSE that enters into uncleared swaps with the FEU is required to exchange IM with the FEU.

The Commission is also amending the definition of MSE to set ''September 1 of any year'' as the determination date for MSE. Under the current requirements, absent a rule change, the MSE for an FEU would have to be determined first on September 1, 2022, which would begin the last phase of compliance under the phased compliance schedule, and subsequently, after the end of the phased compliance schedule, on January 1 of each year. Under the Final Rule, the date for the determination of MSE after the end of the phased compliance schedule will shift from January 1 to September 1. The change in the MSE determination date to September 1 of each year effectively sets the timing for compliance with the IM requirements on September 1 after the end of the phased compliance schedule with respect to uncleared swaps entered into by a CSE and an FEU with MSE.

The shift of the MSE determination date from January 1 to September 1 may defer for nine months to September 1, 2023, the obligation to exchange IM for a firm that absent the rule change would have been subject to the IM requirements on January 1, 2023. Uncleared swaps entered into by the firm during the nine-month deferral period will be deemed legacy swaps, or uncleared swaps exempt from the IM requirements.[49] As a result, in 2023, less collateral may be collected for uncleared swaps, which could render uncleared swap positions riskier and increase the risk of contagion and systemic risk. The Commission, however, notes that because the deferral period will affect entities with lower AANAs than entities brought into scope in earlier phases of the IM compliance schedule, the potential uncollateralized risk would be mitigated, becoming a lesser concern, particularly because the proposed change in the MSE determination date will draw the Commission's rules closer to BCBS/IOSCO's approach, promoting international harmonization.

Conversely, the change in the MSE determination date could also result in requiring certain entities to post and collect IM that otherwise would not have been required to do so. This could occur when an FEU meets the MSE threshold in the last phase of compliance beginning on September 1, 2022, but falls below the threshold by January 1, 2023, because the AANA for June, July, and August of the prior year (*i.e.* 2022) is below $8 billion. In such case, under the current rule, a CSE would no longer be required to exchange IM with such FEU beginning on January 1, 2023. However, the change in the MSE determination date to September 1, as adopted, will require the CSE to continue to exchange IM with the FEU through September 1, 2023, as no determination of MSE status will be required between September 1, 2022, and September 1, 2023, and, as a result, the CSE will be required to exchange IM with the FEU for nine months longer than the January 1, 2023 MSE determination date would have required.

These amendments to the definition of MSE will have the effect of reducing the time frame that FEUs and their CSE counterparties will have to prepare for compliance with the IM requirements. Under the current rule being amended, CSEs would have been required to exchange regulatory IM with counterparties that are FEUs with MSE beginning on September 1, 2022, which starts the last phase of the phased compliance schedule. The MSE for the FEU would have been determined using the AANA for June, July, and August of the prior year (*i.e.,* 2021). As a result, for the last phase of compliance in 2022, a CSE and FEU would have had at least twelve months to prepare for compliance with the IM requirements. By contrast, under the Final Rule, a CSE and FEU, for the last phase of compliance in 2022, will have only 3 months to prepare for IM compliance because MSE will be required to be determined using the AANA for March, April, and May of the current year (*i.e.,* 2022).

Also, under the Final Rule, after the last phase of compliance under the phased compliance schedule, the date for determining MSE for an FEU will be September 1 of each year, and the AANA calculation period for determining whether an FEU has MSE will be March, April, and May of such year. As a result, an FEU with MSE and its CSE counterparty will have three months to prepare in advance of compliance with the IM requirements, whereas under the current rule being amended, such parties would have had four months because MSE would have been required to be determined on January 1 based on the AANA for June, July, and August of the prior year.

In its Margin Subcommittee Report, the GMAC subcommittee acknowledged that the change in the period for the calculation of AANA and the change in the MSE determination date from January 1 to September 1 would reduce the time frame for preparing for compliance with the IM requirements.[50] Nevertheless, the subcommittee expressed support for the changes, noting that the changes would align the CFTC's margin requirements with the BCBS/IOSCO Framework.[51]

The Commission is also amending the definition of MSE to replace ''average daily aggregate notional amount,'' or daily average AANA, with ''average month-end aggregate notional amount,'' for calculating AANA to determine whether an entity has MSE. In adopting the CFTC Margin Rule, the Commission acknowledged that month-end AANA averaging for the calculation of AANA would be consistent with BCBS/IOSCO's approach. Nonetheless, the CFTC, along with the U.S prudential regulators, decided to adopt daily AANA averaging for the calculation of AANA to determine MSE. In the preamble to the CFTC Margin Rule, the

23.161(a)(7) (addressing the last phase of compliance and the timing of compliance going forward) and the definition of MSE in Regulation 23.151 can be reasonably read together to set January 1 as the MSE determination date. *See* 17 CFR 23.151; 17 CFR 23.161(a)(7).

[49] Pursuant to Regulation 23.161, the compliance dates for the IM and VM requirements under the CFTC Margin Rule are staggered across a phased schedule that extends from September 1, 2016, to September 1, 2022. The compliance period for the VM requirements ended on March 1, 2017 (though the CFTC and other regulators provided guidance permitting a six-month grace period to implement the requirements following the implementation date), while the IM requirements continue to phase in through September 1, 2022. An uncleared swap entered into prior to an entity's IM compliance date is a ''legacy swap'' that is not subject to the IM requirements. *See* CFTC Margin Rule, 81 FR at 651 and Regulation 23.161. 17 CFR 23.161.

[50] *See* Margin Subcommittee Report at 49.

[51] *Id.* (The GMAC subcommittee stated that the divergence between the U.S. and international requirements ''creates complexity and confusion, and leads to additional effort, cost and compliance changes for smaller market participants that are generally subject to margin requirements in multiple global jurisdictions.'').

Commission explained that daily average AANA would provide a more comprehensive assessment of an FEU's participation in the swaps market in determining whether the FEU has MSE and would address the possibility of window dressing of exposures by market participants that might seek to avoid the CFTC's margin requirements.[52]

In its Report, the GMAC subcommittee stated that the use of daily average AANA for the calculation AANA entailed more work for smaller counterparties and that such method of calculation was only used in the United States, noting that in the United States, daily AANA averaging over the three-month calculation period for Phase 5[53] required 64 observations while global determinations based on month-end AANA required only three observations.[54] The Report further stated that month-end AANA averaging over the three-month calculation period, by accounting for three periodic dates on which AANA would be calculated, would mitigate the risk that market participants would adjust exposures to avoid the CFTC's margin requirements, and that it would be neither practicable nor financially desirable for parties to tear-up their positions on a recurring basis prior to each month-end AANA calculation, as it would interfere with their hedging strategies and cause them to incur realized profit and loss.[55]

The Commission notes that the adoption of a month-end AANA methodology for the calculation of AANA to determine MSE will align the CFTC's approach with the BCBS/IOSCO Framework and the approach adopted by other major market jurisdictions. The Commission does acknowledge that such methodology for calculating AANA could raise the risk that market participants that are counterparties to CSEs may ''window dress'' their exposures by adjusting their exposures as they approach the month-end date. By doing so, an FEU would no longer have to post and collect IM with all CSEs for all its uncleared swaps for at least twelve months from the date on which compliance with the IM requirements would have been initially required.[56]

To address this concern, the Commission has determined to revise the proposed rule text to include anti-evasion language prohibiting activities not carried out in the ordinary course of business and willfully designed to circumvent the month-end AANA calculation by, for example, altering swap book composition to evade meeting the definition of MSE and thus coming within the scope of the CFTC's IM requirements. In addition, the Commission points to the availability of other tools to address the risk of ''window dressing.'' Regulation 23.402(a)(ii) requires CSEs to have written policies and procedures to prevent their evasion, or participation in or facilitation of an evasion, of any provision of the CEA or the Commission's regulations.[57] Also, section 4b of the CEA prohibits any person entering into a swap with another person from cheating or defrauding or willfully deceiving or attempting to deceive the other person.[58]

The Commission further notes that replacing daily average AANA with month-end AANA for determining MSE could result in an AANA calculation that is not fully representative of an entity's participation in the swaps markets. Under the current definition of MSE, AANA must be calculated counting uncleared swaps, uncleared security-based swaps, foreign exchange forwards, or foreign exchange swaps. Under the Final Rule, which provides for the calculation of AANA by averaging month-end AANA during the three-month calculation period, some of the financial products that are required to be included in the calculation, because of their terms, such as tenure and time of execution, may be undercounted or excluded.[59]

The Commission believes that the notional amount associated with products that may be excluded from the AANA calculation, as a result of the change to month-end AANA averaging for the calculation of AANA, may be relatively low and that the products' contribution to the AANA calculation for the purpose of determining MSE may be insignificant. In this regard, in an analysis undertaken by the Commission's Office of the Chief Economist (''OCE'') on a sample of days, the OCE estimated (setting aside the window dressing issue) that calculations based on end-of-month AANA would yield fairly similar results as calculations based on the current daily average AANA approach. Based on 2020 swap data, the OCE estimated that 492 entities of the 514 entities that would have come into scope in the last phase of the IM compliance schedule (with AANA between $8 and $50 billion) based on the current daily AANA calculation methodology would also come into scope under the month-end AANA calculation methodology being adopted herein. Put differently, all but 22 of the entities that would be above MSE under the existing methodology would also be above MSE under the month-end AANA methodology. In addition, there are 20 entities that would be in scope under the month-end AANA methodology, but would not be in scope under the existing methodology, so that the aggregate number of entities under the two methodologies differs only by two.

In the aggregate, the two methodologies capture quite similar sets of entities. In addition, the entities that fall out of scope applying the month-end AANA methodology tend to be among the smallest coming into IM compliance in the last phase of compliance. That is, entities that would have been in-scope under the current daily average AANA methodology but not the month-end AANA methodology average $6.95 billion in AANA, compared to $20 billion for all entities coming into scope in the last phase of compliance.[60]

Based on the OCE analysis discussed above, in the Commission's view, switching from daily average AANA to month-end AANA for the purpose of determining MSE would likely have a limited impact on the protections provided by the CFTC Margin Rule. In addition, the Commission believes that the anti-evasion language being incorporated into the rule text by this Final Rule mitigates the window dressing concerns.[61]

[52] *See supra* note 21.

[53] As used in the Margin Subcommittee Report, Phase 5 meant the phase of compliance with the CFTC's IM requirements that started on September 1, 2020, comprising covered swap entities and covered counterparties with AANA between $750 billion and $50 billion. Since the issuance of the Report, the IM compliance schedule has been revised to defer the beginning of Phase 5 to September 1, 2021. *See* 17 CFR 23.161(a)(6).

[54] Margin Subcommittee Report at 52.

[55] *Id.*

[56] Under the Final Rule, the MSE calculation will be made annually on September 1 of each year and will be in effect for the next twelve months after that date.

[57] 17 CFR 23.402(a)(ii).

[58] 7 U.S.C. 6b.

[59] For example, the Commission observes that certain physical commodity swaps, such as electricity and natural gas swaps, are products for which a month-end AANA calculation might not provide a comprehensive assessment of the full scope of an FEU's exposure to those products.

[60] Note that the OCE calculation excludes commodity swaps, and the examples of products that end-of-month calculations may undercount tend to be commodity swaps, such as natural gas and electricity swaps. Overall, commodity swaps tend to represent less than 1% of all swap trades. *See* BIS Statistic Explorer, Global OTC derivatives market (July 30, 2020), *https://stats.bis.org/statx/srs/table/d5.1?f=pdf.*

[61] The prudential regulators have not indicated whether they intend to amend their margin requirements consistent with the BCBS/IOSCO

Commenters expressed strong support for the amendments to the MSE definition in Regulation 23.151 to align the method for calculating AANA and the timing of compliance with the IM requirements after the end of the last phase of compliance with the BCBS/IOSCO Framework.[62] Commenters stated that the amendments would help smaller market participants overcome unnecessary operational challenges. [63] The commenters also stated that the amendments would help entities that conduct swaps business across jurisdictions.[64] A commenter stated that the differences in the AANA calculation methods and the timing of compliance burden market participants, such as asset managers, in determining whether clients are in scope in the later phases of the compliance schedule and create a complex and confusing ongoing monitoring process.[65]

Another commenter noted that the U.S. is the only jurisdiction that requires using the three-month period of June, July and August of the preceding year for the calculation of AANA, and the only jurisdiction besides Brazil that requires AANA to be calculated using daily averaging rather than month-end averaging over the three-month period.[66] The commenter stated that a jurisdiction-specific approach creates additional effort for smaller counterparties coming into scope in the later phases of the compliance schedule, which need to run separate AANA calculations using different time periods and methods and need to provide separate notifications to their counterparties concerning the application of the IM requirements.[67] The commenter stated that according to its estimates, 775 counterparties with a total of 5,443 relationships could come into the scope of global IM requirements in the last phase of compliance beginning September 1, 2022, and that over 74% of those counterparties will qualify for the IM requirements with less than EUR 25 billion AANA and therefore may be in a position to recalculate their AANA each year to affirm the continued application of the IM requirements.[68] In addition, hundreds of other counterparties that do not initially breach the $8 billion threshold will need to conduct annual AANA calculations to confirm whether they have come into scope of the IM requirements in one or more jurisdictions.[69] The commenter concluded by stating that jurisdictional differences are difficult to track and manage, leading to inadvertent errors or omissions in the calculations and the application of IM requirements, and that the differences could interfere with the ability to apply substituted compliance, since a party may become subject to the IM requirements under the CFTC Margin Rule on a different date in the U.S. as they will in other global jurisdictions.[70]

Addressing concerns that the month-end AANA methodology for determining MSE may result in window dressing, a commenter stated that it was not a realistic risk, as it would take considerable effort for parties to unwind their positions and then reestablish the position on a recurring basis over the three-month period, which would interrupt their hedging strategies and require the counterparties to absorb the cost of realized profit and loss changes.[71] Another commenter echoed these arguments, noting that tearing up positions may interfere with hedging and cause portfolios to incur realized profit and loss changes.[72] A commenter, speaking on behalf of the managed fund industry, stated that adjustments to swaps positions to benefit from the month-end AANA methodology would be contraindicated in the case of an investment adviser to a regulated fund because the investment adviser is a fiduciary to the fund that is legally obligated to manage the fund's assets in accordance with that fund's investment strategy, policies, and limitations.[73] Adjusting swap exposures over the course of three periodic dates solely to avoid IM could impose transaction costs and inhibit a fund's ability to manage its portfolio risk, which may be inconsistent with the adviser's duty to act in the best interest of its clients.[74] Another commenter representing the life insurance industry stated that the proposed changes to the calculation of AANA would be unlikely to change the life insurers' market behavior given that life insurers are subject to significant state regulation of their derivatives activities.[75]

While recognizing that practical considerations, as discussed by the commenters, may reduce the risk of window dressing, the Commission believes that it should seek to remove any potential incentives that may lead to the manipulation of swaps exposures to avoid meeting the definition of MSE and thus coming within the scope of the margin requirements. Accordingly, as discussed further above, the Commission is revising the proposed rule text to incorporate an anti-evasion provision prohibiting activities willfully designed to avoid the month-end AANA calculation.

With respect to the divergence between the CFTC and the U.S. prudential regulators regarding the method for calculating AANA for determining whether an entity has MSE and the timing of compliance after the last phase of the compliance schedule, commenters stated that the CFTC should proceed with the amendments even if the prudential regulators do not make corresponding changes to their margin rules while also encouraging the prudential regulators to align with the global standards.[76] A commenter further noted that given that most affected FEUs belong to a corporate group that has to calculate AANA for multiple jurisdictions, a deviation between the CFTC and prudential regulators would not increase the regulatory burden for most FEUs as they would already be calculating AANA under the CFTC/prudential regulator approach and the BCBS/IOSCO approach.[77]

After reviewing the comments, the Commission has confirmed the rationale articulated for proposing the amendments to the definition of MSE in Regulation 23.151 and is therefore adopting the amendments as proposed, subject to the change to the proposed rule text to add the anti-evasion provision discussed in more detail above. The Commission believes, as discussed in the preamble to the Proposal, that the amendments will eliminate the need to maintain separate schedules and processes for the computation of AANA and reduce the burden and cost of compliance with the

Framework and the amendments to the definition of MSE discussed herein. Also of note, the U.S. Securities and Exchange Commission (''SEC'') has adopted a different approach that does not use MSE for identifying entities that come within the scope of the SEC margin requirements. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, 84 FR 43872 (Aug. 22, 2019).

[62] *See* ACLI 10/23/2020 Letter at 1; Associations 10/22/2020 Letter at 2; FIA 10/22/2020 Letter at 4; MFA 10/22/2020 Letter at 1; SIFMA AMG 10/22/2020 Letter at 2; Working Group 10/22/2020 Letter at 3.

[63] SIFMA AMG 10/22/2020 Letter at 1; ACLI 10/23/2020 Letter at 2.

[64] *Id.*

[65] *Id.*

[66] Associations 10/22/2020 Letter at 2.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] SIFMA AMG 10/22/2020 Letter at 3.

[73] ICI 10/22/2020 Letter at 5.

[74] *Id.*

[75] ACLI 10/23/2020 Letter at 2.

[76] SIFMA AMG 10/22/2020 Letter at 3; Working Group 10/22/2020 Letter at 2.

[77] Working Group 10/22/2020 Letter at 3.

IM requirements.[78] In addition, section 752(a) of the Dodd-Frank Act calls on the CFTC to ''consult and coordinate'' with respect to the establishment of consistent international standards.[79] As such, the Commission believes that amending the definition of MSE, as proposed, is appropriate to harmonize its compliance schedule with that of BCBS/IOSCO and, for entities engaging in swaps with CSEs, eliminates a disjunction that could risk calculation errors and may hinder compliance with the IM requirements.

B. Regulation 23.154—Alternative Method of Calculation of IM

As originally adopted, the CFTC Margin Rule requires CSEs to collect and post IM with covered counterparties, including CFTC-registered SDs or MSPs.[80] Regulation 23.154(a) directs CSEs to calculate, on a daily basis, the IM amount to be collected from covered counterparties.[81] CSEs have the option to calculate the IM amount by using either a risk-based model or the standardized IM table set forth in Regulation 23.154(c)(1).[82] For a CSE that elects to use a risk-based model to calculate IM, Regulation 23.154(b)(1) requires the CSE to obtain the written approval of the Commission or a registered futures association [83] to use the model to calculate IM required by the Commission's margin requirements for uncleared swaps.[84]

After reviewing the comments on the Proposal, the Commission is adopting the amendment to Regulation 23.154(a) as proposed, subject to some clarifications further discussed below. More specifically, the Commission is amending Regulation 23.154(a) by adding new paragraph (a)(5). Paragraph (a)(5) permits a CSE that enters into uncleared swaps with a CFTC-registered SD or MSP, or a swap entity, to use the swap entity's risk-based model calculation of IM to determine the amount of IM that must be collected from such counterparty and to determine whether the IM threshold amount has been exceeded, which would require documentation concerning the posting, collection, and custody of IM.

This amendment to Regulation 23.154(a) modifies, consistent with Letter 19–29, the requirement that CSEs calculate the amount of IM to be collected from a swap entity counterparty by giving CSEs the option to rely on such counterparty's risk-based IM calculation. The Commission acknowledges that as a result, some CSEs may forgo the adoption of a risk-based model to avoid the cost and burden associated with developing and maintaining such a model. The Commission notes that without a model to compute its own IM, a CSE may lack reasonable means to verify the IM amount provided by its counterparty or may fail to recognize shortfalls in the IM calculation or flaws in the counterparty's risk-based model. As such, the CSE may collect insufficient amounts of IM to offset counterparty risk. In addition, the Commission acknowledges the swap entity's potential conflict of interest in calculating IM for the CSE, [85] as it may be biased in favor of calculating and posting lower amounts of IM to the CSE.

Based on the foregoing concerns, the Commission is adopting, as part of the new paragraph (5) in Regulation 23.154(a), two of the conditions set forth in Letter 19–29.[86]

First, consistent with Letter 19–29, paragraph (a)(5) requires that the risk-based model used by the CSE's swap entity counterparty for the calculation of IM satisfy the requirements of Regulation 23.154(b) (requiring the approval of the use of the model by either the Commission or the NFA), or that the model be approved by a prudential regulator.[87]

Second, paragraph (a)(5) permits CSEs to use the risk-based model calculation of IM of a swap entity counterparty only if the uncleared swaps for which IM is calculated are entered into for the purpose of hedging the CSE's own risk. The risk to be hedged is understood to be the risk that a CSE would incur when entering into swaps with non-swap entity counterparties. By limiting the application of this alternative method of calculation of IM to only uncleared swaps entered into for the purpose of hedging risk arising from swaps entered into with non-swap entities, the Commission ensures the narrow application of this method of calculation.

The Commission contrasts the risk of customer-facing swaps with the risk that CSEs incur when entering into a swap in a dealing capacity ''to accommodate the demand'' of a swap entity counterparty.[88] The Commission believes that it would be inappropriate to allow a CSE to use the IM calculation of the swap entity counterparty in this latter case. The Commission notes that the latter case (*i.e.,* where the CSE is acting in a dealing capacity for a counterparty that is itself calculating IM) would occur in the inter-dealer market for swaps. The Commission believes that a CSE participating in the inter-dealer market in a dealing capacity should have the capacity to develop, implement, and use an approved risk-based model.

The Commission expects that new paragraph (a)(5) would be relied upon by CSEs that opt not to develop and obtain approval to use a risk-based model for the calculation of IM but instead elect to use the table-based calculation described in Regulation 23.154(c) for swaps with non-swap entity counterparties. Such CSEs, in the course of their uncleared swaps business, would enter into uncleared swaps mostly with end-user, non-swap entity counterparties, and hedge the risk of those swaps with other uncleared swaps entered into with swap entity counterparties. The CSEs would exchange IM with the swap entity counterparties for the uncleared swaps entered into for their own hedging, as the swaps would be subject to the CFTC

[78] The Commission acknowledges that the burdens on market participants will not be fully eliminated, and in fact, may increase, for those entities that enter into uncleared swaps with SDs and MSPs that are subject to the U.S. prudential regulators' margin requirements for uncleared swaps and come within the scope of the prudential regulators' margin regime, as the prudential regulators have not revised their rules consistent with the rule changes being adopted herein. Any further discussion in this Final Rule of the benefits of not needing to maintain separate schedules and processes is limited to entities not also undertaking swaps with U.S. prudentially regulated SDs.

[79] *See s*ection 752(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[80] *See* 17 CFR 23.152.

[81] *See* 17 CFR 23.154(a).

[82] *See id.*

[83] *See* 17 CFR 23.154(b)(1)(i). In this context, the term ''registered futures association'' refers to the National Futures Association (''NFA''), which is the only futures association registered with the Commission.

[84] *See* 17 CFR 23.154(b)(1)(i).

[85] The Commission, however, notes that the potential for conflict may be mitigated as the swap entity, as a CFTC-registered SD or MSP, would be subject to Regulation 23.600, which requires SDs and MSPs to establish a risk management program for the management and monitoring of risk, including credit and legal risk, associated with their swap activities. *See* 17 CFR 23.600.

[86] As previously discussed, Letter 19–29 permits Cargill to use the risk-based IM calculation of a counterparty that is a CFTC-registered SD to determine the amount of IM to be collected from such counterparty, subject to specified conditions discussed in more detail below.

[87] The prudential regulators have not amended their margin requirements for uncleared swaps consistent with the amendment to Regulation 23.154(b) discussed herein. As such, the CFTC's margin requirements will diverge from the prudential regulators' approach.

[88] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 77 FR 30596, 30608 (May 23, 2012) (noting that a distinguishing characteristic of swap dealers is being known in the industry for their availability to accommodate demand for swaps).

IM requirements.[89] Because maintaining a risk-based model imposes a disproportionate burden on the CSEs relative to the discrete and limited nature of their uncleared swap activities, the CSEs would generally not have a model for the calculation of IM, and thus new paragraph (a)(5) will permit them to use the risk-based model calculation of their swap entity counterparties to determine the amount of IM to be collected from such counterparties.

Letter 19–29, in addition to the foregoing conditions, requires that Cargill, prior to using the risk-based model calculation of IM of a swap entity counterparty, agree with its counterparty in writing that the IM calculation be provided to Cargill in a manner and time frame that would allow Cargill to comply with the CFTC Margin Rule and other applicable Commission regulations, and that the calculation be used to determine the amount of IM to be collected from the counterparty and to determine whether the IM threshold amount has been exceeded, which would require documentation addressing the posting, collection, and custody of IM. While the Commission acknowledges that the application of the alternative method of calculation of IM adopted herein could potentially result in the miscalculation or underestimation of IM, it believes that the safeguards in Part 23 of the Commission's regulations, such as the documentation requirements in Regulations 23.158 and 23.504, address this concern.

Regulation 23.158(a) requires CSEs to comply with the documentation requirements set forth in Regulation 23.504.[90] Regulation 23.504(b)(4)(i) requires CSEs to have written documentation reflecting the agreement with a counterparty concerning methods, procedures, rules, and inputs for determining the value of each swap at any time from execution to the termination, maturity, or expiration of such swap for the purposes of complying with the margin requirements under section 4s(e) of the Act and regulations under this part.[91] Regulation 23.504(b)(3)(i) also provides that the documentation shall include credit support arrangements, including initial and variation margin requirements, if any.[92]

Letter 19–29 also sets forth two conditions that are designed to ensure that Cargill will undertake adequate risk management with respect to its uncleared swaps. The Commission notes that the availability of the alternative method of calculation of IM may lead some CSEs to forgo the adoption of a proprietary risk-based model for the calculation of IM. Without a proprietary risk-based model, CSEs may not be able to precisely calculate IM, or the potential future exposure of uncleared swaps, which could undercut a CSE's ability to adequately manage the risk of its swaps. However, the Commission believes that CSEs' risk management obligations under the CEA and the Commission's regulations provide adequate safeguards to address this concern. In this regard, the Commission notes that section 4s(j)(2) of the CEA requires SDs and MSPs, including CSEs, to establish robust and professional risk management systems adequate for the management of their day-to-day swaps business[93] and that Regulation 23.600, consistent with the mandate under the CEA, requires SDs and MSPs to establish and maintain a risk management program to monitor and manage risk associated with their swap activities.[94]

To obtain relief under Letter 19–29, Cargill also must ''keep track of exceedances''[95] and ''[if] the exceedances indicate that the Approved IM Calculation Method fails to meet the relevant regulators' standards, [Cargill] must take appropriate steps to ensure compliance with its risk management obligations and address exceedances with its SD counterparty.''[96] The purpose of this requirement is to ensure that Cargill monitors, identifies, and addresses potential shortfalls in the amount of IM generated by the counterparty. Cargill must also report to the CFTC ''any adjustments and enhancements . . . applied to the amount of IM calculated pursuant to the Approved IM Calculation Method to ensure [Cargill's] collection of adequate amounts of IM.''

The Commission notes that if a CSE declines to adopt a proprietary model to calculate IM, a CSE may be unable to verify whether the amounts of IM calculated by its counterparty are sufficient. The Commission, however, believes that Regulation 23.600 addresses this concern by requiring SDs and MSPs to account for credit risk in conducting their risk oversight and to ensure compliance with the CFTC margin requirements. In the case of a CSE relying on new paragraph (a)(5), as adopted, adequate risk oversight will include steps by the CSE to monitor, identify, and address potential shortfalls in the amounts of IM generated by the counterparty on whose IM model the CSE is relying. While the Commission does not prescribe the CSE's oversight process, it believes that a risk management program that is unable to identify or to address shortfalls in IM will be insufficient to comply with Regulation 23.600.

Moreover, Regulation 23.600 requires SDs and MSPs to furnish to the Commission risk exposure reports setting forth credit risk exposures and any other applicable risk exposures relating to their swap activities. Here again, the Commission believes that an adequate risk exposure report pursuant to Regulation 23.600 will require a CSE to identify any adjustments and enhancements to the amount of IM calculated pursuant to the risk-based model of its swap entity counterparty to ensure the CSE's collection of adequate amounts of IM.

Commenters generally supported the proposed amendment to Regulation 23.154(a) to permit CSEs to rely on their swap entity counterparties' risk-based model calculation of IM.[97] A commenter stated that the proposed alternative method of IM calculation would greatly reduce the complexity and burden associated with the implementation of the margin requirements, in particular in the last phases of compliance, thus fostering greater liquidity and contributing to lowering the hedging costs of end-users.[98] Another commenter discussed the competitive disadvantage that smaller SDs might experience absent the alternative method of IM calculation.[99] This commenter noted that large SDs may be

[89] *See generally* 17 CFR 23.152 (requiring CSEs to exchange IM with swap entity counterparties for their uncleared swaps).

[90] 17 CFR 23.158(a).

[91] 7 U.S.C. 6s(e);17 CFR 23.504(b)(4)(i).

[92] Regulation 23.504(b)(1) further provides that the documentation should include all terms governing the trading relationship between an SD or MSP and its counterparty, including without limitation, terms addressing payment obligations, netting of payments, events of default or other termination events, calculation and netting of obligations upon termination, valuation, and dispute resolution. 17 CFR 23.504(b)(1).

[93] 7 U.S.C. 6s(j)(2).

[94] *See* 17 CFR 23.600.

[95] Exceedances are price movements above the amount of IM computed using a risk-based model that complies with the Commission's regulations.

[96] Letter 19–29 at 4.

[97] Associations 10/22/2020 Letter at 4; BPEC 10/23/2020 Letter at 2; FIA 10/22/2020 Letter at 4; STRM 10/23/2020 Letter at 1; Working Group 10/22/2020 Letter at 3. In addition to the comments addressing the alternative method of calculation of IM, as proposed, two commenters requested broadening the Proposal to permit CSEs to use the risk-based model of calculation of IM of financial end user counterparties. BPEC 10/23/2020 Letter at 9; Associations 10/22/2020 Letter at 4. In the Commission's view, this matter falls outside the scope of the Proposal. Accordingly, the Commission will not express a view or act on this matter.

[98] BPEC 10/23/2020 Letter at 2.

[99] FIA 10/22/2020 Letter at 5.

disincentivized from trading uncleared swaps with such SDs since doing so would require large SDs to manage risk-based model calculations with some entities and table-based calculation with smaller SDs.[100] Further, this commenter stated that table-based IM calculations, which do not take into account a firm's specific portfolio composition, including diversification and hedges, might produce more conservative results requiring the posting and collection of margin that is inappropriately high given the actual level of risk involved in a typical transaction.[101]

Another commenter representing a group of commercial firms in the energy industry stated that allowing smaller SDs to rely on their SD counterparties' approved IM model calculation would allow them to continue to play a crucial role in certain discrete swaps markets, like the energy swaps markets, in an economic and cost effective manner.[102] The commenter noted that the use of the table-based method for the calculation of IM by smaller SDs and IM modeling by larger SDs resulted in a mismatch in calculation methods that could lead to worse pricing for smaller SDs, as the table-based method would likely cause their counterparties to post more IM than they would under a model-based approach, with the cost of that margin being reflected in a higher price provided to the smaller SDs.[103]

Notwithstanding these expressions of support, many commenters objected to the provision in the Proposal that limits the application of the alternative method of calculation of IM to uncleared swaps entered into by a CSE and a swap entity counterparty to hedge the risk of customer-facing swaps undertaken by the CSE, namely the hedging limitation.[104] A commenter stated that it would be difficult, if not impossible, to ensure that all transactions to which the alternative method of calculation could apply are entered into for hedging purposes given that the concept of hedging is difficult to administer.[105] The commenter pointed to questions that may arise, including what standard should be used to determine whether a given swap is in fact a ''hedge.'' [106] The commenter asked whether each swap with a large SD must be matched one-by-one with a swap with a non-swap entity counterparty,[107] and whether it would be feasible for an entity to undertake portfolio hedging or dynamic hedging in that context.[108] The commenter also asked what would happen if the underlying swap transaction with a non-swap entity counterparty had been terminated, and whether anticipatory hedges could be counted as hedging.[109] The commenter noted that because the swaps markets are dynamic, the character of swaps may change over time and tagging a swap as hedging and non-hedging may be impractical.[110] The commenter concluded that given the uncertainty as to what constitutes hedging, CSEs may be reluctant to apply the alternative method of calculation.[111]

Another commenter raised similar concerns regarding difficulties in applying the concept of hedging, illustrated by the position limits rule recently adopted after many attempts by the Commission to implement the Dodd-Frank Act, noting that at the core of the rule lies the concept of hedging.[112] The commenter stated that the concept of hedging is difficult to quantify and that there are many instances when ''hedging'' is virtually indistinguishable from speculation.[113] In the absence of a definition in the Final Rule, the commenter stated, counterparties could be left guessing and may be reluctant to rely on the alternative method of calculation for fear of violating the hedging limitation.[114] A commenter also noted that proposed Regulation 23.154(a)(5) does not define the term hedging and suggested replacing the term with the phrase ''hedge or mitigate commercial risk.'' [115]

Another commenter stated that many CSEs do not separate hedging from dealing on a transaction-by-transaction basis since CSEs often manage hedging on a portfolio basis and, as a result, to implement the hedging limitation, CSEs would need to undertake a significant amount of analysis and legal review to make hedging determinations, making the relief provided by the alternative method of IM calculation impracticable.[116] Similarly, another commenter stated that if a CSE must be able to demonstrate that each swap is a hedge of a transaction with a non-SD, then the CSE would not be able to engage in portfolio hedging if the portfolio includes risk related to a speculative swap with another SD.[117] Consequently, in the commenter's view, the hedging limitation would limit the flexibility and efficacy of a CSE's risk management program.[118]

In line with these comments, another commenter stated that if a commercial CSE's portfolio includes non-hedging transactions, the opportunity to rely on the IM calculations of its SD counterparty may not be useful since they would need to calculate separately IM for the non-hedging transactions, which would reduce the benefits of netting or diversification offered by the Standardized IM Model (''SIMM'').[119] As a result, the commenter noted, the amount of IM is likely to be higher, disadvantaging commercial CSEs and their SD counterparties in a way that would not apply to CSE portfolios with non-SDs.[120]

Commenters also noted that CSEs and their counterparties typically transact both hedging and dealing swaps under a single ISDA Master Agreement or credit support annex, with many relationships put in place years ago, and calculate IM at the relationship or master contract level rather than the transaction level.[121] A commenter stated that if CSEs are required to add additional representations confirming that a given transaction is a ''hedging'' transaction, the existing documentation would need to be updated.[122] The commenter further stated that IM would also need to be administered on the basis of hedging and non-hedging transactions which would make the

[100] *Id.*

[101] *Id.* at 5.

[102] Working Group 10/22/2020 Letter at 3.

[103] *Id. See also* STRM 10/23/2020 Letter at 2.

[104] Associations 10/22/2020 Letter at 4; BPEC 10/23/2020 Letter at 2; FIA 10/22/2020 Letter at 6; Working Group 10/22/2020 Letter at 4.

[105] BPEC 10/23/2020 Letter at 5.

[106] *Id.* at 4.

[107] *Id. See also* STRM 10/23/2020 Letter at 4 (stating that classifying individual transactions with other SDs as hedges and tying the hedges to particular client-facing transactions would impose a material compliance burden that could nullify any benefit offered by the relief in proposed Regulation 23.154(a)(5)).

[108] BPEC 10/23/2020 Letter at 4.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 5.

[112] FIA 10/22/2020 Letter at 7.

[113] *Id.*

[114] *Id.*

[115] STRM 10/23/2020 Letter at 4.

[116] BPEC 10/23/2020 Letter at 5.

[117] Working Group 10/22/2020 Letter at 4.

[118] *Id.*

[119] Associations 10/22/2020 Letter at 4. This commenter, along with another commenter, also argued that SIMM, whose use must be approved by a regulator prior to its utilization in the calculation of regulatory IM, is a robust framework that obviates the need for a safeguard, such as the hedging limitation, to ensure the calculation of sufficient amounts of IM. *See* Associations 10/22/2020 Letter at 5; FIA 10/22/2020 Letter at 9. While recognizing the value of standardization, the Commission believes that SIMM on its own does not offer the safeguards necessary to address the concerns raised by the application of the alternative method of IM calculation. That is because SIMM is a tool that must be tailored to fit each firm's portfolio and risk profile, and must be subject to ongoing oversight to ensure adequate calibration.

[120] Associations 10/22/2020 Letter at 4.

[121] *See generally* Associations 10/22/20 Letter at 4; BPEC 10/23/2020 Letter at 6; FIA 10/22/2020 Letter at 7–8.

[122] FIA 10/22/2020 Letter at 8.

netting of all transactions under a single ISDA Master Agreement impossible.[123] As a result, the implementation of the hedging limitation would be extremely complex and result in potentially added operational risk, and certain swap entity counterparties, given the added market and bankruptcy risk, may shy away from undertaking swaps with CSEs that rely on the alternative method of calculation of IM.[124]

A commenter also pointed out that having to use the table-based method of calculation for determining IM in some circumstances and a counterparty's IM model in other circumstances would be operationally complex for a CSE, potentially to the point of being unworkable, and may result in the CSE being forced to choose between entering into transactions in the inter-dealer market or using the alternative method of calculation.[125] The commenter further stated that the hedging limitation could have negative implications for liquidity in certain markets, as some CSEs with unique insights and risk profiles that are best situated to assume customer risk from other SDs may opt not to trade with such SDs to avoid the burden associated with the hedging limitation.[126] Another commenter stated that costs associated with the hedging limitation, including operational and documentation burdens, could lead small CSEs to cease providing risk mitigation services to end-user counterparties, leaving end-users with unhedged risks.[127]

The concerns raised in the foregoing comments hinge on two ideas: (i) CSEs undertake hedging and speculative swaps with swap entity counterparties; and (ii) there is no clear standard for determining which swaps are entered into for hedging purposes. Commenters assert that because CSEs undertake both hedging and speculative swaps with swap entity counterparties, the implementation of the hedging limitation would add further complexity to the transactions and would be burdensome as swaps are generally managed on a portfolio basis and may be under a single master netting agreement or credit support annex, making the separation of hedging and non-hedging transactions challenging, if not impossible.[128]

In response to these concerns, the Commission acknowledges the potential burdens associated with the implementation of the hedging limitation. However, the Commission points out that the proposed addition of a method of calculation of IM that would enable a CSE to rely on a swap entity counterparty's model calculation of IM provides an alternative to the two existing methods of calculation of IM. The alternative method provides flexibility to address a particular situation illustrated in Letter 19–29. As such, it is intended for use by CSEs whose core swaps business is with non-swap entities but that occasionally enter into swaps with a few swap entity counterparties to offset the risk of customer-facing swaps. Given the limited swaps business with swap entity counterparties, it is uneconomical for the CSEs to develop, adopt, and maintain a proprietary risk-based model for the sole purpose of engaging such counterparties.

In light of the intended use for the alternative method of IM calculation, the Commission incorporated in the Proposal, in line with Letter 19–29, the hedging limitation restricting the application of the proposed alternative method of IM calculation to uncleared swaps entered into by a CSE to hedge the CSE's customer-facing risk. The Commission noted in the Proposal that the incorporation of the hedging limitation would also have the effect of limiting the use of the proposed method of IM calculation. While the proposed alternative method of IM calculation was intended to make the alternative method set forth in Letter 19–29 more widely available, the Commission stated that its application raised some concerns that would be mitigated, in part, by limiting the use of the alternative method of calculation to hedging transactions. More specifically, the Commission expressed the concern that in calculating the amount of IM to be used by the CSE to determine the amount to be collected from the swap entity counterparty, the swap entity counterparty could miscalculate the amount of IM or may be motivated to underestimate the amount of IM in order to post lesser IM amounts to the CSE. In turn, the CSE, without a proprietary model to calculate IM, would have no meaningful way to verify whether the amounts generated by the swap entity counterparty were correct or to contest the amounts, potentially resulting in the CSE collecting insufficient amounts of margin to mitigate the risk of its swaps.

The Commission notes that there are other safeguards in the Commission's regulations, such as risk management requirements applicable to both CSEs and their swap entity counterparties, that could address the potential miscalculation or underestimation of IM; however, the Commission believes that these safeguards do not obviate the need for the hedging limitation. Rather, in the Commission's view, the hedging limitation will work together with such other measures to provide effective protections to address the concerns raised by the application of the alternative method of calculation of IM.

Accordingly, the Commission has decided to retain the hedging limitation. The Commission expects that counterparties that engage in both hedging and speculative transactions would engage in such a small number of speculative transactions that the complexity and burden of separating speculative and hedging transactions and operationally implementing the hedging limitation would be rather low. On the other hand, if the speculative activity between the CSE and the swap entity counterparty is so robust as to complicate the use of the alternative method of calculation, the CSE should be able to carry out its own calculation of IM by either adopting a proprietary model for the calculation of margin or using the table-based method of calculation. It follows that if the CSE adopts a proprietary model of calculation for its speculative swaps, the CSE should be likewise able to adopt a model or use the same model for calculating IM for its hedging swaps, thus obviating the need to rely on its counterparty's IM calculation.

Regarding comments asserting a lack of a clear standard to differentiate between hedging and non-hedging swaps, the Commission believes that the existing standard set out in section 4a(c)(2)(B) of the CEA [129] to define ''bona fide hedging transaction or position'' provides a suitable framework for determining which swaps are hedges for the purpose of applying the alternative method of calculation. By referring to section 4a(c)(2)(B) for this purpose, the Commission is setting forth a principles-based approach, not requiring strict adherence to all the terms of the statute, as the statute addresses physical markets and products not pertinent in this context, and pertains to issues (*i.e.,* speculation in the physical markets) outside the scope of this Final Rule. Key principles derived from section 4a(c)(2)(B) that should be taken into account in determining whether a swap between a CSE and a swap entity counterparty has been entered into for hedging purposes include: (a) Whether the swap reduces

[123] *Id.*

[124] *See* Associations 10/22/20 Letter at 4; BPEC 10/23/2020 Letter at 6; FIA 10/22/2020 Letter at 8.

[125] Working Group 10/22/2020 Letter at 4.

[126] *Id. See also* STRM 10/23/2020 Letter at 5.

[127] FIA 10/22/2020 Letter at 8.

[128] *See* BPEC 10/23/20 Letter at 6; FIA 10/22/2020 Letter at 8.

[129] 7 U.S.C. 6a(c)(2).

risk attendant to another swap undertaken between the CSE and a non-swap entity counterparty; and (b) whether such other swap (i) was executed by the non-swap entity counterparty as a substitute for transactions made or to be made, or for positions taken or to be taken at a later time, in a commercial enterprise; (ii) is economically appropriate to the reduction of risk in the conduct and management by the non-swap entity counterparty of a commercial enterprise; and (iii) arises from the potential change in value of the non-swap entity counterparty's assets, liability or services. To determine whether the criteria in (b) above have been satisfied, the CSE, in accordance with Regulation 23.402(d), would be able to rely on a written representation from the non-swap entity counterparty, unless the CSE has information that would cause a reasonable person to question the accuracy of the representation.[130]

By using this framework, the Commission believes that many of the questions raised by the commenters in connection with the application of the hedging limitation would be addressed. For example, commenters asked whether swaps entered into by a CSE and an end-user and the offsetting swaps undertaken by the CSE and a swap entity counterparty must match one-to-one.[131] The framework provides some flexibility permitting CSEs as part of the hedging strategy to match a set of customer-facing swaps with one or more hedging swaps undertaken with a swap entity counterparty. Commenters also asked what would happen if the customer-facing swaps were terminated, and whether anticipatory hedging would be deemed hedging in the context of the alternative method of calculation.[132] Consistent with the framework set forth above, swaps undertaken by a CSE and a swap entity counterparty as part of a hedging strategy to offset the risk of customer-facing swaps—including swaps that are ultimately terminated and swaps that may be entered into in the future—would be deemed to be hedges for the purposes of the alternative method of IM calculation.

The Commission confirms, consistent with the statutory framework set forth in section 4a(c)(2)(B), that both the underlying swap between the CSE and the end-user counterparty, and the offsetting swap between the CSE and the swap entity counterparty must be entered into for hedging purposes. More specifically, the swap between the CSE and the end-user counterparty must be entered into to hedge risk attendant in a commercial enterprise. In connection with this position, a commenter stated that the burden of compliance with the hedging limitation would be borne not only by the CSE and the swap entity counterparty, but also by end-users that are counterparties to the CSE, as they too would need to make an assessment of whether their swaps are for ''hedging'' purposes and would need to update their documentation accordingly.[133] Given that the alternative method of calculation is expected to be used in the limited circumstances described herein, the Commission believes that the chance that end-users may be burdened would be greatly reduced.

A commenter also stated that the hedging limitation may not only burden small CSEs but also their swap entity counterparties.[134] Another commenter noted that a swap entity counterparty may be reluctant to trade with a CSE fearing the CSE's misrepresentation or mischaracterization of its swaps as hedges, which could lead the swap entity counterparty to violate its obligations under the CFTC Margin Rule.[135] In this regard, the Commission notes that Regulation 23.402(d) permits a swap entity counterparty with respect to swaps with a CSE to rely on the CSE's representations to satisfy its due diligence obligations unless the swap entity counterparty has any reason to question the CSE's representations.[136] The Commission believes that Regulation 23.402(d) mitigates swap entity counterparties' concerns regarding a CSE's potential misrepresentation or mischaracterization of its swaps as hedges.

Two commenters suggested replacing the hedging limitation with a $750 billion threshold, whereby CSEs with AANA below the threshold would be able to use the alternative method of IM calculation without imposing conditions on the business of CSEs that could have adverse market impact.[137] In the Commission's view, another threshold to determine the applicability of the CFTC's margin requirements would add further complexity to the rules. In addition, the Commission believes that the hedging limitation as adopted and further discussed above is adequately designed to advance the Commission's goals.

III. Administrative Compliance

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires Federal agencies to consider whether the rules they propose will have a significant economic impact on a substantial number of small entities.[138] As discussed in the Proposal, the amendments being adopted herein only affect SDs and MSPs that are subject to the CFTC Margin Rule and their covered counterparties, all of which are required to be eligible contract participants (''ECPs'').[139] The Commission has previously determined that SDs, MSPs, and ECPs are not small entities for purposes of the RFA.[140] Therefore, the Commission believes that the Final Rule will not have a significant economic impact on a substantial number of small entities, as defined in the RFA.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Final Rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') [141] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. The

[130] 17 CFR 23.402(d) (providing that an SD or MSP may rely on the written representations of a counterparty to satisfy its due diligence requirements under subpart H of Part 23 of the Commission's regulations, which sets forth business conduct standards for SDs and MSPs to be applied in their dealings with counterparties). *See also* Position Limits for Derivatives (approved Oct. 15, 2020) (defining ''bona fide hedging transaction or position'' to include pass-through swaps, as described in section 4a(c)(2)(B) of the CEA, undertaken to offset the risk of other swaps entered into to hedge commercial risk, and noting that a counterparty may rely on its counterparty's written representations confirming that such counterparty is executing the pass-through swap to hedge another swap undertaken to offset commercial risk).

[131] FIA 10/22/2020 Letter at 7; BPEC 10/23/2020 Letter at 4.

[132] *Id.*

[133] FIA 10/22/2020 Letter at 8.

[134] BPEC 10/23/2020 Letter at 5.

[135] FIA 10/22/2020 Letter at 8.

[136] *See* 17 CFR 23.402(d) (allowing SDs or MSPs to rely on the written representations of a counterparty to satisfy its due diligence requirements concerning swaps entered into with the counterparty, unless the SD or MSP has information that would cause a reasonable person to question the accuracy of the representation).

[137] STRM 10/23/2020 Letter at 5; Working Group 10/23/2020 Letter at 5.

[138] 5 U.S.C. 601 *et seq.*

[139] Each counterparty to an uncleared swap must be an ECP, as the term is defined in section 1a(18) of the CEA, 7 U.S.C. 1a(18) and Regulation 1.3, 17 CFR 1.3. *See* 7 U.S.C. 2(e).

[140] *See* Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (SDs and MSPs) and Opting Out of Segregation, 66 FR 20740, 20743 (April 25, 2001) (ECPs).

[141] 44 U.S.C. 3501 *et seq.*

Commission may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget control number. The Final Rule, as adopted, contains no requirements subject to the PRA.

C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[142] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

The Commission is amending the CFTC Margin Rule to revise the method for calculating AANA for determining whether an FEU has MSE and the timing of compliance with the IM requirements after the end of the phased compliance schedule (''timing of post-phase-in compliance''). These amendments align the CFTC Margin Rule with the BCBS/IOSCO Framework with respect to these matters. The Commission is also amending Regulation 23.154(a), consistent with Letter 19–29, to allow CSEs to use the risk-based model calculation of IM of a counterparty that is a swap entity.[143]

With respect to these rule amendments, the Commission considered the costs and benefits resulting from its discretionary determinations with respect to section 15(a) considerations, and sought comments from interested persons regarding the nature and extent of such costs and benefits. In response to its request for comment, as noted earlier, the Commission received nine comment letters.[144] All the comment letters generally expressed support for the Proposal.[145] One commenter noted that it reflects the realities of the marketplace and further aligns the U.S. regulations with the global regulators.[146] Other commenters stated that the Proposal would enable the implementation of the IM requirements in a practical and efficient manner and reduce the complexity and burden associated with the implementation of those requirements.[147] The commenters added that the Proposal would foster greater liquidity and contribute to the lowering of hedging costs, particularly in the last phases of the compliance schedule.[148]

The baseline against which the benefits and costs associated with the Final Rule is compared is the uncleared swaps markets as they exist today and the currently applicable timing for compliance with the IM requirements after the expiration of the phased compliance schedule. Concerning the amendment to Regulation 23.154(a), the Commission believes that to the extent market participants may have relied on Letter 19–29, the actual costs and benefits of the amendment, as realized by the market, may not be as significant at a practical level. With respect to the amendments to align aspects of the CFTC Margin Rule with the BCBS/IOSCO Framework, the Commission notes that the Dodd-Frank Act calls on the CFTC to ''consult and coordinate on the establishment of consistent international standards'' with respect to the regulation of swaps.[149] The amendments therefore advance the Congressional direction towards harmonization of the CFTC's requirements with international standards, thereby removing a regulatory impediment that might hinder the competitiveness of the U.S. swaps industry.[150]

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the following discussion of costs and benefits refers to the effects of the Final Rule on all activity subject to the Final Rule, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with activities in, or effect on, U.S. commerce under section 2(i) of the CEA.[151]

1. Benefits

By harmonizing the CFTC's method for calculating AANA for determining MSE and the timing of post-phase-in compliance with the BCBS/IOSCO Framework, the Final Rule will create a benefit because it will reduce complexity—for example, the month-end AANA calculation method being adopted will require consideration of only three observation dates rather than daily AANA averaging over the three-month calculation period—and the potential for confusion in the application of the margin requirements. Some entities will no longer need to undertake separate AANA calculations using different calculation periods, nor will they need to conform to two separate compliance timings, varying according to the location of their swap counterparties and jurisdictional requirements applicable to the counterparties.

The Final Rule will affect FEUs with AANA between $8 billion and $50 billion that come into the scope of compliance with the IM requirements under the CFTC Margin Rule in the last compliance phase beginning on September 1, 2022, as well as those entities that come into scope after the end of the last compliance phase. The Commission believes that the Final Rule will benefit some of these entities, which, given their level of swap activity, pose a lower risk to the uncleared swaps market and the U.S. financial system in general than entities that came into scope in earlier phases. The OCE has estimated that there are approximately 514 of such entities representing 4% of total AANA across

[142] 7 U.S.C. 19(a).

[143] For the definition of the term ''swap entity,'' *see supra* note 42.

[144] *See* ACLI 10/23/2020 Letter; Associations 10/22/2020 Letter; BPEC 10/23/2020 Letter; FIA 10/22/2020 Letter; ICI 10/22/2020 Letter; MFA 10/22/2020 Letter; STRM 10/23/2020 Letter; SIFMA AMG 10/22/2020 Letter; Working Group 10/22/2020 Letter.

[145] *See* ACLI 10/23/2020 Letter at 1; Associations 10/22/2020 Letter at 1; BPEC 10/23/2020 Letter at 2; FIA 10/22/2020 Letter at 2–3; ICI 10/22/2020 Letter at 1; MFA 10/22/2020 Letter at 1; STRM 10/23/2020 Letter at 1; SIFMA AMG 10/22/2020 Letter at 1; Working Group 10/22/2020 Letter at 3.

[146] *See* ACLI 10/23/2020 Letter.

[147] *See generally* BPEC 10/23/2020 Letter; MFA 10/22/2020 Letter.

[148] *Id.*

[149] *See supra* note 79.

[150] A starting point in determining the potential benefit of alignment with the BCBS/IOSCO Framework is various statutory provisions where the U.S. Congress has called on the CFTC and other financial regulators to align U.S. regulatory requirements with international standards. For example, the Commodity Futures Modernization Act of 2000 (''CFMA'') focused on the potential threat to competitiveness of the U.S. industry where there is divergence with international standards. In particular, section 126 of the CFMA provides that regulatory impediments to the operation of global business interests can compromise the competitiveness of United States businesses. *See* CFMA section 126(a), Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

[151] 7 U.S.C. 2(i).

all phases.[152] This means that the Final Rule addresses entities that tend to engage in less uncleared swap trading activity and, and in the aggregate, pose less systemic risk than entities in previous phases. Because these entities are smaller, they presumably have fewer resources to devote to IM compliance and hence will benefit from the alignment of the method of calculation of AANA across jurisdictions without contributing substantially to systemic risk.

For entities with AANA between $8 billion and $50 billion that will begin collecting IM on September 1, 2022, moving the calculation period from June, July, and August 2021 to March, April, and May 2022 will better align with current practices. While the Commission cannot anticipate exactly how the June–August 2021 period will differ from the March–May 2022 period, based on comparable past experience, the OCE estimates that approximately 75–100 entities will come into scope, and a similar number will fall below the threshold by virtue of moving the calculation period. The adjusted calculation period will reduce the regulatory burden for firms that have reduced their MSE below the $8 billion threshold while requiring the collection of margin for those firms that have increased their swaps business above the threshold. While aggregate AANA for firms that fall into or out of scope is small relative to the overall market (less than one percent of total aggregate AANA), moving the calculation period close to the compliance date may have a significant impact on entities that have reduced their MSE.

The Commission also notes that the benefits of alignment with the BCBS/IOSCO Framework will continue to accrue in future years, as the determination of MSE for an FEU under the CFTC Margin Rule is an annual undertaking, triggered by the entry into an uncleared swap between the FEU and a CSE counterparty and the need to determine whether the FEU has MSE, which triggers the application of the IM requirements and the exchange of regulatory IM between a CSE and an FEU for their uncleared swap transactions.

With respect to the amendment to Regulation 23.154(a), the Commission believes that the uncleared swap markets will benefit from the extension of the targeted relief provided to Cargill, the requester in Letter 19–29, to a wider group of CSEs with similar unique swaps business models. In taking a no-action position, MPD took account of Cargill's representation that its swap trading activity primarily involved physical agricultural commodities and certain other asset classes and that it ''may maintain positions that require collection of IM from SDs.'' Cargill further stated that given the highly specialized and discrete nature of its swaps business, risk-based modeling would impose a disproportionate burden.

The more widespread availability of the alternative method of calculation of IM provided by Regulation 23.154(a), as amended by the Final Rule, may incentivize some market participants to expand their swaps business. In particular, given that certain market participants will have the option to forgo the cost of risk-based modeling, this potential reduction in compliance costs may encourage certain entities to increase their swaps trading. By increasing the pool of potential swap counterparties, the Final Rule could enhance competition, increase overall liquidity, and facilitate price discovery in the uncleared swaps markets.

2. Costs

While the Final Rule will have the effect of creating efficiencies for market participants, the Commission acknowledges that the rule changes being adopted will also give rise to some costs. Among other things, the change of the CFTC's AANA calculation period for determining MSE to align it with BCBS/IOSCO's AANA calculation period will reduce the time frame for determining whether an FEU is subject to the IM requirements and for preparing for compliance with the requirements during the final phase-in period of 2022.

Under the current margin requirements, in the period leading to the final phase-in date of September 1, 2022, FEUs would have a full year to prepare, as MSE for an FEU would be determined using the AANA for June, July and August of the prior year. However, under the Final Rule, entities will have only a three-month advance notice in 2022, as AANA will be calculated using the March, April and May period of that year. Entities will have a shorter time frame to engage in preparations to comply with IM requirements, including, among other things, procuring rule-compliant documentation, establishing processes for the exchange of regulatory IM, and setting up IM custodial arrangements. Because the Final Rule aligns the AANA calculation for determining MSE with BCBS/IOSCO's approach and the compliance date remains unchanged, the Commission believes that the cost will be mitigated. In particular, the Commission notes that commenters confirmed,[153] as reported in the Margin Subcommittee Report, that the differences in the U.S. regulations could create complexity and confusion and lead to additional effort, cost and compliance challenges for smaller market participants that are generally subject to margin requirements in multiple global jurisdictions.[154]

The Commission further notes that the amendment to the timing of post-phase-in compliance, as proposed, will defer compliance with the IM requirements with respect to uncleared swaps entered into by a CSE with an FEU that comes into the scope of IM compliance after the end of the last compliance phase. Under the current rule being amended, FEUs with MSE as measured in June, July, and August 2022 would have come into the scope of compliance post-phase-in beginning on January 1, 2023. On the other hand, under the Final Rule, FEUs with MSE as measured in March, April, and May 2023 will come into scope, post-phase-in compliance, beginning on September 1, 2023. As a result, for FEUs with MSE in both periods, less collateral for uncleared swaps may be collected given that the Final Rule changes the beginning of post-phase-in compliance from January 1, 2023, to September 1, 2023, rendering uncleared swap positions entered into between January 1, 2023, and September 1, 2023, riskier, as no IM will be required to be collected during that period, which could increase the risk of contagion and the potential for systemic risk. The Commission, however, notes that under the Final Rule, a CSE may be required to exchange IM with an FEU that comes into scope in the last phase of compliance beginning on September 1, 2022, but falls below the MSE level by January 1, 2023, for nine months longer than otherwise would have been the case, as post-phase-in, no assessment of MSE status will be required until September 1, 2023.

With respect to the adoption of a month-end AANA methodology for the calculation of AANA for determining MSE, as proposed, the Commission acknowledges that there are potential costs. The utilization of month-end

[152] Using March-May of 2020 as the calculation period. The methodology for calculating AANA is described in Richard Haynes, Madison Lau, & Bruce Tuckman, *Initial Margin Phase 5,* at 4 (Oct. 24, 2018), *https://www.cftc.gov/sites/default/files/About/Economic%20Analysis/Initial%20Margin%20Phase%205%20v5_ada.pdf.*

[153] *See* ACLI 10/23/2020 Letter at 2; Associations 10/22/2020 Letter at 3; FIA 10/22/2020 Letter at 4; SIFMA AMG 10/22/2020 Letter at 3; Working Group 10/22/2020 Letter at 2.

[154] Margin Subcommittee Report at 49.

AANA could result in an AANA calculation that is not representative of a market participant's participation in the swaps markets. As previously discussed, an AANA calculation based on month-end AANA may result in the exclusion or undercounting of certain financial contracts that are required to be included in the calculation (*e.g.,* uncleared swaps, uncleared security-based swaps, foreign exchange forwards, or foreign exchange swaps) because of certain combinations of tenure and time of execution, such as those often present in some intra-month natural gas and electricity swaps.[155] The Commission also notes the potential that market participants might ''window dress'' their exposures to avoid MSE status and compliance with the CFTC's margin requirements. At the same time, it is possible that the month-end methodology, which uses only three data points, could result in some entities having an AANA calculation on the three end-of-month dates that is uncharacteristically high relative to their typical positions.

If products are excluded from the AANA calculation, or if exposures are ''window dressed,'' the month-end calculation may have the effect of deferring the time by which market participants meet the MSE classification resulting in additional swaps between market participants and CSEs being deemed legacy swaps that are not subject to the IM requirements.[156] This may increase the level of counterparty credit risk to the financial system. While potentially meaningful, this risk will be mitigated because the legacy swap portfolios will be entered into with FEUs that engage in lower levels of notional trading.

In addition, many larger SDs are under the jurisdiction of the U.S. prudential regulators, and these entities and their counterparties will apparently be required to continue to use the current AANA calculation methodology. Entities that trade with both SDs that are under the jurisdiction of the U.S. prudential regulators and CSEs that are under the CFTC's jurisdiction will be required to undertake separate AANA calculations using different calculation periods, varying according to the regulator of their swap counterparty. Hence, entities that trade in other jurisdictions and that trade with SDs subject to the prudential regulators' jurisdiction will be required to continue to undertake separate AANA calculations using different calculation periods and two separate compliance timings. In fact, an entity that only trades in the U.S. will now be required to conduct separate AANA calculations using different calculation periods and timings. While we received no quantification of the number of such entities, SDs regulated by U.S. prudential regulators represent a sizable share of swap trading.

Recognizing the potential for costs to increase for this reason, all of the comments received by the Commission noted the benefits of alignment with the BCBS/IOSCO Framework, and none mentioned the costs associated with any potential misalignment with the U.S. prudential regulators. Further, some commenters stated that the CFTC should proceed with the amendments even if the prudential regulators do not make corresponding changes to their margin rules.[157]

In addition, the Commission notes that, in the aforementioned OCE exercise utilizing a sample of days, the OCE estimated that calculations based on end-of-month AANA would yield fairly similar results as the calculations based on the current daily average AANA approach (setting aside the window dressing issue). Based on 2020 swap data, the OCE estimated that approximately 492 entities of the 514 entities that would have come into scope in the last phase of the phased compliance schedule, based on the existing methodology, would also come into scope based on the methodology being adopted under the Final Rule. Put differently, all but 22 of the entities that would be above MSE under the existing methodology would also be above MSE under the Final Rule's methodology. In addition, there are 20 entities that would be in scope under the Final Rule's methodology, but would not have been under the existing methodology, so that the aggregate number of entities differs only by two. In aggregate, the two methodologies capture quite similar sets of entities. In addition, the entities that fall out of scope when one changes methodology tend to be among the smallest of entities coming into scope in the last phase of compliance. That is, entities that would have been in-scope under the current methodology but not the Final Rule's methodology average $6.95 billion in AANA, compared to $20 billion for all entities coming into scope in the last phase of compliance.[158]

Taking account of the relatively small percentage of aggregate AANA represented by FEUs that will have MSE for the first time in the near future, and thus be subject to the Commission's IM requirements under the Final Rule, the Commission believes that the potential exclusion of certain financial products in determining MSE will have a limited impact on the effectiveness of the CFTC Margin Rule. In addition, with respect to the potential that a market participant might ''window dress'' its exposure, the Commission believes that the anti-evasion language being incorporated into the rule text by this Final Rule, discussed in more detail above, would reduce the risk that swap exposures or positions might be manipulated to evade the CFTC's IM requirements. The Commission also notes that it has authority, including anti-fraud authority under section 4b of the CEA,[159] to take appropriate enforcement actions against any market participant that may engage in deceptive conduct with respect to the AANA calculation, and that CSEs, under the Commission's regulations, must have written policies and procedures in place to prevent evasion or the facilitation of an evasion by an FEU counterparty.[160]

Roughly 514 entities, as estimated by the OCE, will come into the scope of the IM requirements beginning on September 1, 2022, and will be affected by the Final Rule. In advance of the September 1, 2022 compliance date, many of these entities may have engaged in planning and preparations relating to the exchange of regulatory IM. With the revision of the AANA method of calculation, these entities may need to adjust their systems to reflect changes in the calculation and update related financial infrastructure arrangements. However, the Commission believes that the resulting increased costs will be negligible, and the amendments being adopted will likely be cost-reducing for those impacted firms.

Regarding the amendment to Regulation 23.154(a), there may be associated costs, as CSEs will be able to rely on the risk-based model calculation of IM computed by a swap entity counterparty. The safeguard provided by the requirement that both the CSE and its SD counterparty maintain a risk-based IM model for any swap transaction for which they do not use the table-based method to calculate IM will be eliminated. A CSE that relies on a counterparty's risk-based model calculations may forgo the adoption of a risk-based model and thus avoid the rigorous Commission requirements

[155] *See supra* note 59.

[156] For explanation of legacy swaps, *see supra* note 49.

[157] SIFMA AMG 10/22/2020 Letter at 3; Working Group 10/22/2020 Letter at 2.

[158] *See supra* note 60.

[159] 7 U.S.C. 6b.

[160] *See* 17 CFR 23.402(a)(ii).

relating to risk-based modeling,[161] which may undercut the effectiveness of the CSE's risk oversight.[162]

In addition, the safeguard of private market discipline that is inherent in having each counterparty develop its own IM model, and therefore the ability for the parties to scrutinize each other's IM model and output, will not be present given that under the Final Rule, a CSE will be permitted to rely on the risk-based model calculation of a swap entity counterparty. As such, there is the potential that insufficient amounts of IM will be generated by the swap entity counterparty, which may be attributable to a deficiency in the model or the fact that the swap entity may be inherently conflicted and interested in generating lower IM collectable by the CSE.[163] Without a model, the CSE will lack adequate means to verify the amount of IM produced by the swap entity counterparty and will not be capable to contest it. As a result, insufficient amounts of IM may be collected by the CSE to protect itself against the risk of default by the swap entity counterparty, increasing the risk of contagion and the potential for systemic risk.

The Commission, however, believes that these costs are mitigated by the Final Rule, because it reflects the narrow terms of Letter 19–29, which extends no-action relief only with respect to uncleared swaps entered into for the purpose of hedging. In addition, the Commission notes that there are other requirements in the Commission's regulations that address the monitoring of exposures and swap risk.

3. Section 15(a) Considerations

In light of the foregoing, the CFTC has evaluated the costs and benefits of the Final Rule pursuant to the five considerations identified in section 15(a) of the CEA as follows:

(a) Protection of Market Participants and the Public

The Final Rule aligns the CFTC's method for calculating AANA for determining MSE and the timing of post-phase-in compliance with the BCBS/IOSCO Framework. By aligning these aspects of the CFTC Margin Rule with the international standard, the Final Rule will reduce the potential for complexity and confusion that can result from using different AANA calculation methods and different compliance schedules for some market participants that may be subject to margin requirements in multiple jurisdictions, which could result in errors in determining whether a particular entity comes within the scope of the CFTC Margin Rule, and, in turn, the failure to exchange requisite margin if the entity is mistakenly determined to be out of scope.

The Final Rule may result in FEUs having less time between the calculation of AANA to determine whether they reach the MSE level, and the date on which CSEs would be required to exchange IM with the FEUs should the FEUs reach the MSE level. This may make it more difficult for such FEUs to prepare for the exchange of IM for their uncleared swaps with CSEs and to timely post IM, increasing the risk of their swap positions.

More specifically, under the existing CFTC Margin Rule, beginning on September 1, 2022, FEUs would have been required to look back to the June-August 2021 period to determine whether they have MSE and come within the scope of the IM requirements. The firms would have had at least twelve months to engage in preparations for the exchange of regulatory IM, by, among other things, procuring rule-compliant documentation, establishing processes and systems for the calculation, collection and posting of IM collateral, and setting up custodial arrangements. Under the Final Rule, which changes the AANA calculation period for determining MSE to March-May of the current year, such firms will have only a three-month window to engage in preparations to exchange IM. Nevertheless, the Commission notes that, under the current rule being amended, after the end of the phased compliance schedule, firms would have had only four months in subsequent years between calculation and required compliance since the calculation period for determining MSE status would have been June through August of the prior year, with compliance starting January 1 of the following year. In addition, because the Final Rule requires the averaging of three month-end dates rather than all business days during the three-month calculation period, the potential burdens of a shorter preparatory period may be offset by the adoption of the BCBS/IOSCO Framework's less onerous calculation method for some entities.

Moreover, the Final Rule shifts the timing of post-phase-in compliance to September 1 of each year. As such, some entities that otherwise would have been required to exchange IM beginning January 1, 2023, will be able to defer compliance to September 1, 2023.[164] As a result, less collateral for uncleared swaps may be collected between January 1, 2023, and September 1, 2023, rendering the parties' positions riskier during that nine-month period, which could raise the risk of contagion and increase the potential for systemic risk. Firms that would have fallen out of scope by January 1, 2023, will also be subject to compliance for an additional nine months.

The amendment to Regulation 23.154(a), as proposed, will allow a CSE to use the risk-based model calculation of IM of a counterparty that is a swap entity. As a result, the CSE may forgo the adoption of a risk-based model, avoiding the cost and burden associated with the development and maintenance of a model. Without a model, the CSE may not be able to challenge the amounts generated by the swap entity counterparty, which may be insufficient because of model error or malfunction or because the swap entity, given the inherent conflict of interest, may be biased in favor of calculating and posting lower amounts of IM to the CSE. Hence, the CSE may collect insufficient amounts of IM to offset the risk of counterparty default, increasing the risk of contagion and the potential for systemic risk.

The Commission believes that these risks may be mitigated by the Final Rule, which is narrowly tailored to permit reliance on a swap entity counterparty's risk-based model calculation only with respect to uncleared swaps entered into for the purpose of hedging. In addition, Regulation 23.600, which requires SDs and MSPs to adopt a robust risk management program for the monitoring and management of risk related to their swap activities, imposes an additional safeguard by requiring the monitoring of exposures and swap risk.

[161] *See generally* 17 CFR 23.154(b).

[162] *But cf.* 17 CFR 23.600 (requiring SDs and MSPs to establish a robust risk management program for the monitoring and management of their swap activities).

[163] *But cf.* 17 CFR 23.600 (requiring swap entities to have a risk management program for the management and monitoring of risk associated with their swaps, which may reduce the risk that such entities may act in a conflicted manner).

[164] This would apply to entities that meet the MSE level based on their AANA during the June, July, and August 2022 period, and continue to have MSE in the March, April, and May 2023 period. Of course, changing the calculation period to the March, April, and May 2023 period may lead to the inclusion of entities whose AANA is below MSE in the June, July, and August 2022 period, but rises to the MSE level or above by the March, April, and May 2023 period. The OCE estimated that approximately 75–100 entities typically move from one side of the MSE threshold to the other between measurement periods.

(b) Efficiency, Competitiveness, and Financial Integrity of Markets

The Final Rule aligns the CFTC Margin Rule's AANA calculation method for determining MSE and the timing of post-phase-in compliance with the BCBS/IOSCO Framework. The Final Rule will thus reduce the need, at least for entities not also undertaking swaps with U.S. prudentially regulated SDs, to undertake separate AANA calculations accounting for different calculation methods and to conform to separate compliance timings, varying according to the location of swap counterparties and jurisdictional requirements applicable to the counterparties.[165] As such, the Final Rule may promote market efficiency and may level the playing field for CSEs, fostering competitiveness and reducing the incentive for market participants to engage in regulatory arbitrage by identifying more accommodating margin frameworks.

The amendment to Regulation 23.154(a), as proposed, will allow CSEs to rely on a swap entity counterparty's IM risk-based model calculation. This will generally result in lower IM than if IM were calculated using the standardized IM table. As such, the amendment may allow CSEs to more effectively compete in providing swaps to end-users. The Final Rule may thus promote efficiency in the uncleared swaps market by increasing the pool of swap counterparties and fostering competition.

Potential costs may arise because, without its own model, a CSE may lack effective means to verify its counterparty's IM calculations. As a result, if there are shortfalls in the output, the CSE may collect less IM collateral to offset the risk of default by the counterparty, which could increase the risk of contagion, threatening the integrity of the U.S. financial markets. The Commission, however, believes that the Final Rule is sufficiently targeted to mitigate these risks. The Final Rule will apply only when uncleared swaps are entered into for hedging, thus limiting widespread use and the potential for uncollateralized uncleared swap risk.

(c) Price Discovery

By aligning the CFTC Margin Rule and the BCBS/IOSCO Framework with respect to the AANA calculation method for determining MSE and the post-phase-in compliance timing, the Final Rule may reduce the burden and confusion inherent in implementing separate measures and processes to address compliance in different jurisdictions for some entities. The Final Rule may thus incentivize more firms to enter into uncleared swap transactions, increasing liquidity and leading to more robust pricing that reflects market fundamentals.

The amendment to Regulation 23.154(a), as proposed, may relieve certain CSEs from having to adopt a risk-based margin model to calculate IM or use the standardized IM table, by allowing them to rely on a counterparty's risk-based model calculation of IM. Relative to the alternatives, being able to have IM calculated in this manner may lower the costs of trading for such entities, and they may increase their trading in uncleared swaps, which in turn may increase liquidity and enhance price discovery. On the other hand, the Final Rule may encourage entities to shift their trading from swaps that can be cleared, potentially reducing liquidity and price discovery in those markets.

(d) Sound Risk Management

The Final Rule may reduce the need for some firms to undertake separate AANA calculations using different methods and to conform to separate compliance timing, allowing firms to engage in sound risk management by focusing on more substantive requirements.

Under the current rule, after the last phase of compliance, CSEs that enter into uncleared swaps with FEUs with MSE would have been required to exchange IM with such FEUs beginning on January 1, 2023. Under the Final Rule, CSEs will not be required to exchange IM with an FEU with MSE until September 1, 2023. As such, one effect of adopting the Final Rule is that uncleared swaps entered into between January 1, 2023, and September 1, 2023, by a CSE and FEU with MSE may now be uncollateralized. Given that less collateral may be collected during that nine-month period, positions created during that period may be riskier, increasing the risk of contagion and systemic risk. Conversely, because the existing January 1, 2023 compliance date would have required reassessment of MSE status on such date, certain FEUs that came into scope in the last phase of compliance may have come out of scope post-phase-in, resulting in the collection of less collateral for such entities than under the Final Rule. The Commission therefore believes that balancing the additional firms that will not be required to exchange IM until September 2023, against the possibility that some firms would have come out of scope under the existing requirements, the impact of the rule change with respect to the exchange of required collateral is likely to be relatively small.

Also, it is possible that FEUs trading certain financial products may not meet the MSE threshold because month-end positions in these financial products are not reflective of their typical position, so that their month-end AANAs may be uncharacteristically low.[166] As result, CSEs and such FEUs may not exchange IM for their uncleared swaps and their swaps may be insufficiently collateralized, increasing the risk of contagion and systemic risk. Conversely, because more than 96% of FEUs are unlikely to have MSE and come within the scope of the IM requirements, as estimated by the OCE, the exclusion of such products will have a limited impact on the effectiveness of the Commission's IM requirements.

Having only three observations to evaluate an entity's typical position may lead to less precision in determining which entities are most likely to contribute to systemic risk. However, absent ''window dressing'' issues, the effect of having fewer observations is unlikely to be substantial. Based on 2020 trading, OCE estimates that the sets of firms that will meet MSE under either measure are largely the same, and the set of entities that meet one criterion and not the other tends to consist of the smallest entities.

In regard to ''window dressing,'' AANA calculations based on month-end AANA compared to the currently required daily AANA averaging may be more susceptible to manipulation and less conducive to sound risk management. FEUs may manage their exposures as they approach the month-end date during the three-month calculation period to avoid MSE status. The Commission, however, believes that the anti-evasion language being incorporated into the rule text by this Final Rule, discussed in more detail above, would reduce the risk of window dressing. In addition, the Commission notes that it has authority, including anti-fraud authority under section 4b of the CEA, to take appropriate enforcement actions against any market participant that may engage in deceptive conduct with respect to the AANA calculation, and that CSEs, under the Commission's regulations, must have written policies and procedures in place

[165] As noted above, for entities that only trade in the U.S., the Final Rule may result in separate compliance timings and AANA calculations.

[166] As noted in footnote 60 infra, the month-end calculation may tend to undercount positions in certain physical energy swaps.

to prevent evasion or the facilitation of an evasion by an FEU counterparty.[167]

As proposed, the Final Rule allows CSEs to use the risk-based model calculation of a swap entity counterparty to calculate the amount of IM to be collected from such counterparty, consistent with Letter 19–29. As a result, CSEs may no longer be incentivized to adopt a proprietary risk-based model. If a CSE uses a counterparty's IM model calculation without developing its own model, the CSE may lack reasonable means to verify the IM provided by its counterparty, recognize shortfalls in the IM calculation, and identify potential flaws in the swap entity counterparty's risk-based model. As such, insufficient amounts of IM may be collected by the CSE to protect itself against the risk of default by the swap entity counterparty, increasing the risk of contagion and the potential for systemic risk. The Commission, however, believes that these risks are mitigated because, under the Final Rule, CSEs are able to use a counterparty's risk-based model IM calculation only with respect to uncleared swaps entered into for the purpose of hedging. In addition, the Commission notes that there are other requirements in the Commission's regulations that address the monitoring of exposures and swap risk.

(e) Other Public Interest Considerations

The Commission believes that the Final Rule, by aligning the CFTC Margin Rule with the BCBS/IOSCO Framework, will promote harmonization with international regulatory requirements and may reduce the potential for regulatory arbitrage. However, given that the U.S. prudential regulators have not amended their margin requirements in line with the Final Rule, the possibility exists that certain firms may undertake swaps with particular SDs based on which U.S. regulatory agency is responsible for setting margin requirements for such SDs.

D. Antitrust Laws

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the CEA, as well as the policies and purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.[168]

The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments.

The Commission has considered the Final Rule to determine whether it is anticompetitive, and has identified no anticompetitive effects. The Commission requested comment on whether the Proposal was anticompetitive and, if it was, what the anticompetitive effects were, and received no comments.

Because the Commission has determined that the Final Rule is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less competitive means of achieving the purposes of the Act.

List of Subjects in 17 CFR Part 23

Capital and margin requirements, Major swap participants, Swap dealers, Swaps.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 23 as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

■ 1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21.

Section 23.160 also issued under 7 U.S.C. 2(i); Sec. 721(b), Pub. L. 111–203, 124 Stat. 1641 (2010).

■ 2. In § 23.151, revise the definition of ''Material swaps exposure'' to read as follows:

§ 23.151 Definitions applicable to margin requirements.

* * * * *

Material swaps exposure for an entity means that, as of September 1 of any year, the entity and its margin affiliates have an average month-end aggregate notional amount of uncleared swaps, uncleared security-based swaps, foreign exchange forwards, and foreign exchange swaps with all counterparties for March, April, and May of that year that exceeds $8 billion, where such amount is calculated only for the last business day of the month. Activities not carried out in the regular course of business and willfully designed to circumvent calculation at month-end to evade meeting the definition of material swaps exposure shall be prohibited. An entity shall count the average month-end aggregate notional amount of an uncleared swap, an uncleared security-based swap, a foreign exchange forward, or a foreign exchange swap between the entity and a margin affiliate only one time. For purposes of this calculation, an entity shall not count a swap that is exempt pursuant to § 23.150(b) or a security-based swap that qualifies for an exemption under section 3C(g)(10) of the Securities Exchange Act of 1934 (15 U.S.C. 78c–3(g)(4)) and implementing regulations or that satisfies the criteria in section 3C(g)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78–c3(g)(4)) and implementing regulations.

* * * * *

■ 3. In § 23.154, add paragraph (a)(5) to read as follows:

§ 23.154 Calculation of initial margin.

(a) * * *

(5) A covered swap entity would be deemed to calculate initial margin as required by paragraph (a)(1) of this section if it uses the amount of initial margin calculated by a counterparty that is a swap entity and the initial margin amount is calculated using the swap entity's risk-based model that meets the requirements of paragraph (b) of this section or is approved by a prudential regulator, provided that initial margin calculated in such manner is used only with respect to uncleared swaps entered into by the covered swap entity and the swap entity for the purpose of hedging the covered swap entity's swaps with non-swap entity counterparties.

* * * * *

Issued in Washington, DC, on December 11, 2020, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Commission Voting Summary and Commissioners' Statements

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

[167] *See* 17 CFR 23.402(a)(ii).

[168] 7 U.S.C. 19(b).

Appendix 2—Statement of Support of Commissioner Brian D. Quintenz

I vote in favor of today's final rule that first, amends a key definition used to determine whether a financial end-user must comply with the Commission's uncleared swap margin regulations when trading with a swap dealer,[1] and second, codifies no-action relief providing additional flexibility for swap dealers to use the risk-based calculation of initial margin.[2] With regard to the adjustment to the definition of material swap exposure, I support the fact that the rulemaking further aligns the Commission's rules to the framework agreed upon by the international framework established by BCBS–IOSCO. However, I continue to take issue with the reliance on notional value as the defining metric for determining whether a firm should be subject to the uncleared margin regulations. The philosophy behind such a framework is that firms with small levels of swaps can have outsized impacts on the financial system. Further, the fact that we, as an agency and as international regulators, continue to embrace a metric as useless, biased, and arbitrary as notional value is something I have long opposed, and I have never, not once, heard an acceptable or even rationale defense for doing so.

Appendix 3—Statement of Support of Commissioner Dawn D. Stump

Overview

I am pleased to support the final rulemaking that the Commission is adopting with respect to the definition of ''material swaps exposure'' and an alternative margin calculation method in connection with the Commission's margin requirements for uncleared swaps.

This rulemaking addresses recommendations that the Commission has received from its Global Markets Advisory Committee (''GMAC''), which I am proud to sponsor, and is based on a comprehensive report prepared by GMAC's Subcommittee on Margin Requirements for Non-Cleared Swaps (''GMAC Margin Subcommittee'').[1] It demonstrates the value added to the Commission's policymaking by its Advisory Committees, in which market participants and other interested parties come together to provide us with their perspectives and potential solutions to practical problems.

The rulemaking we are adopting makes two changes to the Commission's uncleared margin rules. These changes have much to commend them—indeed, we did not receive any comment letters opposing them. These rule changes further objectives that I have commented on before:

- The imperative of harmonizing our margin requirements with those of our international colleagues in order to facilitate compliance and coordinated regulatory oversight; and
- the benefits of codifying relief that has been issued by our Staff and re-visiting our rules, where appropriate.

Background: A Different Universe Is Coming Into Scope of the Uncleared Margin Rules

The Commission's uncleared margin rules for swap dealers, like the Framework of the Basel Committee on Banking Supervision and the Board of the International Organization of Securities Commissions (''BCBS/IOSCO'')[2] on which they are based, were designed primarily to ensure the exchange of margin between the largest, most systemic, and interconnected financial institutions for their uncleared swap transactions with one another. Today, these institutions and transactions are subject to uncleared margin requirements that have taken effect since the rules were adopted.

Pursuant to the phased implementation schedule of the Commission's rules and the BCBS/IOSCO Framework, though, a different universe of market participants—presenting unique considerations—will soon be coming into scope of the margin rules. It is only now, as we enter the final phases of the implementation schedule, that the Commission's uncleared margin rules will apply to a significant number of financial end-users, and we have a responsibility to make sure they are fit for that purpose. Accordingly, now is the time we must thoughtfully consider whether the regulatory parameters that we have designed for the largest financial institutions in the earlier phases of margin implementation need to be tailored to account for the practical and operational challenges posed by the exchange of margin when one of the counterparties is a pension plan, endowment, insurance provider, mortgage service provider, or other financial end-user.

International Harmonization To Enhance Compliance and Coordinated Regulation

The first rule change we are adopting would revise the calculation method for determining whether financial end-users come within the scope of the initial margin (''IM'') requirements, and the timing for compliance with the IM requirements after the end of the phased compliance schedule. These changes would align certain timing and calculation issues under the Commission's margin rules with both the BCBS/IOSCO Framework and the manner in which these issues are handled by our regulatory colleagues in all other major market jurisdictions.

Swap dealers must exchange IM with respect to uncleared swaps that they enter into with a financial end-user counterparty that has material swaps exposure (''MSE''). The Commission's margin rules currently provide that after the last phase of compliance, MSE is to be determined on *January 1,* and that an entity has MSE if it has more than $8 billion in average aggregate notional amount (''AANA'') during *June, July, and August* of *the prior year.* By contrast, under the BCBS/IOSCO Framework and in virtually every other country in the world, an entity is determined to come into scope of the IM requirement on *September 1,* and an entity has MSE if it has the equivalent of $8 billion in AANA[3] during *March, April, and May* of *that year.*

The reason the United States is out-of-step with the rest of the world on these timing and calculation issues is not because of any reasoned policy determination. Rather, it is the result of a quirk that the U.S. margin rules were adopted based on the BCBS/IOSCO Framework that was in effect at the time—but the BCBS/IOSCO Framework was revised two years later.

In a further disconnect, the Commission's margin rules look to the *daily average* AANA during the three-month calculation period for determining MSE, whereas the BCBS/IOSCO Framework and other major market jurisdictions base the AANA calculation on an *average of month-end dates* during that period. Yet, as noted in the rulemaking release, the Commission's Office of the Chief Economist has estimated that calculations based on end-of-month AANA generally would yield similar results as calculations based on the Commission's current daily AANA approach. It has been suggested that this rule change theoretically might incentivize a firm to ''window dress'' its swap exposures as the month-end approaches in order to avoid margin requirements. But the GMAC Margin Subcommittee observed that it would be neither practicable nor financially desirable for parties to tear-up their positions on a recurring basis prior to the month-end calculation,[4] because doing so would interfere with hedging strategies and cause the firm to incur realized profit and loss.[5]

Accordingly, the Commission is amending these timing and calculation provisions of its uncleared margin rules to harmonize them with the BCBS/IOSCO Framework and the approach followed by our international colleagues. Given the global nature of the derivatives markets, we should always seek international harmonization of our

[1] Definition of material swap exposure under reg. 23.151(a).

[2] CFTC Letter 19–29.

[1] *Recommendations to Improve Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps,* Report to the CFTC's Global Markets Advisory Committee by the Subcommittee on Margin Requirements for Non-Cleared Swaps (April 2020) (''Margin Subcommittee Report''), available at *https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download.*

[2] *See generally* BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (July 2019), available at *https://www.bis.org/bcbs/publ/d475.pdf.*

[3] The MSE threshold under the BCBS/IOSCO Framework is stated in euros rather than dollars.

[4] Margin Subcommittee Report at 52.

[5] Commenters made this same point. *See, e.g.,* Joint Letter from ISDA, SIFMA, and GFXD at 3 (month-end window dressing is not a realistic risk since unwinding and then reestablishing positions on a recurring basis over the three-month period would take considerable effort, interrupt hedging strategies, and require counterparties to absorb the costs of realized profit and loss changes); Letter from SIFMA Asset Management Group at 3 (it would be neither practicable nor financially desirable for parties to tear-up positions on a recurring basis prior to each month end); Letter from Investment Company Institute at 5–6 (for regulated funds, adjusting swap exposures over the course of three periodic dates solely to avoid IM could impose transaction costs and inhibit a fund's ability to manage its portfolio risk, which may be inconsistent with the investment adviser's fiduciary duty to act in the best interest of its client). Comment letters available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=4157.*

regulations unless a compelling reason exists not to do so—which is not the case here.

Indeed, in the Dodd-Frank Act, Congress specifically directed the Commission, ''[i]n order to promote effective and consistent global regulation of swaps,'' to ''consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation . . . of swaps [and] swap entities. . . .''[6] And when the G–20 leaders met in Pittsburgh in the midst of the financial crisis in 2009, they, too, recognized that a workable solution for global derivatives markets demands coordinated policies and cooperation.[7]

Our rule change regarding MSE is true to the direction of Congress in the Dodd-Frank Act, and honors the commitment of the G–20 leaders at the Pittsburgh summit. Differences between countries in the detailed timing and calculation requirements with respect to uncleared margin compel participants in these global markets to run multiple compliance calculations—for no particular regulatory reason. This not only forces market participants to bear unnecessary costs, but actually hinders compliance with margin requirements because of the entirely foreseeable prospect of calculation errors in applying the different rules.

As noted above, now is the time to address this disconnect in MSE timing and calculation requirements because the financial end-users to which the MSE definition applies are coming into scope of the margin rules. During the unfortunate events of the financial crisis, we learned that coordination among global regulators, working towards a common objective, is essential. That lesson remains true today, and we are reminded that disregarding this reality has the potential to weaken, rather than strengthen, the effectiveness of our oversight and the resilience of global derivatives markets.

The Benefits of Codifying Staff Relief and Re-Visiting Our Rules

The second rule change that we are adopting would codify existing Staff no-action relief in recognition of market realities. The Commission's Staff often has occasion to issue relief or take other action in the form of no-action letters, interpretative letters, or advisories on various issues and in various circumstances. This affords the Commission a chance to observe how the Staff action operates in real-time, and to evaluate lessons learned. With the benefit of this time and experience, the Commission should then consider whether codifying such Staff action into rules is appropriate.[8] As I have said before, ''[i]t is simply good government to re-visit our rules and assess whether certain rules need to be updated, evaluate whether rules are achieving their objectives, and identify rules that are falling short and should be withdrawn or improved.''[9]

This second rule change would codify the alternative IM calculation method set out in Staff no-action Letter No. 19–29.[10] It would provide that a swap dealer may use the risk-based model calculation of IM of a counterparty that is a CFTC-registered swap dealer as the amount of IM that the former must collect from the latter. The release states the Commission's expectation that this alternative method of IM collection will be used by swap dealers with a discrete and limited swap business consisting primarily of entering into uncleared customer-facing swaps with end-user counterparties, and then hedging the risk of those swaps with uncleared swaps entered into with a few other swap dealers.

Simply put, not all swap dealers are created equal. It is therefore appropriate to tailor our uncleared margin regime accordingly. Letter No. 19–29 recognized this reality and smoothed the rough edges of our otherwise one-size-fits-all uncleared margin rules, and it is appropriate to codify that result.

Yet, under the rule amendments being adopted, this alternative method is subject to the condition that the uncleared swaps for which a swap dealer uses the risk-based model calculation of IM of its swap dealer counterparty are entered into for the purpose of hedging the former's own risk from entering into customer-facing swaps with non-swap dealer counterparties. This is a departure from the GMAC Margin Subcommittee, which did not recommend such a condition.

I am concerned by comments we received suggesting that this condition may cause this rule change to prove unworkable in practice.[11] I am encouraged that the rulemaking release addresses some of these comments by, among other things, confirming: (1) The flexibility of swap dealers as part of their hedging strategy to match a set of customer-facing swaps with one or more hedging swaps undertaken with swap dealer counterparties; and (2) that customer-facing swaps entered into through anticipatory hedging or that are subsequently terminated would be deemed hedges for purposes of the alternative method of IM calculation. Nevertheless, if over time, market participants find that the hedging condition causes this rule change to fail to fulfill its intended purpose, I urge them to alert the Commission so that it can consider appropriate adjustments.

There Remains Unfinished Business

While I am pleased with the steps the Commission is taking, there remains unfinished business in the implementation of uncleared margin requirements. As an initial matter, U.S. prudential regulators with oversight authority over bank swap dealers have not adopted the same rule changes. As a result, although commenters expressed support for the Commission proceeding with these rule changes even in the absence of parallel action by the U.S. prudential regulators, the operational difficulties confronting market participants that are coming into scope of the margin rules will not be fully addressed when they enter into uncleared swaps with bank swap dealers. I look forward to continuing the dialogue with our regulatory colleagues at other U.S. agencies to support addressing these challenges.

In addition, the report of the GMAC Margin Subcommittee recommended several actions, beyond those that we are adopting, to address the hurdles associated with the application of uncleared margin requirements to end-users. Having been present for the development of the Dodd-Frank Act, I recall that the concerns expressed by many lawmakers at the time focused on the application of the new requirements to end-users. The unique challenges with respect to uncleared margin that caused uneasiness back in 2009–2010 are now much more immediate as the margin requirements are being phased in to apply to these end-users. As the calendar turns into the new year, I look forward to continuing to work together to address the other recommendations included in the GMAC Margin Subcommittee's report regarding applying the uncleared margin rules to financial end-users. The need to do so will

[6] *See* section 752(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, Title VII, 124 Stat. 1376 (2010) (''Dodd-Frank Act'').

[7] *See* Leaders' Statement from the 2009 G–20 Summit in Pittsburgh, Pa. at 7 (September 24–25, 2009) (''We are committed to take action at the national and international level to raise standards together so that our national authorities implement global standards consistently in a way that ensures a level playing field and avoids fragmentation of markets, protectionism, and regulatory arbitrage''), available at *https://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.*

[8] *See* comments of Commissioner Dawn D. Stump during Open Commission Meeting on January 30, 2020, at 183 (noting that after several years of no-action relief regarding trading on swap execution facilities (''SEFs''), ''we have the benefit of time and experience and it is time to think about codifying some of that relief. . . . [T]he SEFs, the market participants, and the Commission have benefited from this time and we have an obligation to provide more legal certainty through codifying these provisions into rules.''), available at *https://www.cftc.gov/sites/default/files/2020/08/1597339661/openmeeting_013020_Transcript.pdf.*

[9] Statement of Commissioner Dawn D. Stump for CFTC Open Meeting on: (1) Final Rule on Position Limits and Position Accountability for Security Futures Products; and (2) Proposed Rule on Public Rulemaking Procedures (Part 13 Amendments) (September 16, 2019), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/stumpstatement091619.*

[10] CFTC Letter No. 19–29, Request for No-Action Relief Concerning Calculation of Initial Margin (December 19, 2019), available at *https://www.cftc.gov/LawRegulation/CFTCStaffLetters/letters.htm?title=&field_csl_letter_types_target_id%5B%5D=636&field_csl_divisions_target_id%5B%5D=596&field_csl_letter_year_value=2019&=Apply.*

[11] *See, e.g.,* Letter from BP Energy Company at 5 (given the uncertainty as to what constitutes hedging, swap dealers may be reluctant to rely on the alternative method of IM calculation) and 6 (limiting relief to hedge transactions may diminish its utility); Letter from Futures Industry Association at 8 (complexity and added risk of hedging condition will make the alternative method of IM calculation impractical as counterparties will shy away from undertaking swaps with swap dealers that rely on the alternative method of calculating IM; also, cost, operational and documentation burdens associated with hedging condition could lead small swap dealers to cease providing risk management services to end-user counterparties, leaving end users with unhedged risks).

only become more urgent as time marches on.

Conclusion

To be clear, these amendments to the uncleared margin rules are not a ''roll-back'' of the margin requirements that apply today to the largest financial institutions in their swap transactions with one another. Rather, they reflect a thoughtful refinement of our rules to align them with the rest of the international regulatory community, and to take account of specific circumstances in which the rules impose substantial practical and operational challenges (*i.e.,* they are not workable) when applied to financial end-users that are now coming within the scope of their mandates.

I am very appreciative of the many people whose efforts have contributed to bringing this rulemaking to fruition. First, the members of the GMAC, and especially the GMAC Margin Subcommittee, who devoted a tremendous amount of time to provide us with a high-quality report on complex margin issues during the turmoil at the start of the pandemic. Second, Chairman Tarbert and my fellow Commissioners for working with me on these important issues. And finally, the Staff of the Market Participants Division, whose tireless efforts have enabled us to advance these initiatives to assure that our uncleared margin rules are workable for all and are in line with international standards, thereby enhancing compliance consistent with our oversight responsibilities under the Commodity Exchange Act.

Appendix 4—Statement of Commissioner Dan M. Berkovitz

I. Introduction

I support today's two final rules that make tailored amendments to the CFTC's Margin Rule.[1] The Margin Rule requires swap dealers (''SDs'') and major swap participants (''MSPs'') for which there is no prudential regulator to post and collect, each business day, initial and variation margin for uncleared swap transactions with each counterparty that is an SD, MSP, or a financial end user with material swaps exposure (''MSE'').[2] The Margin Rule is a lynchpin of the Dodd-Frank reforms for swaps markets, and critical to mitigating risks in the financial system that might otherwise arise from uncleared swaps.[3] I support the final rules because they provide targeted, operational improvements to the Margin Rule; include backstops to deter any potential abuse; and are unlikely to increase risk to the U.S. financial system.

The two final rules address: (1) The definition of MSE and an alternative method for calculating initial margin (''MSE and Initial Margin Final Rule''); and (2) the application of the minimum transfer amount (''MTA'') for initial and variation margin (''MTA Final Rule''). The final rules align Commission requirements with international frameworks developed by the Basel Committee on Banking Supervision and the International Organization of Securities Commissions (''BCBS/IOSCO''),[4] and incorporate recommendations made to the CFTC's Global Markets Advisory Committee.[5] The final rules also build off existing CFTC staff no-action letters that in some cases have been in place since 2017, and that have operated with no apparent detrimental effects.

II. MSE and Initial Margin Final Rule

The MSE and Initial Margin Final Rule amends the definition of MSE to align it with the BCBS/IOSCO framework, including the method for calculating the average daily aggregate notional amount (''AANA'') of swaps. The final rule provides for calculations based on the average of the last business day in each month of a three-month period. The Commission previously raised concerns that this method of AANA calculation could potentially become less representative of an entity's true AANA and swaps exposure, potentially through the use of ''window dressing'' to artificially reduce AANA during the measurement period.[6]

The MSE and Initial Margin Final Rule includes an important new provision to address this issue. The final rule explicitly prohibits any ''[a]ctivities not carried out in the regular course of business and willfully designed to circumvent calculation at month-end to evade meeting the definition of material swaps exposure . . . .''[7] The addition of this language to the final rule's regulatory text will help ensure that CFTC efforts at international harmonization will not come at the expense of the safety and soundness of the U.S. financial system.[8] I thank the Chairman and the CFTC staff for working with my office to include this provision.

The MSE and Initial Margin Final Rule will also allow SDs and MSPs for which there is no prudential regulator (''Covered Swap Entities'' or ''CSEs'') to rely on the initial margin calculations of the more sophisticated counterparties with whom they transact swaps to manage their risks. This flexibility is limited to circumstances where a CSE enters into uncleared swaps with an SD, MSP, or swap entity to hedge its customer-facing swaps. This amendment to the Commission's existing rules could help promote liquidity and competition in swaps markets by increasing choice for end-users that are CSE customers.

The MSE and Initial Margin Final Rule provides helpful direction regarding the scope of hedging swaps for purposes of relying on a CSE counterparty's initial margin calculations. As set forth in the preamble to the final rule, a hedging swap must be consistent (although not identical) with the statutory definition of ''bona fide hedging transaction or position'' in CEA section 4a(c)(2)(B).[9] The final rule also makes clear that existing Commission regulations require a CSE that relies on its counterparty's initial margin calculations to also take steps to ''monitor, identify, and address potential shortfalls in the amounts of [initial margin] generated by the counterparty on whose [initial margin] model the CSE is relying.''[10]

III. MTA Final Rule

To reduce operational burdens associated with de minimis margin transfers, the Margin Rule provides that a CSE is not required to collect or post margin until the combined amount of initial margin and variation margin that is required to be collected or posted and that has not been collected or posted with respect to the counterparty exceeds $500,000—the MTA.[11] This MTA level, in part, helps limit the amount of a counterparty's uncollateralized, uncleared swaps exposure and mitigate any systemic risk arising from such swaps.

The MTA Final Rule addresses the application of the $500,000 MTA level to a counterparty's ''separately managed accounts,'' as well as the use of separate MTAs for initial and variation margin.[12] The MTA Final Rule codifies separate treatment for separately managed accounts and permits an MTA of $50,000 for each such account of a counterparty. This approach responds to practical limits on the ability of asset managers, for example, to aggregate initial and variation margin obligations across multiple separately managed accounts owned by the same counterparty. The MTA Final Rule also provides that if certain entities agree to separate MTAs for initial margin and variation margin, the respective amounts of MTA must be reflected in their required margin documentation.

These new provisions balance concerns over operational inefficiencies and practical challenges in the Commission's MTA rules against concerns that they may result in the exchange of less total margin than would be the case under the Commission's current

[1] Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 81 FR 636 (Jan. 6, 2016) (''Margin Rule'').

[2] Although addressed in the final rules, there are currently no registered MSPs.

[3] Section 4s(e) of the Commodity Exchange Act (''CEA''), as amended by the Dodd-Frank Act, requires the Commission to adopt rules for minimum initial and variation margin for uncleared swaps entered into by SDs and MSPs for which there is no prudential regulator.

[4] BCBS/IOSCO, Margin requirements for non-centrally cleared derivatives (July 2019), available at *https://www.bis.org/bcbs/publ/d475.pdf.* The BCBS/IOSCO framework was originally promulgated in 2013 and later revised in 2015.

[5] Recommendations to Improve Scoping and Implementation of Initial Margin Requirements for Non-Cleared Swaps, Report to the CFTC's Global Markets Advisory Committee by the Subcommittee on Margin Requirements for Non-Cleared Swaps (Apr. 2020), available at *https://www.cftc.gov/media/3886/GMAC_051920MarginSubcommitteeReport/download.*

[6] *See* Margin Rule, 81 FR at 645.

[7] MSE and Initial Margin Final Rule at new § 23.151 (defining ''Material Swaps Exposure'').

[8] The preamble to the MSE and Initial Margin Final Rule also notes an analysis by the CFTC's Office of the Chief Economist indicating that the new month-end AANA calculation method captures substantially the same entities and total number of entities as the Commission's previous daily AANA calculation method. As with any rulemaking, the Commission is free in the future to periodically review its data and confirm that the new AANA calculation method is performing as expected.

[9] 7 U.S.C. 6a(c)(2).

[10] MSE and Initial Margin Final Rule at section II(B).

[11] 17 CFR 23.151.

[12] Both aspects of the MTA Final Rule were the subject of CFTC staff no-action letters issued in 2017 and 2019, respectively.

requirements. Comments in response to the proposed rule noted the difficulties that would be associated with creating numerous separately managed accounts solely to evade the comparatively low $50,000 MTA for separately managed accounts. The MTA Final Rule also defines separately managed account so that the swaps of such account are not subject to a netting of initial or variation margin obligations. This potentially provides further disincentive to create separately managed accounts solely for the purpose of evading the $50,000 MTA level for such accounts.

IV. Conclusion

Mitigating systemic risk to the U.S. financial system was a primary objective of the Dodd-Frank Act in 2010, and of subsequent Commission rulemakings to implement Dodd-Frank, including the Margin Rule adopted in 2016. The Commission must remain committed to the Margin Rule and vigilant for any large pool of uncollateralized, uncleared swaps exposure. Today's targeted final rules, which codify existing practices, include embedded backstops, and provide tailored operational enhancements to the Margin Rule, are unlikely to present systemic risks.

I thank staff of the Market Participants Division for their work on these final rules.

[FR Doc. 2020–27736 Filed 1–4–21; 8:45 am]

BILLING CODE 6351–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 212

RIN 0412–AB00

Procedures for the Review and Clearance of USAID's Guidance Documents

AGENCY: U.S. Agency for International Development (USAID).

ACTION: Final rule.

SUMMARY: This final rule amends USAID's regulations to implement Executive Order (E.O.) 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents.* This rule sets forth processes and procedures for USAID to issue guidance documents as defined in the E.O. in a manner consistent with the requirements of Federal law applicable to all employees involved in inherently governmental deliberative decision-making on policy and employees involved in related administrative processes.

DATES: This final rule is effective January 5, 2021.

FOR FURTHER INFORMATION CONTACT: Tyrone K. Brown, Guidance Mailbox, (202) 355–7450, *tybrown@usaid.gov.*

SUPPLEMENTARY INFORMATION:

Background

On October 9, 2019 (84 FR 55235), President Trump issued Executive Order (E.O.) 13891, *Promoting the Rule of Law Through Improved Agency Guidance Documents.* The E.O. asserts that, except as mandated by applicable law or incorporated into a binding contract or agreement, Federal Departments and Agencies should treat guidance documents as non-binding on outside entities both in law and practice. To further the principle that Federal guidance should be transparent and made readily available to the public, Section 3 of the E.O. requires that Departments and Agencies make guidance documents available on a single, searchable, indexed public website. Section 3 also requires that Departments and Agencies review their guidance documents and, consistent with applicable law, rescind those that should no longer be in effect. Lastly, Section 4 requires that each Department and Agency put in place processes and procedures for issuing guidance documents as defined by the E.O.

In accordance with that direction, to codify our processes and procedures for guidance documents, the U.S. Agency for International Development (USAID) is amending our Automated Directives System (ADS) to update ADS Chapter 501, which governs the clearance process for reviewing and issuing Agency policy documents, to include guidance documents as defined by the E.O. USAID's formal clearance process ensures that all guidance documents receive legal review and, when appropriate, review and approval from USAID's Regulatory Reform Officer, who is the Agency's Deputy Administrator.

Before the Agency issues guidance documents as defined by E.O. 13891, we must review them to ensure they are written in plain language and do not impose any substantive legal requirements above and beyond statute or regulation. If a guidance document purports to describe, approve, or recommend specific conduct not required by existing laws, statutes, and regulations, then it must include a clear and prominent statement that the contents of the guidance document do not have the force and effect of law and are not meant to bind the public in any way, and that the guidance document is intended only to provide clarity to the public regarding existing requirements under the law or internal Agency policies and procedures applicable to our staff.

According to E.O. 13891, guidance documents shall also be subject to notice-and-comment procedures. The E.O. mandates that Departments and Agencies shall publish a notice in the **Federal Register** to announce that a draft of the proposed guidance document is publicly available; shall post the draft guidance document on the guidance portal of the Department or Agency; shall invite public comment on the draft document for a minimum of 30 days; and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance portal, when the Department or Agency finalizes and issues the guidance document. Consistent with E.O. 13891, USAID proposes procedures to allow the public to petition for the modification or withdrawal of an active guidance document posted on the Agency's guidance portal. USAID's guidance portal will provide clear and specific instructions on how to request the modification or withdrawal of an active guidance document.

The Office of the General Counsel (GC) at USAID has determined that the Agency has no ''guidance documents'' as defined under E.O. 13891. USAID's internal guidance materials do not qualify as ''guidance documents'' under the E.O., nor do grant and contract solicitations and awards; *Country and Regional Development Cooperation Strategies;* Agency programmatic Policies and *Strategies;* and purely internal Agency policies not intended to have substantial effect on the behavior of regulated parties, such as Chapters of our ADS. The procedures contained in this final rule apply to all guidance documents, which USAID defines as any statement of Agency policy or interpretation that concerns a statute, regulation, or technical matter within the jurisdiction of the Agency that is intended to have general applicability and future effect on the behavior of regulated parties, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures of the *Administrative Procedure Act.*

Notice and Comment Not Required

This rule relates to internal Agency management. Therefore, pursuant to Section 553(a)(2) of Title 5 of the United States Code (U.S.C.), notice of proposed rulemaking and opportunity to comment are not required.

Procedural Requirements

The Office of Management and Budget (OMB) has determined that this regulatory action does not meet the criteria for significant regulatory action

pursuant to E.O. 12866, Regulatory Planning and Review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in E.O. 13771.

The regulations added by this rule are intended to improve the internal management of USAID. As such, it is for the use of USAID personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its Departments and Agencies or other entities, its officers or employees, or any other person. Accordingly, we expect the economic impact of this rule, if any, to be minimal.

Regulatory Flexibility Act

Because notice-and-comment rulemaking is not necessary for this rule, the provisions of the Regulatory Flexibility Act, Section 604 of Title 5 of the U.S.C. do not apply.

Paperwork Reduction Act

This final rule imposes no new reporting or recordkeeping requirements that necessitate clearance by OMB.

List of Subjects in 22 CFR Part 212

Administrative practice, Freedom of Information Act (FOIA), Procedures.

In consideration of the foregoing, and under the authority of E.O. 13891, the U.S. Agency for International Development (USAID) amends 22 CFR part 212 as follows:

■ 1. The authority citation for part 22 continues to read as follows:

Authority: Pub. L. 114–185, 130 Stat. 538

■ 2. Add subparts N and O, consisting of § 212.25 through 212.40, to read as follows:

Sec.

Subpart N—Rulemaking

212.25. Responsibilities.

Subpart O—Procedures for Guidance Documents

212.26. General.
212.27. Review and clearance by the Office of the Bureau for Management.
212.28. Requirements for clearance.
212.29. Public access to effective guidance documents.
212.30. Good-faith cost estimates.
212.31. Approved procedures for guidance documents identified as ''significant'' or ''otherwise of importance to the Agency's interests.''
212.32. Definitions of ''significant guidance document'' and guidance documents that are ''otherwise of importance to the Agency's interests.''
212.33. Designation procedures.
212.34. Notice-and-comment procedures.
212.35. Petitions for guidance.
212.36. Rescinded guidance.
212.37. Exigent circumstances.
212.38. Reports to Congress and the Government Accountability Office.
212.39. No judicial review or enforceable rights.
212.40. Use of guidance documents.

Subpart N—Rulemaking

§ 212.25 Responsibilities.

(a) The Deputy Administrator serves as USAID's Regulatory Reform Officer (RRO). The RRO oversees implementation of regulatory-reform initiatives and policies to ensure USAID effectively manages regulatory burdens, consistent with applicable law.

(b) The Assistant Administrator for Management serves as USAID's Regulatory Policy Officer (RPO) and provides oversight for the Agency's internal rulemaking process. The RPO must be involved in each stage of the regulatory process to foster the development of effective, innovative, and least-burdensome regulations.

(c) The Office of Management Policy, Budget, and Performance in the Bureau for Management (M) coordinates the rulemaking process and ensures the Agency's rulemaking activities comply with all statutory and regulatory requirements.

(d) The Initiating Program Office (IPO) at USAID is the Bureau or Independent Office (B/IO) that provides subject-matter expertise on regulatory matters that affect the IPO's programs.

(e) The Office of the General Counsel at USAID provides guidance on legal and procedural requirements during the Agency's rulemaking process.

Subpart O—Guidance Procedures

§ 212.26 General.

(a) This subpart governs all employees of the United States Agency for International Development (USAID) involved in any phase of issuing Agency guidance documents as defined by under E.O. 13891.

(b) This subpart applies to all guidance documents issued by all components of the Agency after January 5, 2021.

(c) For purposes of this subpart, the term ''guidance document'' includes any statement of Agency policy or interpretation that concerns a statute, regulation, or technical matter within the jurisdiction of the Agency that is intended to have general applicability and future effect, but is not intended to have the force or effect of law in its own right and is not otherwise required by statute to be implemented through the rulemaking procedures specified in 5 U.S.C. 553. The term is not confined to formal written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, and advisories, and may include video, audio, and web-based formats. See OMB Bulletin 07–02, Agency Good Guidance Practices.

(d) This subpart does not apply to the following:

(1) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(2) Rules of Agency organization, procedure, or practice;

(3) Decisions of Agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

(4) Internal executive management legal advice or legal advisory opinions addressed to executive officials;

(5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.,* case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.,* guidance that pertains to the use, operation, or control of a U.S. Government facility or property), and correspondence with individual persons or entities (*e.g.,* Congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or Congressional testimony that do not set forth for the first time a new regulatory policy;

(8) Guidance pertaining to military or foreign-affairs functions;

(9) Grant solicitations and awards;

(10) Contract solicitations and awards; or

(11) Purely internal Agency guidance policies, such as Chapters of the ADS directed solely to USAID's employees, or to other Federal Departments and Agencies not intended to have substantial future effect on the behavior of regulated parties; USAID's *Country/Regional Development Cooperation Strategies;* the Agency's programmatic Policies and *Strategies;* Acquisition and Assistance Policy Directives (AAPDs); Application Guidelines; COVID–19 Guidance; Food for Peace Information Bulletins (FFPIBs); Guidance and Tools

for Global Food-Security Programs; Procurement Executive Bulletins (PEBs); Standard Provisions for the Protecting Life in Global Health Assistance (PLGHA) Policy; and documents in the USAID Policy Registry.
212.40.

§ 212.27 Review and clearance by the Office of Management Policy, Budget, and Performance in the Bureau for Management.

All USAID guidance documents, as defined by E.O. 13891 and § 212.26, require review and clearance in accordance with this subpart. The Bureau for Management (M Bureau) must review and clear any guidance a Bureau or Independent Office within USAID proposes to issue.

§ 212.28 Requirements for clearance.

USAID's review and clearance of guidance documents shall ensure that each one that a B/IO within the Agency proposes to issue satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for the Agency's action);

(b) The guidance document identifies or includes the following:

(1) The term ''guidance'' or its functional equivalent;

(2) The issuing B/IO within the Agency;

(3) A unique identifier, including, at a minimum, the date of issuance and title of the document and a Regulation Identifier Number (RIN), if applicable;

(4) The activity or entities to which the guidance applies;

(5) Citations to applicable statutes and regulations;

(6) A statement that notes whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(7) A short summary at the top of the document of the subject matter covered in the guidance document.

(c) The guidance document avoids using mandatory language, such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless the language is describing an established statutory or regulatory requirement, or is addressed to USAID's staff and will not foreclose the Agency's consideration of positions advanced by affected private parties; and

(d) The guidance document is written in plain and understandable English. All guidance documents should include a clear and prominent statement to declare that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or USAID's policies.

§ 212.29 Public access to effective guidance documents.

Each B/IO within USAID responsible for issuing guidance documents shall do the following:

(a) Ensure all effective guidance documents, identified by a unique identifier that includes, at a minimum, the document's title and date of issuance or revision and its RIN, if applicable, are on USAID's guidance portal in a single, searchable, indexed database and are available to the public in accordance with 5 U.S.C. 552(a)(2);

(b) Note on USAID's guidance portal that guidance documents lack the force and effect of law, except as authorized by law and are not meant to bind the public in anyway;

(c) Maintain and advertise USAID's guidance portal as a means for the public to comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in § 212.34 and to submit requests electronically for the issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 212.26; and

(d) The Bureau for Management is the office designated to receive and address complaints from the public that USAID is not following the requirements of OMB's Good Guidance Bulletin, or is improperly treating a guidance document as a binding requirement.

§ 212.30 Good-faith cost estimates.

Even though not legally binding, some Agency guidance could result in a substantial economic impact. For example, the issuance of Agency guidance could induce private parties to alter their conduct to conform to recommended standards or practices, such that they could incur costs beyond the costs of complying with existing statutes and regulations. While it might be difficult to predict with precision the economic impact of voluntary guidance, to the extent practicable the proposing B/IO within USAID shall make a good-faith effort to estimate the likely economic cost impact of the guidance document to determine whether it might qualify as ''significant.'' When a B/IO is assessing or explaining whether it believes a guidance document is significant, it should, at a minimum, provide the same level of analysis that would be required for a determination under the Congressional Review Act (M–19–14), *Guidance on Compliance with the Congressional Review Act,* that the guidance document is major. When USAID determines that a guidance document will be ''economically significant,'' the proposing B/IO should conduct and publish a regulatory-impact analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible (in conformance with E.O. 12866).

§ 212.31 Approval procedures for guidance documents identified as "significant" or "otherwise of importance to the Agency's interests."

(a) For guidance a USAID B/IO proposes to issue, if there is a reasonable possibility a guidance document could be as ''significant'' or ''otherwise of importance to the Agency's interests'' within the meaning of § 212.31, or if the B/IO is uncertain whether the guidance could qualify as such, the B/IO should email a copy of the proposed guidance document (or a summary of it) to the M Bureau for review and further direction before issuance.

(b) As with significant regulations, after appropriate internal consultation and review, the M Bureau will submit significant guidance documents that are otherwise of importance to the Agency's interests to the Office of Information and Regulatory Affairs (OIRA) within OMB for review and designation.

(c) If OMB/OIRA determines a guidance document from a USAID B/IO not to be either significant or otherwise of importance to the Agency's interests within the meaning of § 212.31, the Bureau for Management may proceed with issuance. For each guidance document coordinated through the Office of the Administrator, the issuing B/IO should include a statement in the Action Memorandum to indicate that the OMB/OIRA has reviewed and cleared the guidance document in accordance with this process.

§ 212.32 Definitions of "significant guidance document" and guidance documents that are "otherwise of importance to the Agency's interests."

(a) The term ''significant guidance document'' means a guidance document USAID will disseminate to regulated entities or the general public and that might reasonably be anticipated:

(1) To lead to an annual effect on the U.S. economy of $100 million or more, or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal Department or Agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues that arise out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term ''significant guidance document'' does not include the categories of documents excluded by § 212.26 or any other category of guidance documents exempted in writing by OMB/OIRA.

(c) OMB/OIRA must review significant and economically significant guidance documents under E.O. 12866 before issuance, and they must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(d) Even if not ''significant,'' USAID will consider a guidance document of regulatory impact as ''otherwise of importance to the Agency's interests'' within the meaning of this paragraph if it might reasonably be anticipated:

(1) To relate to a major program, policy, or activity of the Agency or a high-profile issue that is pending for decision before the Agency;

(2) To involve one of the Administrator's top policy priorities;

(3) To garner significant press or Congressional attention; or

(4) To raise significant questions or concerns from constituencies of importance to the Agency, such as Committees of Congress, States or Indian tribes, the White House or other Departments and Agencies of the Executive Branch, courts, consumer or public-interest groups, or leading representatives of industry.

(e) As noted in paragraphs (a) through (d) of this section, ''guidance documents'' for the purposes of this rule, including this subpart, do not include those documents identified in this subpart O.

§ 212.33 Designation procedures.

(a) The Bureau for Management may request a B/IO within USAID to prepare a designation request for certain guidance documents. Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The B/IO's recommended designation of ''not significant,'' ''significant,'' or ''economically significant,'' as well as a justification for that designation.

(b) Except as otherwise provided in paragraph (c) of this section, the Agency will seek significance determinations from OMB/OIRA for certain guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing these guidance documents, after internal consultation and review, the Bureau for Management shall submit the document to OMB/OIRA for review under the provisions in Section 6 of E.O. 12866 to determine if it meets the definition of ''significant'' or ''economically significant.''

(c) All ''guidance documents'' as with rulemakings, receive a significance determination from OMB/OIRA, unless explicitly exempt from E.O. 12866. Note that the only documents that do not receive designations are those that fall outside the definition of ''guidance'' or within a group categorically considered nonsignificant as agreed upon by OMB/OIRA in Memorandum M–20–02).

§ 212.34 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, all proposed USAID guidance documents determined to be a ''significant guidance document'' within the meaning of § 212.31 shall be subject to the following notice-and-comment procedures:

(1) The issuing B/IO within USAID shall publish a notice in the **Federal Register** to announce that a draft of the proposed guidance document is publicly available; post the draft guidance document on the Agency's guidance portal; invite public comment on the draft document for a minimum of 30 days; and

(2) Prepare and post a public response to major concerns raised in the comments, as appropriate, on USAID's guidance portal, when the Agency finalizes and issues the guidance document.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which the Bureau for Management finds, in consultation with GC, the proposing B/IO, and USAID's RRO, good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefore in the guidance issued).

(c) Where appropriate, the Bureau for Management and the proposing B/IO may recommend to the RRO that a particular guidance document that is otherwise of importance to the Agency's interests shall also be subject to the notice-and-comment procedures described in paragraph (a) of this section.

§ 212.35 Petitions for guidance.

Any person may petition the Agency to withdraw or modify a particular guidance document by using the procedures found in § 212.26(c). USAID should respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

§ 212.36 Rescinded guidance.

No B/IO within USAID may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 212.37 Exigent circumstances.

In emergency situations, or when a statutory deadline or court order requires the issuing B/IO within USAID to act more quickly than normal review procedures allow, the issuing B/IO shall coordinate with the Bureau for Management to notify OMB/OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this subpart at the earliest opportunity. Wherever practicable, the issuing B/IO should schedule its proceedings to permit sufficient time to comply with the procedures set forth in this subpart.

§ 212.38 Reports to Congress and the Government Accountability Office.

Unless otherwise determined in writing, it is the policy of USAID that upon issuing a guidance document determined to be ''significant'' within the meaning of § 212.31 the issuing B/IO shall submit a report to Congress and the Government Accountability Office in accordance with the procedures described in 5 U.S.C. 801 (the Congressional Review Act [CRA]). Under the CRA, USAID must coordinate with OMB/OIRA regarding a major determination for all guidance documents, irrespective of whether the Agency otherwise would submit a rule for regulatory review (Memorandum-19–14).

§ 212.39 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of USAID. As such, it is for USAID personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its Departments and Agencies or other entities, its officers or employees, or any other person.

§ 212.40 Use of guidance documents.

Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, non-compliance with guidance documents cannot be used as a basis for proving violations of applicable law. Guidance documents can do no more, with respect to prohibition of conduct, than articulate USAID's understanding of how a statute or regulation applies to particular circumstances.

Ruth Buckley,

Acting Performance Improvement Officer/ Acting Office Director, Bureau for Management Office of Management Policy, Budget and Operational Performance.

[FR Doc. 2020–26352 Filed 1–4–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9942]

RIN 1545–BP53

Small Business Taxpayer Exceptions Under Sections 263A, 448, 460 and 471

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations to implement legislative changes to sections 263A, 448, 460, and 471 of the Internal Revenue Code (Code) that simplify the application of those tax accounting provisions for certain businesses having average annual gross receipts that do not exceed $25,000,000, adjusted for inflation. This document also contains final regulations regarding certain special accounting rules for long-term contracts under section 460 to implement legislative changes applicable to corporate taxpayers. The final regulations generally affect taxpayers with average annual gross receipts of not more than $25 million, as adjusted for inflation.

DATES:

Effective date: The regulations are effective on January 5, 2021.

Applicability dates: For dates of applicability, see §§ 1.263A–1(a)(2)(i), 1.263A–1(m)(6), 1.263A–2(g)(4), 1.263A–3(f)(2), 1.263A–4(g)(2), 1.263A–7(a)(4)(ii), 1.381(c)(5)–1(f), 1.446–1(c)(3), 1.448–2(h), 1.448–3(h), 1.460–1(h)(3), 1.460–3(d), 1.460–4(i), 1.460–6(k), and 1.471–1(c).

FOR FURTHER INFORMATION CONTACT: Concerning §§ 1.460–1 through 1.460–6, Innessa Glazman, (202) 317–7006; concerning all other regulations in this document, Anna Gleysteen, (202) 317–7007.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) to implement statutory amendments to sections 263A, 448, 460, and 471 of the Code made by section 13102 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA). These statutory amendments generally simplify the application of the method of accounting rules under those provisions to certain businesses (other than tax shelters) with average annual gross receipts that do not exceed $25,000,000, adjusted for inflation.

The uniform capitalization (UNICAP) rules of section 263A provide that, in general, the direct costs and the properly allocable share of the indirect costs of real or tangible personal property produced, or real or personal property described in section 1221(a)(1) acquired for resale, cannot be deducted but must either be capitalized into the basis of the property or included in inventory costs, as applicable. Before the enactment of the TCJA, certain types of taxpayers and certain types of property were exempt from UNICAP, but there was no generally applicable exemption based on gross receipts.

Section 448(a) generally prohibits C corporations, partnerships with a C corporation as a partner, and tax shelters from using the cash receipts and disbursements method of accounting (cash method). However, section 448(b)(3) provides that section 448(a) does not apply to C corporations and partnerships with a C corporation as a partner that meet the gross receipts test of section 448(c). Prior to the TCJA's enactment, a taxpayer met the gross receipts test of section 448(c) if, for all taxable years preceding the current taxable year, the average annual gross receipts of the taxpayer (or any predecessor) for any 3-taxable-year period did not exceed $5 million.

Section 460(a) provides that income from a long-term contract must be determined using the percentage-of-completion method (PCM). A long-term contract is defined in section 460(f) as generally any contract for the manufacture, building, installation, or construction of property if such contract is not completed within the taxable year in which such contract is entered into. Subject to special rules in section 460(b)(3), section 460(b)(1)(A) generally provides that the percentage of completion of a long-term contract is determined by comparing costs allocated to the contract under section 460(c) and incurred before the close of the taxable year with the estimated total contract costs. Prior to the TCJA, section 460(e)(1)(B) provided an exemption from the PCM for a long-term construction contract of a taxpayer who estimated that the contract would be completed within the 2-year period from the commencement of the contract (two-year rule), and whose average annual gross receipts for the 3-taxable-year period ending with the year preceding the year the contract was entered into did not exceed $10 million (Section 460(e) gross receipts test).

Section 471(a) requires inventories to be taken by a taxpayer when, in the opinion of the Secretary of the Treasury or his delegate (Secretary), taking an inventory is necessary to determine the income of the taxpayer. Section 1.471–1 requires the taking of an inventory at the beginning and end of each taxable year in which the production, purchase, or sale of merchandise is an income-producing factor. Additionally, when an inventory is required to be taken, § 1.446–1(c)(1)(iv) and (c)(2) require that an accrual method be used for purchases and sales. Prior to the enactment of the TCJA, there were no regulatory exceptions from the requirement to take an inventory under § 1.471–1.

The statutory amendments of the TCJA increase the gross receipts test amount under section 448(c) to $25,000,000, adjusted for inflation, for eligibility to use the cash method and also exempt taxpayers, other than a tax shelter under section 448(a)(3), meeting the gross receipts test (Section 448(c) Gross Receipts Test) from: (1) The UNICAP rules under section 263A; (2) the requirement to use the percentage-of-completion method under section 460 provided other requirements of section 460(e) are satisfied; and (3) the requirement to take inventories under section 471(a) if their inventory is treated as non-incidental materials and supplies, or if the method of accounting for their inventory conforms with the method reflected on their applicable financial statement (AFS), or if they do not have an AFS, their books and records prepared in accordance with their accounting procedures. These amendments generally apply to taxable years beginning after December 31, 2017. The amendments to section 460 apply to contracts entered into after December 31, 2017, in taxable years ending after December 31, 2017.

On August 20, 2018, the Department of the Treasury (Treasury Department)

and the IRS issued Revenue Procedure 2018–40 (2018–34 IRB 320), which provided administrative procedures for a taxpayer, other than a tax shelter under section 448(a)(3), meeting the requirements of section 448(c) to obtain the consent to change the taxpayer's method of accounting to a method of accounting permitted by section 263A, 448, 460 or 471. The revenue procedure also requested comments for future guidance regarding the implementation of the TCJA modifications to sections 263A, 448, 460, and 471. The record of public comments received in response to Revenue Procedure 2018–40 may be requested by sending an email to *Notice.Comments@irs.gov.*

On August 5, 2020, the Treasury Department and the IRS published a notice of proposed rulemaking (REG–132766–18) in the **Federal Register** (85 FR 47608), correction published in the **Federal Register** (85 FR 58307) on September 18, 2020, containing proposed regulations under sections 263A, 448, 460, and 471 (proposed regulations). The proposed regulations reflect consideration of the comments that were received in response to Revenue Procedure 2018–40.

The Treasury Department and the IRS received nine written comments responding to the proposed regulations. The Treasury Department and the IRS received one request to speak at a public hearing, which was later withdrawn. Therefore, no public hearing was held. Comments received before these final regulations were substantially developed, including all comments received on or before the deadline for comments on September 14, 2020, were carefully considered in developing these final regulations.

Copies of the comments received are available for public inspection at *http://www.regulations.gov* or upon request. After consideration of the comments received, this Treasury decision adopts the proposed regulations as revised in response to such comments. Those comments and the revisions are discussed in the Summary of Comments and Explanation of Revisions section of this preamble.

Summary of Comments and Explanation of Revisions

I. Overview

This Summary of Comments and Explanation of Revisions section summarizes the formal written comments that were received addressing the proposed regulations. However, comments merely summarizing or interpreting the proposed regulations or recommending statutory revisions generally are not discussed in this preamble. These final regulations provide guidance under sections 263A, 448, 460, and 471 to implement the TCJA's amendments to those provisions. These final regulations also modify §§ 1.381(c)(5)–1 and 1.446–1 to reflect these statutory amendments. The rationale for provisions in these final regulations that are not discussed in this Explanation of Revisions remains the same as described in the Explanation of Provisions section of the preamble to the proposed regulations.

A. Section 263A(i)

1. Costing Rules for Self-Constructed Assets

In response to Revenue Procedure 2018–40, a commenter stated that a small business taxpayer that is exempted from section 263A pursuant to section 263A(i) would be subject to the costing rules prior to the enactment of section 263A (pre-section 263A costing rules) for self-constructed assets used in the taxpayer's trade or business. However, according to the commenter, the pre-section 263A costing rules were unclear as to what costs are capitalizable to self-constructed assets. In light of this comment, the preamble to the proposed regulations requested comments on specific clarifications needed regarding the pre-section 263A costing rules. Only one comment was received in response to this request. The sole commenter noted that one of the reasons for the enactment of section 263A was that courts had reached different conclusions as to the types of costs that were required to be capitalized under the pre-section 263A costing rules. *Compare Adolph Coors Co.* v. *Commissioner,* 519 F.2d 1280 (10th Cir. 1975), cert. denied 423 U.S. 1087 (1976) (requiring the full inclusion of all overhead costs in the cost basis of self-constructed assets) *with Fort Howard Paper Co.* v. *Commissioner,* 49 T.C. 275 (1967) (requiring only the inclusion of overhead costs directly attributable to the self-constructed asset). The commenter suggested that taxpayers who used the exemption under section 263A(i) to not capitalize costs under section 263A be permitted to use an incremental costing method to determine the costs of self-constructed assets, consistent with the approach in *Fort Howard Paper.* The commenter stated that identifying indirect costs not directly attributable to the construction of specific self-constructed assets would be difficult.

After considering this comment, the Treasury Department and the IRS have determined that the requested clarification is beyond the scope of these regulations, which is to implement section 263A(i) as enacted by TCJA. For taxpayers that elect under section 263A(i) to not apply section 263A, the requirement to capitalize certain costs to self-constructed assets comes from other provisions of the Code, such as section 263(a). TCJA did not amend such provisions and thus the clarification of permissible capitalization methods and the types of costs required to be capitalized to self-constructed assets under such provisions is beyond the scope of these final regulations.

2. Changes to Regulations Under Section 448

Under section 448(a)(3), a tax shelter is prohibited from using the cash method. Section 448(d)(3) cross references section 461(i)(3) to define the term ''tax shelter.'' Section 461(i)(3)(B), in turn, includes a cross reference to the definition of ''syndicate'' in section 1256(e)(3)(B), which defines a syndicate as a partnership or other entity (other than a C corporation) if more than 35 percent of the losses of that entity during the taxable year are *allocable* to limited partners or limited entrepreneurs. Sections 1.448–1T(b)(3) (for taxable years beginning before January 1, 2018) and proposed 1.448–2(b)(2)(iii) (for taxable years beginning after December 31, 2017) narrow this definition by providing that a taxpayer is a syndicate only if more than 35 percent of its losses are *allocated* to limited partners or limited entrepreneurs. Consequently, a partnership or other entity (other than a C corporation) may be considered a syndicate under section 448 only for a taxable year in which it has losses.

Proposed § 1.448–2(b)(2)(iii)(B) permits a taxpayer to elect to use the allocated taxable income or loss of the immediately preceding taxable year to determine whether the taxpayer is a syndicate under section 448(d)(3) for the current taxable year. Under the proposed regulations, a taxpayer that makes this election must apply the rule to all subsequent taxable years, and for all purposes for which status as a tax shelter under section 448(d)(3) is relevant, unless the Commissioner permits a revocation of the election.

Several comments were received concerning issues related to tax shelters, including the definition of ''syndicate,'' under proposed § 1.448–2(b)(2)(i)(B). Some commenters recommend using the authority granted under section 1256(e)(3)(C)(v) to provide a deemed active participation rule to disregard certain interests held by limited

entrepreneurs or limited partners for applying the Section 448(c) Gross Receipts Test if certain conditions were met. For example, conditions of the rule could include that the entity had not been classified as a syndicate within the last three taxable years, and that the average taxable income of the entity for that period was greater than zero.

The final regulations do not adopt this recommendation. The Treasury Department and the IRS have determined that it would be inappropriate to provide an exception to the active participation rules in section 1256(e)(3)(C)(v) by ''deeming'' active participation for small business taxpayers. The Treasury Department and the IRS believe that the deeming of active participation in this context would be overbroad and would run counter to Congressional intent. Sections 448(b)(3) and (d)(3), 461(i)(3) and 1256(e)(3)(C) were not modified by the TCJA, and the legislative history to section 13012 of the TCJA does not indicate any Congressional intent to modify the definition of ''tax shelter'' or ''syndicate.'' By not modifying those provisions, Congress presumably meant to exclude tax shelters, including syndicates, from being eligible to use the cash method of accounting and the small business taxpayer exemptions in section 13102 of the TCJA, even while otherwise expanding eligibility to meet the Section 448(c) Gross Receipts Test.

Other comments requested clarification generally of what ''active participation'' means and the circumstances, if any, under which a member of a limited liability company is treated as a ''limited partner'' or ''limited entrepreneur'' under section 461(k)(4). The Treasury Department and the IRS have determined that such guidance is outside the scope of these final regulations, which are to implement the changes made by section 13102 of the TCJA.

The Treasury Department and the IRS remain aware of the increased relevance of the definition of tax shelter under section 448(d)(3) after enactment of the TCJA and the practical concerns regarding the determination of tax shelter status for the taxable year. To ameliorate these practical concerns, these final regulations modify the syndicate election provided in proposed § 1.448–2(b)(2)(iii)(B) to provide additional relief by making the election an annual election. The Treasury Department and the IRS have determined that an annual election appropriately balances the statutory language with the consistency requirement for use of a method of accounting under section 446(a) and § 1.446–1. A cash method taxpayer that is generally profitable year-to-year may experience an unforeseen taxable loss for an anomalous year but return to its profitable position in subsequent years. If the taxpayer allocated more than 35 percent of the taxable loss to limited partners or limited entrepreneurs, the taxpayer would be required to change from the cash method to another method for the anomalous year in accordance with section 448(a)(3). However, that taxpayer would otherwise not be prohibited under section 448(a)(3) to use the cash method in the next profitable taxable year. An annual election under § 1.448–2(b)(2)(iii)(B) allows a taxpayer to elect in the loss year to use the allocated taxable income or loss of the immediately preceding taxable year to determine whether the taxpayer is a syndicate under section 448(d)(3) for the current taxable year. The Treasury Department and the IRS have determined that permitting taxpayers to continue to use the cash method, as well as other methods impacted by a determination under section 448(d)(3), in such situations is consistent with the requirements under section 446(a).

This election applies for all provisions of the Code that specifically refer to section 448(a)(3) to define tax shelter, such as the small business exemptions under sections 163(j)(3), 263A(i)(1), 460(e)(1)(B) and 471(c)(1). A taxpayer is required to file a statement with the original timely filed Federal income tax return, with extensions, to affirmatively make this election under § 1.448–2(b)(2)(iii)(B) for such taxable year. The election is valid only for the taxable year for which it is made, and once made, cannot be revoked. The Treasury Department and the IRS intend to issue procedural guidance to address the revocation of an election made under proposed § 1.448–2(b)(2)(iii)(B) as a result of the application of the final regulations.

Other commenters noted for some taxpayers who took advantage of the small business exception in section 448(b)(3) to change to the cash method, the change in method of accounting resulted in a negative section 481(a) adjustment, which triggered an allocated loss and made the taxpayer a tax shelter under section 448(a)(3). As a result, the taxpayers became ineligible to use the cash method for the year in which the negative section 481(a) adjustment was recognized but may be otherwise eligible to use the cash method for future years. Under proposed § 1.448–2(g)(3), these taxpayers would be ineligible for the automatic change procedures to make a subsequent change back to the cash method once they are no longer tax shelters within a five-year period. The commenters recommend relief for taxpayers with this situation.

The commenters propose an exception to the tax shelter rules for a taxpayer that satisfies the Section 448 Gross Receipts Test if a negative section 481(a) adjustment from a change in method of accounting under the small business taxpayer exemptions (for example, sections 263A(i), 471(c), 448(b)) results in the taxpayer being considered a tax shelter under section 448(d)(3) and proposed § 1.448–2(b)(2)(iii). These final regulations do not adopt this suggestion. As described in the Preamble to the proposed regulations, the Treasury Department and the IRS have determined that no exception was provided in the TCJA to limit the definition of tax shelter in section 448(d)(3) for taxpayers making method changes related to the small business taxpayer exemptions. However, the Treasury Department and the IRS expect that the annual election under § 1.448–2(b)(2)(iii)(B), described earlier, will provide relief for many taxpayers in this situation.

Additionally, the Treasury Department and the IRS have reconsidered the 5-year restriction on automatic method changes in light of these comments. Section 446(a), unmodified by the TCJA, provides that taxable income shall be computed under the method of accounting on the basis of which the taxpayer *regularly* computes his income in keeping his books. A taxpayer that changes its method of accounting for the same item with regular frequency (for example, annually or every other taxable year) is not adhering to the consistency requirement of section 446. The consistency requirement of section 446(a) is distinct from the authority granted the Commissioner under section 446(b) to determine whether the method of accounting used by a taxpayer clearly reflects income. *See e.g., Advertisers Exchange, Inc.* v. *Commissioner,* 25 T.C. 1086, 1092 (1956) (''Consistency is the key and is required regardless of the method or system of accounting used.'') (citations omitted); *Huntington Securities Corporation* v. *Busey,* 112 F.2d 368, 370 (1940) (''. . . whatever method the taxpayer adopts must be consistent from year to year unless the Commissioner authorizes a change.'')

The Treasury Department and the IRS are aware that the 5-year restriction in proposed § 1.448–2(g)(3) could be burdensome for a small business taxpayer that was required to change from the cash method as a result of

section 448(a)(3) or not meeting the Section 448 Gross Receipts Test in a taxable year but that becomes eligible to use the cash method under section 448 in the subsequent taxable year. Proposed § 1.448–2(g)(3) would have required this small business taxpayer to request consent to change back to the cash method using the non-automatic change procedures in Revenue Procedure 2015–13 (or successor). These final regulations remove the 5-year restriction on making automatic method changes for certain situations.

Sections 263A(i)(3), 448(d)(7), 460(e)(2)(B) and 471(c)(4) provide that certain changes in method of accounting for the small business exemptions are made with the consent of the Secretary. A taxpayer must follow the applicable administrative procedures related to a change in method of accounting notwithstanding the deemed consent of the Secretary. *See, e.g., Capital One Financial Corporation and Subsidiaries* v. *Commissioner of Internal Revenue,* 130 T.C. 147, 157 (2008) (''a taxpayer forced to change its method of accounting under section 448 must still file a Form 3115 with its return''). The Treasury Department and the IRS intend to provide procedural rules relating to changes in method of accounting to implement the final regulations using the automatic method change procedures of Revenue Procedure 2015–13. Those procedural rules will address whether a waiver of the 5-year overall method eligibility rule in section 5.01(1)(e) of Revenue Procedure 2015–13 is appropriate for small business taxpayers that were required to change from the cash method in one taxable year but are not subsequently limited by section 448.

The Treasury Department and the IRS have determined that taxpayers that are voluntarily changing (that is, not required by section 448 to no longer use the cash method) between overall methods are distinguishable from taxpayers that are required to change from the cash method to another method because they no longer meet the Section 448(c) Gross Receipts Test or become a tax shelter under section 448(d)(3). The procedural guidance is expected to address both fact patterns. Additionally, the Treasury Department and the IRS intend for the procedural guidance to address similar fact patterns for taxpayers making changes related to the regulations under sections 263A(i), 460(e)(1)(B) and 471(c), as discussed in this Summary of Comments and Explanation of Revisions.

3. Section 471 Small Business Taxpayer Exemptions

A. Inventory Treated as Non-Incidental Materials and Supplies

The preamble to the proposed regulations notes that the Treasury Department and the IRS interpret the statutory language of section 471(c)(1)(B) to mean that the property excepted from section 471(a) by that provision continues to be inventory property even though the general inventory rules under section 471(a) are not required to be applied to that property. Section 471(c)(1)(B) provides that a qualifying taxpayer's ''method of accounting for *inventory* for such taxable year'' (emphasis added) will not be treated as failing to clearly reflect income if the method ''treats *inventory* as non-incidental materials and supplies'' (emphasis added). The Treasury Department and the IRS read the repeated use of the word ''inventory'' to mean that Congress intended that inventory property remains inventory property while relieving taxpayers from the general inventory rules of section 471(a). To reduce confusion about the nature of property treated as non-incidental materials and supplies under section 471(c)(1)(B)(i), these final regulations refer to the method under that provision of the Code as the ''section 471(c) NIMS inventory method.''

The Treasury Department and the IRS interpret section 471(c)(1)(B)(i) as providing three distinct benefits for taxpayers. First, the provision significantly expanded the types of taxpayers permitted to treat their inventory as non-incidental materials and supplies. Under prior administrative guidance, as discussed later in section 3.A.i of this Summary of Comments and Explanation of Revisions, taxpayers with gross receipts of no more than $1 million and taxpayers in certain industries (generally not producers or resellers) with gross receipts of no more than $10 million were permitted to treat their inventory as non-incidental materials and supplies. Section 471(c) greatly expanded the availability of this method of accounting to taxpayers in all types of trades or businesses, including producers and resellers, by reference to the increased cap on gross receipts under the Section 448(c) Gross Receipts Test. Second, treating inventory as non-incidental materials and supplies under § 1.471–1(b)(5) provides simplification and burden reduction for taxpayers by requiring only certain costs to be capitalized to inventory. For example, a taxpayer using the section 471(c) NIMS inventory method does not capitalize direct labor costs or any indirect costs to inventory costs. See discussion of direct labor costs later in section 3.A.iii of this Summary of Comments and Explanation of Revisions. Simplification does not indicate that the nature of the property was changed by the TCJA, or that the intent of Congress was to provide immediate expensing of inventory costs. Thirdly, taxpayers, other than a tax shelter under section 448(a)(3), treating inventory as non-incidental materials and supplies under § 1.471–1(b)(5) are eligible to use the overall cash method of accounting for purchases and sales of merchandise, rather than being required to use an accrual method. *See* § 1.446–1(a)(4)(i).

i. Definition of the Term ''Used or Consumed''

The preamble to the proposed regulations provides that the Treasury Department and IRS interpret section 471(c)(1)(B)(i) as generally codifying the administrative guidance existing at the time of its enactment (that is, Revenue Procedure 2001–10 (2001–2 IRB 272) and Revenue Procedure 2002–28 (2002–18 IRB 815)) and making that method available to significantly more taxpayers. Accordingly, the proposed regulations provided that items of inventory treated as materials and supplies under section 471(c) are used or consumed in the taxable year in which the taxpayer provides the item to a customer, and the cost of such item is recovered in that taxable year or the taxable year in which the taxpayer pays for or incurs such cost, whichever is later.

Comments were received on the definition of ''used or consumed'' in proposed § 1.471–1(b)(4)(i) as it relates to producers. A commenter asserted that the meaning of the term ''used or consumed'' for a producer using the section 471(c) NIMS inventory supplies method should be consistent with the meaning of the term ''used or consumed'' in § 1.162–3. The commenter states that a producer's raw materials are ''used or consumed'' when the raw materials enter the taxpayer's production process. The commenter states that under section 471(c)(1)(B)(i) and § 1.162–3(a)(1), only section 263A would limit a producer's ability to recover the cost of its raw materials when the raw materials are first used in the production process, and the final regulations should be modified to provide that a producer does not wait until the finished product is provided to a customer to recover the costs of its raw materials. In addition, the commenter states that the policy considerations

underlying this provision were to provide small business taxpayers with simplification, and the definition of ''used or consumed'' for producers in proposed § 1.471–1(b)(4)(i) does not result in simplification.

The Treasury Department and IRS decline to change the definition of used or consumed for a producer in these final regulations. As discussed previously, the Treasury Department and the IRS interpret section 471(c)(1)(B)(i) as generally codifying the administrative guidance existing at the time of enactment of TCJA (that is, Revenue Procedure 2001–10 and Revenue Procedure 2002–28) and making it applicable to significantly more taxpayers, in addition to the other benefits discussed in section 3.A of this Summary of Comments and Explanation of Revisions. The commenter's recommendation that the term ''used or consumed'' for a producer should be treated as occurring when the raw material is used or consumed in the taxpayer's production process would allow a producer to recover production costs earlier than was previously allowed under the administrative guidance of Revenue Procedure 2001–10 and Revenue Procedure 2002–28. Additionally, the commenter's recommendation suggests that the term ''used or consumed'' should be interpreted literally by looking to actual use or consumption by the taxpayer. However, under such an interpretation a reseller, unlike a producer, would not be able to recover any inventory costs as a reseller does not acquire raw materials for use in a production process nor does it use or consume finished inventory; rather a reseller acquires and resells finished inventory, unchanged, to customers. The Treasury Department and the IRS have determined that the statute and legislative history do not support a reading of the provision that would provide such a disparity in the recovery of inventory costs between producers and resellers.

In addition, the commenter's argument interprets the words ''inventory treated as non-incidental materials and supplies'' to mean that the components used to produce the finished goods inventory, rather than the finished goods inventory itself, are treated as materials and supplies. The interpretation advocated by the commenter would result in producers being permitted to recover the cost inputs of their units of inventory in the same manner as they recover the costs of their materials and supplies (that is, when the cost input is used or consumed in producing the unit of inventory). The Treasury Department and the IRS do not believe Congress intended to break down the traditional definition of the word ''inventory,'' particularly since that position benefits only a certain group of taxpayers (producers). The Treasury Department and the IRS determined that the definition for used or consumed should provide an equitable rule for the timing of the recovery of the inventory between producers and resellers. Accordingly, these final regulations adopt the proposed regulations without change.

ii. De Minimis Safe Harbor Under § 1.263(a)–1(f)

Several comments were received regarding the applicability of the *de minimis* safe harbor under § 1.263(a)–1(f) (*de minimis* safe harbor) to inventory treated as non-incidental materials and supplies. The commenters assert that the final regulations should permit a taxpayer that uses the section 471(c) NIMS inventory method to use the *de minimis* safe harbor for its inventory treated as non-incidental materials and supplies. The commenters point to footnote 465 of the Bluebook, which described the law, both before and after TCJA, as generally permitting deduction of the cost of non-incidental materials and supplies in the taxable year in which they are first used or are consumed in the taxpayer's operations in accordance with § 1.162–3(a)(1). Furthermore, under § 1.162–3(a)(1), a taxpayer may also be able to elect to deduct such non-incidental materials and supplies in the taxable year the amount is paid under the *de minimis* safe harbor election under § 1.263(a)–1(f). General Explanation of Public Law 115–97, at 113 fn. 465.

The Treasury Department and the IRS were aware of footnote 465 in the Bluebook when drafting the proposed regulations, but have a different understanding of the rule for ''inventory treated as non-incidental materials and supplies'' under Section 471(c)(1)(B)(i) as explained in section 3.A.i of this Summary of Comments and Explanation of Revisions. The Treasury Department and the IRS interpret section 471(c)(1)(B)(i) as generally codifying the administrative procedures that established the non-incidental materials and supplies method for inventoriable items, and prior pronouncements of §§ 1.162–3 and 1.263(a)–1(f) that these regulations do not apply to inventory property, including inventory property treated as non-incidental materials and supplies. *See, e.g.,* Tangible Property Regulations—Frequently Asked Questions, available at *https://www.irs.gov/businesses/small-businesses-self-employed/tangible-property-final-regulations#Ademinimis.*

A commenter states that the *de minimis* safe harbor was created after Revenue Procedure 2001–10 and Revenue Procedure 2002–28 were released, and therefore, did not address the issue of the applicability of the *de minimis* safe harbor. The Treasury Department and the IRS agree with the timeline described by the commenter. However, as discussed in the immediately preceding paragraph, the IRS' position on the *de minimis* safe harbor has been addressed in a prior pronouncement. As described previously in section 3.A of this Summary of Comments and Explanation of Revisions, inventory treated as non-incidental materials and supplies retains its character as inventory property. The *de minimis* safe harbor, which is a regulatory election rather than a statutory one, does not apply to inventory. Section 1.263(a)–1(f)(2)(i).

Finally, the Treasury Department and the IRS note that for amounts paid to qualify for the *de minimis* safe harbor, the amounts must have been expensed on the taxpayer's applicable financial statement or books and records, as applicable. Sections 1.263(a)–1(f)(1)(i)(B) and (ii)(B). This applicable financial statement or books and records expensing requirement under § 1.263(a)–1(f) would be an impediment to the application of the *de minimis* safe harbor under the section 471(c) NIMS inventory method for taxpayers who maintain records of their inventory in their applicable financial statement or books and records, even if the section 471(c) NIMS inventory method permitted the use of the *de minimis* safe harbor method. In addition, there is no need for the separate *de minimis* safe harbor because small business taxpayers may use the inventory method provided in section 471(c)(1)(B) which generally provides that a taxpayer who expenses inventory costs in its applicable financial statement or books and records may generally expense that cost for Federal income tax purposes. For example, a small business taxpayer that expenses the cost of ''freight-in'' in its books and records and wants to expense the item for Federal income tax purposes may generally do so using the non-AFS section 471(c) inventory method, as permitted by section 471(c)(1)(B)(ii) and discussed later in section 3.C.ii of this Summary of Comments and Explanation of Revisions.

iii. Direct Labor

Proposed § 1.471–1(b)(4)(ii) provides that inventory costs includible in the

section 471(c) NIMS inventory method are the direct costs of the property produced or property acquired for resale. However, an inventory cost does not include a cost for which a deduction would be disallowed or that is not otherwise recoverable, in whole or in part, but for § 1.471–1(b)(4), under another provision of the Code.

Some comments were received on the types of direct costs required to be included as an inventory cost under the section 471(c) NIMS inventory method. These commenters recommended the final regulations exclude direct labor costs from the definition of an inventory cost under proposed § 1.471–1(b)(4)(ii). The commenters reasoned that the preamble to the proposed regulation indicated that section 471(c)(1)(B)(i) was generally a codification of Revenue Procedure 2001–10 and Revenue Procedure 2002–28. However, the commenters point out that this administrative guidance did not provide for direct labor or overhead costs to be included in the non-incidental materials and supplies method.

One commenter asserted that inventory treated as non-incidental materials and supplies are not inventory property but are to be characterized as a material and supply. The commenter discussed Example 1, in Section III.D of Notice 88–86 (1988–2 CB 401) to determine the treatment of non-incidental materials and supplies prior to the enactment of section 263A. Example 1 involves an architect providing design services that include blueprints and drawings and deals with the provision of *de minimis* amounts of property by a service provider. This commenter cites to Notice 88–86 to provide, by analogy, that inventory treated as non-incidental materials and supplies under section 471(c)(1)(B)(i) should not include direct labor costs.

The Treasury Department and the IRS disagree with the application by analogy to Example 1 in Section III.D of Notice 88–86. That example illustrates that an individual providing services, such as an architect, is not a producer despite providing a *de minimis* amount of property to the client as part of the provision of services. As discussed in section 3.A of this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS believe that inventory property treated as non-incidental materials and supplies retains its character as inventory property, and so Example 1 is inapposite.

The Treasury Department and the IRS acknowledge that there was uncertainty under Revenue Procedure 2001–10 and Revenue Procedure 2002–28 as to whether direct labor and overhead costs were required to be capitalized under the non-incidental materials and supplies method permitted by those revenue procedures. The Treasury Department and the IRS are also aware that tracking of direct labor costs may be burdensome, and in some cases, difficult to do for many small businesses. The Treasury Department and the IRS agree with the commenters' request that direct labor costs be excluded from the inventory costs required to be included in inventory treated as non-incidental materials and supplies. As a result, these final regulations provide that inventory costs includible in the section 471(c) NIMS inventory method are direct material costs of the property produced or the costs of property acquired for resale.

B. Treatment of Inventory by Taxpayers With an Applicable Financial Statement (AFS)

Under proposed § 1.471–1(b)(5), a taxpayer other than a tax shelter, that has an AFS and that meets the Section 448(c) Gross Receipts Test is not required to take an inventory under section 471(a), and may choose to treat its inventory as reflected in its AFS. Proposed § 1.471–1(b)(5)(ii) defines AFS by reference to section 451(b)(3) and the accompanying regulations, which included the additional AFS rules provided in proposed § 1.451–3(h).

In section 4.C.i of the preamble to the proposed regulations, the Treasury Department and the IRS requested comments on a proposed consistency rule for a taxpayer with an AFS that has a financial accounting year that differs from the taxpayer's taxable year, and on other issues related to the application of proposed § 1.451–3(h) to the AFS section 471(c) inventory method. The Treasury Department and the IRS proposed to require a taxpayer with an AFS that uses the AFS section 471(c) inventory method to consistently apply the same mismatched reportable period method of accounting provided in proposed § 1.451–3(h)(4) for its AFS section 471(c) inventory method of accounting that is used for section 451 purposes. No comments were received on the consistency rule or other issues related to the application of proposed § 1.451–3(h) to the AFS section 471(c) inventory method.

These final regulations adopt this consistency rule. The Treasury Department and the IRS have determined that a taxpayer using an accrual method with an AFS that has a mismatched reporting period with its taxable year should apply the same mismatched reportable period method of accounting for revenue recognition purposes and inventory purposes because there is better matching of income and cost of goods sold by applying the same reportable period method.

C. Treatment of Inventory by Taxpayers Without an AFS

Under proposed § 1.471–1(b)(6), a taxpayer, other than a tax shelter, that does not have an AFS and that meets the Section 448(c) Gross Receipts Test is not required to take an inventory under section 471(a), and may choose to use the non-AFS section 471(c) inventory method to account for its inventory. The non-AFS section 471(c) inventory method is the method of accounting for inventory reflected in the taxpayer's books and records that are prepared in accordance with the taxpayer's accounting procedures and that properly reflect the taxpayer's business activities for non-tax purposes. For example, a books and records method that determines ending inventory and cost of goods sold that properly reflects the taxpayer's business activities for non-Federal income tax purposes is to be used under the taxpayer's non-AFS section 471(c) inventory method.

(i) Definition of Books and Records

Some comments were received on the non-AFS section 471(c) inventory method and the standard used in proposed § 1.471–1(b)(6) for ''books and records.'' One commenter reasoned that the purpose of section 471(c)(1)(B)(ii) was to provide simplification, and the reliance on the definition of books and records used in case law is too complex, creates audit risks, and uncertainties as to what books and records means. The commenter recommended using a standard in which ''books and records'' is a flexible term and something the taxpayer and his accounting professional can agree on that is consistent from year to year. For example, the commenter suggests that any financial statement reporting of inventory that is consistently applied be acceptable as books and records.

Some comments discuss the issue of work papers and physical counts of inventory, and whether either should be used if a taxpayer is expensing these items for books and records purposes. The commenters asserted that even though a taxpayer takes a physical count of inventory, the taxpayer should be allowed to expense the inventory for Federal income tax purposes if the inventory is expensed on its books and records.

The Treasury Department and the IRS decline to change the definition of the

term ''books and records'' in these final regulations, and the rules continue to generally include both work papers and physical counts of inventory. The term books and records is used elsewhere in the Code and regulations, and there is no indication in the statute or legislative history to section 471(c)(1)(B)(ii) that a different definition is intended from the general usage of this term used elsewhere in the Code. Consequently, these final regulations use the well-established definition of books and records of a taxpayer, which includes the totality of the taxpayer's documents and electronically-stored data. See, for example, *United States* v. *Euge,* 444 U.S. 707 (1980). See also *Digby* v. *Commissioner,* 103 T.C. 441 (1994), and § 1.6001–1(a).

Certain commenters requested that the final regulations provide additional clarification on the significance of the taking of a physical count of inventory under the non-AFS section 471(c) inventory method. For example, commenters requested that Example 1 in proposed § 1.471–1(b)(6)(iii) be modified to provide that the physical count is ignored if the taxpayer does not provide inventory information to a creditor. These final regulations provide additional examples, including variations on Example 1, to clarify the relevance of a physical count of inventory under the non-AFS section 471(c) inventory method. For example, a taxpayer that takes a physical count of inventory for reordering purposes but does not allocate cost to such inventory is not required to use the physical count for the non-AFS section 471(c) inventory method, regardless of whether the information is otherwise used for an internal report purpose or provided to an external third party, such as a creditor. Alternatively, a taxpayer that takes an end-of-year physical count and uses this information in its accounting procedures to allocate costs to inventory is required to use this inventory information for the non-AFS section 471(c) inventory method regardless of whether the taxpayer makes reconciling entries to expense these costs in its financial statements. Thus, the examples in these final regulations clarify the principle that a taxpayer may not ignore its regular accounting procedures or portions of its books and records under the non-AFS section 471(c) inventory method.

(ii) Inventory Costs

The proposed regulations defined ''inventory costs'' for the non-AFS section 471(c) inventory method generally as costs that the taxpayer capitalizes to property produced or property acquired for resale in its books and records. Certain commenters requested that the final regulations clarify how a taxpayer treats costs to acquire or produce tangible property that the taxpayer does not capitalize in its books and records because the proposed regulations did not specifically address these costs.

These final regulations clarify in § 1.471–1(b)(6)(i) that costs that are generally required to be capitalized to inventory under section 471(a) but that the taxpayer is not capitalizing in its books and records are not required to be capitalized to inventory. The Treasury Department and the IRS have also determined that, under this method, such costs are not treated as amounts paid to acquire or produce tangible property under § 1.263(a)–2, and therefore, are generally deductible when they are paid or incurred if such costs may be otherwise deducted or recovered notwithstanding § 1.471–1(b)(4) under another provision of the Code and Regulations. Additionally, these final regulations clarify that costs capitalized for the non-AFS section 471(c) inventory method are those costs that related to the production or resale of the inventory to which they are capitalized in the taxpayer's books and records. Similar clarifications have been made in § 1.471–1(b)(5) regarding the AFS section 471(c) inventory method.

Applicability Dates

These final regulations are applicable for taxable years beginning on or after January 5, 2021. However, a taxpayer may apply these regulations for a taxable year beginning after December 31, 2017, and before January 5, 2021, provided that if the taxpayer applies any aspect of these final regulations under a particular Code provision, the taxpayer must follow all the applicable rules contained in these regulations that relate to that Code provision for such taxable year and all subsequent taxable years, and must follow the administrative procedures for filing a change in method of accounting in accordance with § 1.446–1(e)(3)(ii). For example, a taxpayer that wants to apply § 1.263A–1(j) to be exempt from capitalizing costs under section 263A must apply § 1.448–2 to determine whether it is eligible for the exemption. The same taxpayer must apply § 1.448–2 to determine whether it is eligible to apply § 1.471–1(b) to be exempt from the general inventory rules under section 471(a). However, it may choose not to apply § 1.471–1(b) even though it chooses to apply § 1.263A–1(j) and § 1.448–2.

Alternatively, a taxpayer may rely on the proposed regulations for a taxable year beginning after December 31, 2017 and before January 5, 2021, provided that if the taxpayer applies any aspect of the proposed regulations under a particular Code provision, the taxpayer must follow all of the applicable rules contained in the proposed regulations that relate to that Code provision for such taxable year, and follow the administrative procedures for filing a change in method of accounting in accordance with § 1.446–1(e)(3)(ii).

Statement of Availability of IRS Documents

The IRS notices, revenue rulings, and revenue procedures cited in this preamble 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

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 Treasury Department and the Office of Management and Budget regarding review of tax regulations.

I. Paperwork Reduction Act

Section 1.448–2(b)(2)(iii)(B) imposes a collection of information for an election to use prior year's allocated taxable income or loss to determine whether a partnership or other entity (other than a C corporation) is a ''syndicate'' for purposes of section 448(d)(3) for the current tax year. The election is made by attaching a statement to the taxpayer's original Federal income tax return (including extensions) for the taxable year that the election is made. The election is an annual election and, if made for a taxable year, cannot be revoked. The collection of information is voluntary for purposes of obtaining a benefit under the proposed regulations. The likely respondents are businesses or other for-profit institutions, and small businesses or organizations.

Estimated total annual reporting burden: 224,165 hours.

Estimated average annual burden hours per respondent: 1 hour.

Estimated number of respondents: 224,165.

Estimated annual frequency of responses: Once.

Other than the election statement, these regulations do not impose any additional information collection

requirements in the form of reporting, recordkeeping requirements or third-party disclosure statements. However, because the exemptions in sections 263A, 448, 460 and 471 are methods of accounting under the statute, taxpayers are required to request the consent of the Commissioner for a change in method of accounting under section 446(e) to implement the statutory exemptions. The IRS expects that these taxpayers will request this consent by filing Form 3115, *Application for Change in Accounting Method*. Taxpayers may request these changes using reduced filing requirements by completing only certain parts of Form 3115. See Revenue Procedure 2018–40 (2018–34 IRB 320). Revenue Procedure 2018–40 provides procedures for a taxpayer to make a change in method of accounting using the automatic change procedures of Revenue Procedure 2015–13 (2015–5 IRB 419) in order to use the exemptions provided in sections 263A, 460 and/or 471. See also the revenue procedure accompanying these regulations for similar method change procedures to make a change in method of accounting to comply with these final regulations.

For purposes of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(c)) (PRA), the reporting burden associated with the collection of information for the election statement and Form 3115 will be reflected in the PRA submission associated with the income tax returns under the OMB control number 1545–0074 (in the case of individual filers of Form 3115) and 1545–0123 (in the case of business filers of Form 3115).

In 2018, the IRS released and invited comment on a draft of Form 3115 in order to give members of the public the opportunity to benefit from certain specific provisions made to the Code. The IRS received no comments on the forms during the comment period. Consequently, the IRS made the forms available in January 2019 for use by the public. The IRS notes that Form 3115 applies to changes of accounting methods generally and is therefore broader than sections 263A, 448, 460 and 471.

As discussed earlier, the reporting burdens associated with the proposed regulations are included in the aggregated burden estimates for OMB control numbers 1545–0074 (in the case of individual filers of Form 3115), 1545–0123 (in the case of business filers of Form 3115 subject to Revenue Procedure 2019–43 and business filers that make the election under proposed § 1.448–2(b)(2)(iii)(B)). The overall burden estimates associated with these OMB control numbers are aggregate amounts related to the entire package of forms associated with the applicable OMB control number and will include, but not isolate, the estimated burden of the tax forms that will be created or revised as a result of the information collections in these regulations. These numbers are therefore not specific to the burden imposed by these regulations. The burdens have been reported for other income tax regulations that rely on the same information collections and the Treasury Department and the IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burdens imposed by tax provisions prior to the TCJA. No burden estimates specific to the forms affected by the regulations are currently available. For the OMB control numbers discussed in the preceding paragraphs, the Treasury Department and the IRS estimate PRA burdens on a taxpayer-type basis rather than a provision-specific basis. Those estimates capture both changes made by the TCJA and those that arise out of discretionary authority exercised in the final regulations and other regulations that affect the compliance burden for that form.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rules. At the proposed rule stage, the Treasury Department and the IRS had not determined whether the proposed rules, when finalized, would likely have a significant economic impact on a substantial number of small entities. The determination of whether the voluntary exemptions under sections 263A, 448, 460, and 471, and the regulations providing guidance with respect to such exemptions, will have a significant economic impact on a substantial number of small entities requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA was provided at the proposed rule stage. In accordance with section 604 of the RFA, following is the final regulatory flexibility analysis.

1. Reasons for and Objectives of the Rule

As discussed earlier in the preamble, these regulations largely implement voluntary exemptions that relieve small business taxpayers from otherwise applicable restrictions and requirements under sections 263A, 448, 460, and 471.

Section 448 provides a general restriction for C corporations and partnerships with C corporation partners from using the cash method of accounting, and sections 263A, 460 and 471 impose specific rules on uniform capitalization of direct and indirect production costs, the percentage of completion method for long-term contracts, and accounting for inventory costs, respectively. Section 13102 of TCJA provided new statutory exemptions from certain of these rules and expanded the scope of existing statutory exemptions from certain of these rules to reduce compliance burdens for small taxpayers. The regulations clarify the exemption qualification requirements and provide guidance with respect to the applicable methods of accounting should a taxpayer choose to apply one or more exemptions.

The objective of the regulations is to provide clarity and certainty for small business taxpayers implementing the exemptions. Under the Code, small business taxpayers were able to implement these provisions for taxable years beginning after December 31, 2017 (or, in the case of section 460, for contracts entered into after December 31, 2017) even in the absence of these regulations. Thus, the Treasury Department and the IRS expect that, at the time these regulations are published, many small business taxpayers may have already implemented some aspects of the regulations.

2. Significant Issues Raised by the Public Comments in Response to the IRFA and Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration

No public comments were received in response to the IRFA. Additionally, no comments were filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed regulations.

3. Affected Small Entities

The voluntary exemptions under sections 263A, 448, 460 and 471 generally apply to taxpayers that meet the $25 million (adjusted for inflation) gross receipts test in section 448(c) and

are otherwise subject to general rules under sections 263A, 448, 460, or 471.

A. Section 263A

The Treasury Department and the IRS expect that the addition of section 263A(i) will expand the number of small business taxpayers exempted from the requirement to capitalize costs, including interest, under section 263A. Under section 263A(i), taxpayers (other than tax shelters) that meet the $25 million (adjusted for inflation) gross receipts test in section 448(c) can choose to deduct certain costs that are otherwise required to be capitalized to the basis of property. Section 263A applies to taxpayers that are producers, resellers, and taxpayers with self-constructed assets. The Treasury Department and the IRS estimate that there are between 3,200,000 and 3,575,000 respondents with gross receipts of not more than $25 million (adjusted for inflation) that have inventories. The Treasury Department and the IRS estimate that of these taxpayers there are between 28,900 and 38,900 respondents with gross receipts of not more than $25 million (adjusted for inflation) that are eligible to change their method of accounting to no longer capitalize costs under section 263A. These estimates come from information collected on: Form 1125–A, *Cost of Goods Sold,* and attached to Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income* or Form 1120–S, *U.S. Income Tax Return for an S Corporation,* on which the taxpayer also indicated it had additional section 263A costs. The Treasury Department and the IRS do not have readily available data to measure the prevalence of entities with self-constructed assets. In addition, these data also do not include other business entities, such as a business reported on Schedule C, *Profit or Loss Form Business,* of an individual's Form 1040, *U.S. Individual Income Tax Return.*

Under section 263A, as modified by the TCJA, small business entities that qualified for Section 263A small reseller exception will no longer be able to use this exception. The Treasury Department and the IRS estimate that nearly all taxpayers that qualified for the small reseller exception will qualify for the small business taxpayer exemption under section 263A(i) since the small reseller exception utilized a $10 million gross receipts test. The Treasury Department and the IRS estimate that there are between 28,900 and 38,900 respondents with gross receipts of not more than $25 million that are eligible for the exemption under section 263A(i). These estimates come from information collected on: Form 1125–A, *Cost of Goods Sold,* and attached to Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income* or Form 1120–S, *U.S. Income Tax Return for an S Corporation* on which the taxpayer also indicated it had additional section 263A costs. These data provide an upper bound for the number of taxpayers affected by the repeal of the small reseller exception and enactment of section 263A(i) because the data includes taxpayers that were not previously eligible for the small reseller exception, such as producers and taxpayers with gross receipts of more than $10 million.

The regulations modify the $50 million gross receipts test in § 1.263A–1(d)(3)(ii)(B)(1) by using the Section 448 Gross Receipts Test. The $50 million gross receipts amount is used by taxpayers to determine whether they are eligible to treat negative adjustments as additional section 263A costs for purposes of the simplified production method (SPM) under section 263A. The Treasury Department and the IRS do not have readily available data to measure the prevalence of entities using the SPM.

Section 1.263A–9 modifies the current regulation to increase the eligibility threshold to $25 million for the election permitting taxpayers to use the highest applicable Federal rate as a substitute for the weighted average interest rate when tracing debt for purposes of capitalizing interest under section 263A(f). The Treasury Department and the IRS estimate that there are between 28,900 and 38,900 respondents with gross receipts of not more than $25 million that are eligible to make this election. These estimates come from information collected on: Form 1125–A, *Cost of Goods Sold,* attached to Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income* or Form 1120–S, *U.S. Income Tax Return for an S Corporation,* on which the taxpayer also indicated it had additional section 263A costs. The Treasury Department and the IRS expect that many taxpayers eligible to make the election for purposes of section 263A(f) will instead elect the small business exemption under section 263A(i). Additionally, taxpayers who chose to apply section 263A even though they qualify for the small business exemption under section 263A(i) may not have interest expense required to be capitalized under section 263A(f). As a result, although these data do not include taxpayers with self-constructed assets that are eligible for the election, the Treasury Department and the IRS estimate that this data provides an upper bound for the number of eligible taxpayers.

B. Section 448

The Treasury Department and the IRS expect that the changes to section 448(c) by the TCJA will expand the number of taxpayers permitted to use the cash method. Section 448(a) provides that C corporations, partnerships with C corporations as partners, and tax shelters are not permitted to use the cash method of accounting; however section 448(c), as amended by the TCJA, provides that C corporations or partnerships with C corporations as partners, other than tax shelters, are not restricted from using the cash method if their average annual gross receipts are $25 million (adjusted for inflation) or less. Prior to the amendments made by the TCJA, the applicable gross receipts threshold was $5 million. Section 448 does not apply to S corporations, partnerships without a C corporation partner, or any other business entities (including sole proprietorships reported on an individual's Form 1040). The Treasury Department and the IRS estimate that there are between 587,000 and 605,000 respondents with gross receipts of not more than $5 million presently using an accrual method, and between 70,000 and 76,500 respondents with gross receipts of more than $5 million but not more than $25 million that are permitted to use to the cash method. These estimates come from information collected on Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income* and Form 1120–S, *U.S. Income Tax Return for an S Corporation.*

Under the regulations, taxpayers that would meet the gross receipts test of section 448(c) and seem to be eligible to use the cash method but for the definition of ''syndicate'' under section 448(d)(3), may elect to use the allocated taxable income or loss of the immediately preceding taxable year to determine whether the taxpayer is a ''syndicate'' for purposes of section 448(d)(3) for the current taxable year. The Treasury Department and IRS estimate that 224,165 respondents may potentially make this election. This estimate comes from information collected on the Form 1065, *U.S. Return of Partnership Income* and Form 1120–S, *U.S. Income Tax Return for an S Corporation.,* and the Form 1125–A, *Cost of Goods Sold,* attached to the Forms 1065 and 1120–S. The Treasury Department and the IRS estimate that these data provide an upper bound for the number of eligible taxpayers because

not all taxpayers eligible to make the election will choose to do so.

C. Section 460

The Treasury Department and the IRS expect that the modification of section 460(e)(1)(B) by the TCJA will expand the number of taxpayers exempted from the requirement to apply the percentage-of-completion method to long-term construction contracts. Under section 460(e)(1)(B), as modified by the TCJA, taxpayers (other than tax shelters) that meet the $25 million (adjusted for inflation) gross receipts test in section 448(c) are not required to use PCM to account for income from a long-term construction contract expected to be completed in two years. Prior to the modification of section 460(e)(1)(B) by the TCJA, a separate $10 million dollar gross receipts test applied. The Treasury Department and the IRS estimate that there are between 15,400 and 19,500 respondents with gross receipts of between $10 million and $25 million who are eligible to change their method of accounting to apply the modified exemption. This estimate comes from information collected on the Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income* and Form 1120–S, *U.S. Income Tax Return for an S Corporation* in which the taxpayer indicated its principal business activity was construction (NAICS codes beginning with 23). These data available do not distinguish between long-term contracts and other contracts, and also do not include other business entities that do not file Form 1120, *U.S. Corporation Income Tax Return,* Form 1065, *U.S. Return of Partnership Income,* and Form 1120–S, *U.S. Income Tax Return for an S Corporation,* such as a business reported on Schedule C, *Profit or Loss from Business,* of an individual's Form 1040, *U.S. Individual Income Tax Return.*

D. Section 471

The Treasury Department and the IRS expect that the addition of section 471(c) will expand the number of taxpayers exempted from the requirement to take inventories under section 471(a). Under section 471(c), taxpayers (other than tax shelters) that meet the $25 million (adjusted for inflation) gross receipts test in section 448(c) can choose to apply certain simplified inventory methods rather than those otherwise required by section 471(a). The Treasury Department and the IRS estimate that there are between 3,200,000 and 3,575,000 respondents with gross receipts of not more than $25 million that are exempted from the requirement to take inventories, and will treat their inventory either as non-incidental materials and supplies, or conform their inventory method to the method reflected in their AFS, or if they do not have an AFS, in their books and records. This estimate comes from data collected on the Form 1125–A, *Cost of Goods Sold.* Within that set of taxpayers, the Treasury Department and the IRS estimate that there are between 10,500 and 11,500 respondents that may choose to conform their method of accounting for inventories to their method for inventory reflected in their AFS. This estimate comes from IRS-collected data on taxpayers that filed the Form 1125–A, *Cost of Goods Sold,* in addition to a Schedule M3, *Net Income (Loss) Reconciliation for Corporations With Total Assets of $10 Million or More,* that indicated they had an AFS. These data provide a lower bound because they do not include other business entities, such as a business reported on Schedule C, *Profit or Loss from Business,* of an individual's Form 1040, *U.S. Individual Income Tax Return,* that are not required to file the Form 1125–A, *Cost of Goods Sold.*

4. Projected Reporting, Recordkeeping, Other Compliance Requirements, and Costs

The Treasury Department and the IRS have not performed an analysis with respect to the projected reporting, recordkeeping, and other compliance requirements associated with the statutory exemptions under sections 263A, 448, 460, and 471 and the final regulations implementing these exemptions. The taxpayer may expend time to read and understand the final regulations. The cost to comply with these regulations are reflected in modest reporting activities. Taxpayers needing to make method changes pursuant to these regulations will be required to file a Form 3115. The Treasury Department and the IRS are minimizing the cost to comply with the regulations by providing administrative procedures that allow taxpayers to make multiple changes in method of accounting related to the statutory exemptions under sections 263A, 448, 460, and 471 for the same tax year on a single Form 3115, instead of filing a separate Form 3115 for each exemption. Although there is a nominal implementation cost, the Treasury Department and the IRS anticipate that the statutory exemptions and the final regulations implementing these exemptions will reduce overall the reporting, recordkeeping, and other compliance requirements of affected taxpayers relative to the requirements that exist under the general rules in sections 263A, 448, 460, and 471. For example, a taxpayer that applies section 471(c)(1)(B)(i) to treat inventory as non-incidental materials and supplies will only need to capitalize the direct material cost of producing inventory instead of also having to capitalize the direct labor and indirect costs of producing inventory under the general rules of section 471(a). Additionally, a taxpayer that applies section 471(c)(1)(B)(ii) can follow the inventory method used in its applicable financial statement, or its books and records if it does not have an applicable financial statement, in lieu of keeping a separate inventory method under the general rules of section 471(a).

5. Steps Taken To Minimize the Economic Impact on Small Entities

As discussed earlier in the preamble, section 448 provides a general restriction for C corporations, partnerships with C corporation partners, and tax shelters from using the cash method of accounting, and sections 263A, 460 and 471 impose specific rules on uniform capitalization of direct and indirect production costs, the percentage of completion method for long-term contracts, and accounting for inventory costs, respectively. Section 13102 of TCJA provided new statutory exemptions and expanded the scope of existing statutory exemptions from these rules to reduce compliance burdens for small taxpayers (for example, reducing the burdens associated with applying complex accrual rules under section 451 and 461, maintaining inventories, identifying and tracking costs that are allocable to property produced or acquired for resale, identifying and tracking costs that are allocable to long-term contracts, applying the look-back method under section 460, etc.). For example, a small business taxpayer with average gross receipts of $20 million may pay an accountant an annual fee of approximately $2,375 to perform a 25 hour analysis to determine the section 263A costs that are capitalized to inventory produced during the year. If this taxpayer chooses to apply the exemption under section 263A and these regulations, it will no longer need to pay an accountant for the annual section 263A analysis.

The regulations implementing these exemptions are completely voluntary because small business taxpayers may continue using an accrual method of accounting, and applying the general rules under sections 263A, 460 and 471 if they so choose. Thus, the exemptions increase the flexibility small business taxpayers have regarding their accounting methods relative to other

businesses. The regulations provide clarity and certainty for small business taxpayers implementing the exemptions.

As described in more detail earlier in the preamble, the Treasury Department and the IRS considered a number of alternatives under the final regulations. For example, in providing rules related to inventory exemption in section 471(c)(1)(B)(i), which permits the taxpayer to treat its inventory as non-incidental materials and supplies, the Treasury Department and the IRS considered whether inventoriable costs should be recovered by (i) using an approach similar to the approach set forth under Revenue Procedure 2001–10 (2001–2 IRB 272) and Revenue Procedure 2002–28 (2002–28 IRB 815), which provided that inventory treated as non-incidental materials and supplies was ''used and consumed,'' and thus recovered through costs of goods sold by a cash basis taxpayer, when the inventory items were provided to a customer, or when the taxpayer paid for the items, whichever was later, or (ii) using an alternative approach that treated inventory as ''used and consumed'' and thus recovered through costs of goods sold by the taxpayer, in a taxable year prior to the year in which the inventory item is provided to the customer (for example, in the taxable year in which an inventory item is acquired or produced). The alternative approach described in (ii) would produce a savings equal the amount of the cost recovery multiplied by an applicable discount rate (determined based on the number of years the cost of goods sold recovery would be accelerated under this alternative). The Treasury Department and the IRS interpret section 471(c)(1)(B)(i) and its legislative history generally as codifying the rules provided in the administrative guidance existing at the time TCJA was enacted. Based on this interpretation, the Treasury Department and the IRS have determined that section 471(c) materials and supplies are ''used and consumed'' in the taxable year the taxpayer provides the goods to a customer, and are recovered through costs of goods sold in that year or the taxable year in which the cost of the goods is paid or incurred (in accordance with the taxpayer's method of accounting), whichever is later. The Treasury Department and the IRS do not believe this approach creates or imposes undue burdens on taxpayers.

III. Section 7805(f)

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this Treasury Decision was submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

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 Anna Gleysteen, IRS Office of the Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

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 1.263A–0 is amended by:

■ 1. Revising the entry in the table of contents for § 1.263A–1(b)(1).

■ 2. Redesignating the entries in the table of contents for § 1.263A–1(j), (k), and (l) as the entries for § 1.263A–1(k), (l), and (m).

■ 3. Adding a new entry in the table of contents for § 1.263A–1(j).

■ 4. Revising the newly designated entries for § 1.263A–1(k), (l), and adding an entry for (m)(6).

■ 5. Revising the entries in the table of contents for § 1.263A–3(a)(2)(ii).

■ 6. Adding entries for § 1.263A–3(a)(5) and revising the entry for § 1.263A–3(b).

■ 7. Redesignating the entries in the table of contents for § 1.263A–4(a)(3) and (4) as the entries for § 1.263A–4(a)(4) and (5).

■ 8. Adding in the table of contents a new entry for § 1.263A–4(a)(3).

■ 9. Revising the entry in the table of contents for § 1.263A–4(d) introductory text.

■ 10. Redesignating the entry in the table of contents for § 1.263A–4(d)(5) as the entry for § 1.263A–4(d)(7).

■ 11. Adding in the table of contents a new entry for § 1.263A–4(d)(5).

■ 12. Adding an entry in the table of contents for § 1.263A–4(d)(6).

■ 13. Adding an entry in the table of contents for § 1.263A–4(e)(5).

■ 14. Revising the entry in the table of contents for § 1.263A–4(f) introductory text.

■ 15. Adding an entry in the table of contents for § 1.263A–4(g).

■ 16. Revising the entry in the table of contents for § 1.263A–7(a)(4).

The revisions and additions read as follows:

§ 1.263A–0 Outline of regulations under section 263A.

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§ 1.263A–1 Uniform Capitalization of Costs.

* * * * *

(b) * * *

(1) Small business taxpayers.

* * * * *

(j) Exemption for certain small business taxpayers.

(1) In general.

(2) Application of the section 448(c) gross receipts test.

(i) In general.

(ii) Gross receipts of individuals, etc.

(iii) Partners and S corporation shareholders.

(iv) Examples.

(A) Example 1

(B) Example 2

(3) Change in method of accounting.

(i) In general.

(ii) Prior section 263A method change.

(k) Special rules

(1) Costs provided by a related person.

(i) In general

(ii) Exceptions

(2) Optional capitalization of period costs.

(i) In general.

(ii) Period costs eligible for capitalization.

(3) Trade or business application

(4) Transfers with a principal purpose of tax avoidance. [Reserved]

(l) Change in method of accounting.

(1) In general.

(2) Scope limitations.

(3) Audit protection.

(4) Section 481(a) adjustment.

(5) Time for requesting change.

(m) * * *

(6) Exemption for certain small business taxpayers.

§ 1.263A–3 Rules Relating to Property Acquired for Resale.

(a) * * *

(2) * * *

(ii) Exemption for small business taxpayers.

* * * * *

(5) *De minimis* production activities.

(i) In general.

(ii) Definition of gross receipts to determine *de minimis* production activities.

(iii) Example.

(b) [Reserved].

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§ 1.263A–4 Rules for Property Produced in a Farming Business.

(a) * * *

(3) Exemption for certain small business taxpayers.

* * * * *

(d) Election not to have section 263A apply under section 263A(d)(3).

* * * * *

(5) Revocation of section 263A(d)(3) election to permit exemption under section 263A(i).

(6) Change from applying exemption under section 263A(i) to making a section 263A(d)(3) election.

* * * * *

(e) * * *

(5) Special temporary rule for citrus plants lost by reason of casualty.

(f) Change in method of accounting.

* * * * *

(g) Effective date.

(1) In general.

(2) Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).

§ 1.263A–7 Changing a method of accounting under section 263A.

(a) * * *

(4) Applicability dates.

(i) In general.

(ii) Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).

* * * * *

■ **Par. 3.** Section 1.263A–1 is amended by:

■ 1. Revising paragraph (a)(2) subject heading.

■ 2. In paragraph (a)(2)(i), revising the second sentence and adding a new third sentence.

■ 3. Revising paragraph (b)(1).

■ 4. In the second sentence of paragraph (d)(3)(ii)(B)(*1*), the language ''§ 1.263A–3(b)'' is removed and the language ''§ 1.263A–1(j)''is added in its place.

■ 5. Redesignating paragraphs (j) through (l) as paragraphs (k) through (m).

■ 6. Adding a new paragraph (j).

■ 7. In newly-redesignated paragraph (m), adding paragraph (m)(6).

The revisions and addition read as follows:

§ 1.263A–1 Uniform capitalization of costs.

(a) * * *

(2) *Applicability dates.* (i) * * * In the case of property that is inventory in the hands of the taxpayer, however, these sections are applicable for taxable years beginning after December 31, 1993. The small business taxpayer exception described in paragraph (b)(1) of this section and set forth in paragraph (j) of this section is applicable for taxable years beginning after December 31, 2017. * * *

* * * * *

(b) * * * (1) *Small business taxpayers.* For taxable years beginning after December 31, 2017, see section 263A(i) and paragraph (j) of this section for an exemption for certain small business taxpayers from the requirements of section 263A.

* * * * *

(j) *Exemption for certain small business taxpayers*—(1) *In general.* A taxpayer, other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3), that meets the gross receipts test under section 448(c) and § 1.448–2(c) (section 448(c) gross receipts test) for any taxable year (small business taxpayer) is not required to capitalize costs under section 263A to any real or tangible personal property produced, and any real or personal property described in section 1221(a)(1) acquired for resale, during that taxable year. This section 448(c) gross receipts test applies even if the taxpayer is not otherwise subject to section 448(a).

(2) *Application of the section 448(c) gross receipts test*—(i) *In general.* In the case of any taxpayer that is not a corporation or a partnership, and except as provided in paragraphs (j)(2)(ii) and (iii) of this section, the section 448(c) gross receipts test is applied in the same manner as if each trade or business of the taxpayer were a corporation or partnership.

(ii) *Gross receipts of individuals, etc.* Except when the aggregation rules of section 448(c)(2) apply, the gross receipts of a taxpayer other than a corporation or partnership are the amount derived from all trades or businesses of such taxpayer. Amounts not related to a trade or business are excluded from the gross receipts of the taxpayer. For example, an individual taxpayer's gross receipts do not include inherently personal amounts, such as personal injury awards or settlements with respect to an injury of the individual taxpayer, disability benefits, Social Security benefits received by the taxpayer during the taxable year, and wages received as an employee that are reported on Form W–2.

(iii) *Partners and S corporation shareholders.* Except when the aggregation rules of section 448(c)(2) apply, each partner in a partnership includes a share of the partnership's gross receipts in proportion to such partner's distributive share, as determined under section 704, of items of gross income that were taken into account by the partnership under section 703. Similarly, a shareholder of an S corporation includes such shareholder's *pro rata* share of S corporation gross receipts taken into account by the S corporation under section 1363(b).

(iv) *Examples.* The operation of this paragraph (j) is illustrated by the following examples:

(A) *Example 1.* Taxpayer A is an individual who operates two separate and distinct trades or business that are reported on Schedule C, *Profit or Loss from Business,* of A's Federal income tax return. For 2020, one trade or business has annual average gross receipts of $5 million, and the other trade or business has average annual gross receipts of $35 million. Under paragraph (j)(2)(ii) of this section, for 2020, neither of A's trades or businesses meets the gross receipts test of paragraph (j)(2) of this section ($5 million + $35 million = $40 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(B) *Example 2.* Taxpayer B is an individual who operates three separate and distinct trades or business that are reported on Schedule C of B's Federal income tax return. For 2020, Business X is a retail store with average annual gross receipts of $15 million, Business Y is a dance studio with average annual gross receipts of $6 million, and Business Z is a car repair shop with average annual gross receipts of $12 million. Under paragraph (j)(2)(ii) of this section, B's gross receipts are the combined amount derived from all three of B's trades or businesses. Therefore, for 2020, X, Y and Z do not meet the gross receipts test of paragraph (j)(2)(i) of this section ($15 million + $6 million + $12 million = $33 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(3) *Change in method of accounting*—(i) *In general.* A change from applying the small business taxpayer exemption under paragraph (j) of this section to not applying the exemption under this paragraph (j), or *vice versa,* is a change in method of accounting under section 446(e) and § 1.446–1(e). A taxpayer changing its method of accounting under paragraph (j) of this section may do so only with the consent of the Commissioner as required under section 446(e) and § 1.446–1. In the case of any taxpayer required by this section to change its method of accounting for any taxable year, the change shall be treated as a change initiated by the taxpayer. For rules relating to the clear reflection

of income and the pattern of consistent treatment of an item, see section 446 and § 1.446–1. The amount of the net section 481(a) adjustment and the adjustment period necessary to implement a change in method of accounting required under this section are determined under § 1.446–1(e) and the applicable administrative procedures to obtain the Commissioner's consent to change a method of accounting as published in the Internal Revenue Bulletin (see Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see also § 601.601(d)(2) of this chapter).

(ii) *Automatic consent for certain method changes.* Certain changes in method of accounting made under paragraph (j) of this section may be made under the procedures to obtain the automatic consent of the Commissioner to change a method of accounting. See Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see also § 601.601(d)(2) of this chapter)). In certain situations, special terms and conditions may apply.

* * * * *

(m) * * *

(6) *Exemption for certain small business taxpayers.* The second and third sentence in paragraph (a)(2)(i), paragraphs (b)(1) and (j) of this section apply to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (m)(6), provided that the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

■ **Par. 4.** Section 1.263A–2 is amended by:

■ 1. Adding a sentence at the end of paragraph (a) introductory text.

■ 2. Revising paragraph (a)(1)(ii)(C).

■ 3. Revising paragraph (g) subject heading.

■ 4. Adding paragraph (g)(4).

The additions and revisions read as follows:

§ 1.263A–2 Rules relating to property produced by the taxpayer.

(a) * * * For taxable years beginning after December 31, 2017, see § 1.263A–1(j) for an exception in the case of a small business taxpayer that meets the gross receipts test of section 448(c) and § 1.448–2(c).

(1) * * *

(ii) * * *

(C) Home construction contracts. Section 263A applies to a home construction contract unless that contract will be completed within two years of the contract commencement date, and, for contracts entered into after December 31, 2017, in taxable years ending after December 31, 2017, the taxpayer meets the gross receipts test of section 448(c) and § 1.448–2(c) for the taxable year in which such contract is entered into. Except as otherwise provided in this paragraph (a)(1)(ii)(C), section 263A applies to such a contract even if the contractor is not considered the owner of the property produced under the contract under Federal income tax principles.

* * * * *

(g) *Applicability dates.** * *

(4) The rules set forth in the last sentence of the introductory text of paragraph (a) of this section and in paragraph (a)(1)(ii)(C) of this section apply for taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (g)(4), provided that the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

■ **Par. 5.** Section 1.263A–3 is amended:

■ 1. In paragraph (a)(1), by revising the second sentence.

■ 2. By revising paragraphs (a)(2)(ii) and (iii).

■ 4. In paragraph (a)(3), by removing the language ''small reseller'' and adding in its place the language ''small business taxpayer''.

■ 5. In paragraph (a)(4)(ii), removing the language ''(within the meaning of paragraph (a)(2)(iii) of this section)'' and adding in its place the language ''(within the meaning of paragraph (a)(5) of this section)''.

■ 6. By adding paragraph (a)(5).

■ 7. By removing and reserving paragraph (b).

■ 8. By revising paragraph (f).

The revisions and additions read as follows:

§ 1.263A–3 Rules relating to property acquired for resale.

(a) * * * (1) * * * However, for taxable years beginning after December 31, 2017, a small business taxpayer, as defined in § 1.263A–1(j), is not required to apply section 263A in that taxable year. * * *

(2) * * *

(ii) *Exemption for certain small business taxpayers.* For taxable years beginning after December 31, 2017, see § 1.263A–1(j) for an exception in the case of a small business taxpayer that meets the gross receipts test of section 448(c) and § 1.448–2(c).

(iii) *De minimis production activities.* See paragraph (a)(5) of this section for rules relating to an exception for resellers with *de minimis* production activities.

* * * * *

(5) *De minimis production activities*—(i) *In general.* In determining whether a taxpayer's production activities are *de minimis,* all facts and circumstances must be considered. For example, the taxpayer must consider the volume of the production activities in its trade or business. Production activities are presumed *de minimis* if—

(A) The gross receipts from the sale of the property produced by the reseller are less than 10 percent of the total gross receipts of the trade or business; and

(B) The labor costs allocable to the trade or business's production activities are less than 10 percent of the reseller's total labor costs allocable to its trade or business.

(ii) *Definition of gross receipts to determine de minimis production activities.* Gross receipts has the same definition as for purposes of the gross receipts test under § 1.448–2(c), except that gross receipts are measured at the trade-or-business level rather than at the single-employer level.

(iii) *Example: Reseller with de minimis production activities.* Taxpayer N is in the retail grocery business. In 2019, N's average annual gross receipts for the three previous taxable years are greater than the gross receipts test of section 448(c). Thus, N is not exempt from the requirement to capitalize costs under section 263A. N's grocery stores typically contain bakeries where customers may purchase baked goods produced by N. N produces no other goods in its retail grocery business. N's gross receipts from its bakeries are 5 percent of the entire grocery business. N's labor costs from its bakeries are 3 percent of its total labor costs allocable to the entire grocery business. Because both ratios are less than 10 percent, N's production activities are *de minimis.* Further, because N's production activities are incident to its resale activities, N may use the simplified resale method, as provided in paragraph (a)(4)(ii) of this section.

* * * * *

(f) *Applicability dates.* (1) Paragraphs (d)(3)(i)(C)(*3*), (d)(3)(i)(D)(*3*), and (d)(3)(i)(E)(*3*) of this section apply for taxable years ending on or after January 13, 2014.

(2) The rules set forth in the second sentence of paragraph (a)(1) of this section, paragraphs (a)(2)(ii) and (iii) of

this section, the third sentence of paragraph (a)(3) of this section, and paragraphs (a)(4)(ii) and (a)(5) of this section apply for taxable years beginning on or after January 5, 2021 . However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (f)(2), provided the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

■ **Par. 6.** Section 1.263A–4 is amended:
■ 1. In paragraph (a)(1), by revising the last sentence.
■ 2. In paragraph (a)(2)(ii)(A)(1), by removing the language ''section 464(c)'' and adding in its place the language with ''section 461(k)''.
■ 3. By redesignating paragraphs (a)(3) and (4) as paragraphs (a)(4) and (5) respectively.
■ 4. By adding new paragraph (a)(3).
■ 5. By revising the paragraph (d) subject heading.
■ 6. In paragraph (d)(1), by revising the last sentence and adding a new sentence at the end of the paragraph.
■ 7. In paragraph (d)(3)(i), by removing the last sentence.
■ 8. By revising paragraph (d)(3)(ii).
■ 9. By redesignating paragraph (d)(5) as paragraph (d)(7).
■ 10. By adding new paragraphs (d)(5) and (6)
■ 11. By adding paragraph (e)(5).
■ 12. By redesignating paragraph (f) as paragraph (g).
■ 13. By adding new paragraph (f).
■ 14. By revising the subject headings of newly-redesignated paragraphs (g) and (g)(1), and by revising newly-designated paragraph (g)(2).

The revisions and additions read as follows:

§ 1.263A–4 Rules for property produced in a farming business.

(a) * * * (1) * * * Except as provided in paragraphs (a)(2), (a)(3), and (e) of this section, taxpayers must capitalize the costs of producing all plants and animals unless the election described in paragraph (d) of this section is made.

* * * * *

(3) *Exemption for certain small business taxpayers.* For taxable years beginning after December 31, 2017, see § 1.263A–1(j) for an exception in the case of a small business taxpayer that meets the gross receipts test of section 448(c) and § 1.448–2(c).

* * * * *

(d) *Election not to have section 263A apply under section 263A(d)(3)*—(1) * * * Except as provided in paragraph (d)(5) and (6) of this section, the election is a method of accounting under section 446. An election made under section 263A(d)(3) and this paragraph (d) is revocable only with the consent of the Commissioner.

* * * * *

(3) * * *

(ii) *Nonautomatic election.* Except as provided in paragraphs (d)(5) and (6) of this section, a taxpayer that does not make the election under this paragraph (d) as provided in paragraph (d)(3)(i) of this section must obtain the consent of the Commissioner to make the election by filing a Form 3115, *Application for Change in Method of Accounting,* in accordance with § 1.446–1(e)(3).

* * * * *

(5) *Revocation of section 263A(d)(3) election to permit exemption under section 263A(i).* A taxpayer that elected under section 263A(d)(3) and paragraph (d)(3) of this section not to have section 263A apply to any plant produced in a farming business that wants to revoke its section 263A(d)(3) election, and in the same taxable year, apply the small business taxpayer exemption under section 263A(i) and § 1.263A–1(j) may revoke the election in accordance with the applicable administrative guidance as published in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii)(b) of this chapter). A revocation of the taxpayer's section 263A(d)(3) election under this paragraph (d)(5) is not a change in method of accounting under sections 446 and 481 and §§ 1.446–1 and 1.481–1 through 1.481–5.

(6) *Change from applying exemption under section 263A(i) to making a section 263A(d)(3) election.* A taxpayer whose method of accounting is to not capitalize costs under section 263A based on the exemption under section 263A(i), that becomes ineligible to use the exemption under section 263A(i), and is eligible and wants to elect under section 263A(d)(3) for this same taxable year to not capitalize costs under section 263A for any plant produced in the taxpayer's farming business, must make the election in accordance with the applicable administrative guidance as published in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii)(b) of this chapter). An election under section 263A(d)(3) made in accordance with this paragraph (d)(6) is not a change in method of accounting under sections 446 and 481 and §§ 1.446–1 and 1.481–1 through 1.481–5.

* * * * *

(e) * * *

(5) *Special temporary rule for citrus plants lost by reason of casualty.* Section 263A(d)(2)(A) provides that if plants bearing an edible crop for human consumption were lost or damaged while in the hands of the taxpayer by reason of freezing temperatures, disease, drought, pests, or casualty, section 263A does not apply to any costs of the taxpayer of replanting plants bearing the same type of crop (whether on the same parcel of land on which such lost or damaged plants were located or any other parcel of land of the same acreage in the United States). The rules of this paragraph (e)(5) apply to certain costs that are paid or incurred after December 22, 2017, and on or before December 22, 2027, to replant citrus plants after the loss or damage of citrus plants. Notwithstanding paragraph (e)(2) of this section, in the case of replanting citrus plants after the loss or damage of citrus plants by reason of freezing temperatures, disease, drought, pests, or casualty, section 263A does not apply to replanting costs paid or incurred by a taxpayer other than the owner described in section 263A(d)(2)(A) if—

(i) The owner described in section 263A(d)(2)(A) has an equity interest of not less than 50 percent in the replanted citrus plants at all times during the taxable year in which such amounts were paid or incurred and the taxpayer holds any part of the remaining equity interest; or

(ii) The taxpayer acquired the entirety of the equity interest in the land of that owner described in section 263A(d)(2)(A) and on which land the lost or damaged citrus plants were located at the time of such loss or damage, and the replanting is on such land.

(f) *Change in method of accounting.* Except as provided in paragraphs (d)(5) and (6) of this section, any change in a taxpayer's method of accounting necessary to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481 and § 1.446–1 through 1.446–7 and § 1.481–1 through § 1.481–3 apply.

(g) *Applicability dates*—(1) *In general.* * * *

(2) *Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).* Paragraphs (a)(3), (d)(5), (d)(6), and (e)(5) of this section apply for taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (g)(2), provided that the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

■ **Par. 7.** § 1.263A–7 is amended:
■ 1. By revising paragraph (a)(3)(i).
■ 2. By redesignating paragraph (a)(4) as paragraph (a)(4)(i).
■ 3. By adding a paragraph (a)(4) subject heading.
■ 4. By revising the newly-designated paragraph (a)(4)(i) subject heading.
■ 5. By adding paragraph (a)(4)(ii).
■ 6. In paragraph (b)(1), by removing the language ''Rev. Proc. 97–27 (1997–21 I.R.B.10)'' and adding in its place the language ''Revenue Procedure 2015–13 (2015–5 IRB 419)''.
■ 7. In paragraph (b)(2)(ii), by removing the language ''Rev. Proc. 2002–9 (2002–1 C.B. 327) and Rev. Proc. 97–27 (1991–1 C.B. 680)'' and adding the language ''Revenue Procedure 2015–13, 2015–5 IRB 419 (or successor)'' in its place.

The revisions and additions read as follows:

§ 1.263A–7 Changing a method of accounting under section 263A.

(a) * * *

(3) * * *

(i) For taxable years beginning after December 31, 2017, resellers of real or personal property or producers of real or tangible personal property whose average annual gross receipts for the immediately preceding 3-taxable-year period, or lesser period if the taxpayer was not in existence for the three preceding taxable years, annualized as required, exceed the gross receipts test of section 448(c) and the accompanying regulations where the taxpayer was not subject to section 263A in the prior taxable year;

* * * * *

(4) *Applicability dates*—(i) *In general.* * * *

(ii) *Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).* Paragraph (a)(3)(i) of this section applies to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraph described in the first sentence of this paragraph (a)(4)(ii), provided that the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

* * * * *

■ **Par. 8.** Section 1.263A–8 is amended by adding a sentence to the end of paragraph (a)(1) to read as follows:

§ 1.263A–8 Requirement to capitalize interest.

(a) * * * (1) * * * However, a taxpayer, other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3), that meets the gross receipts test of section 448(c) for the taxable year is not required to capitalize costs, including interest, under section 263A. See § 1.263A–1(j).

* * * * *

■ **Par. 9.** Section 1.263A–9 is amended by adding a sentence to the end of paragraph (e)(2) to read as follows:

§ 1.263A–9 The avoided cost method.

* * * * *

(e) * * *

(2) * * *A taxpayer is an eligible taxpayer for a taxable year for purposes of this paragraph (e) if the taxpayer is a small business taxpayer, as defined in § 1.263A–1(j).

* * * * *

■ **Par. 10.** Section 1.263A–15 is amended by adding paragraph (a)(4) to read as follows:

§ 1.263A–15 Effective dates, transitional rules, and anti-abuse rule.

(a) * * *

(4) The last sentence of each of § 1.263A–8(a)(1) and § 1.263A–9(e)(2) apply to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the last sentence of each of § 1.263A–8(a)(1) and § 1.263A–9(e)(2), provided that the taxpayer follows all the applicable rules contained in the regulations under section 263A for such taxable year and all subsequent taxable years.

* * * * *

■ **Par. 11.** Section 1.381(c)(5)–1 is amended:
■ 1. In paragraph (a)(6), by designating *Examples 1* and *2* as paragraphs (a)(6)(i) and (ii), respectively.
■ 2. In newly-designated paragraphs (a)(6)(i) and (ii), by redesignating the paragraphs in the first column as the paragraphs in the second column:

Old paragraphs	New paragraphs
(a)(6)(i)(i) and (ii)	(a)(6)(i)(A) and (B)
(a)(6)(ii)(i) and (ii)	(a)(6)(ii)(A) and (B)

■ 3. In newly designated paragraphs (a)(6)(ii)(A) and (B), by removing the language ''small reseller'' and adding in its place the language ''small business taxpayer'' everywhere it appears.
■ 4. By adding a sentence to the end of paragraph (f).

The addition reads as follows:

§ 1.381(c)(5)–1 Inventory method.

* * * * *

(f) * * * The designations of paragraphs (a)(6)(ii)(A) and (B) of this section and removal of the term ''small reseller'' and replacement with the term ''small business taxpayer'' apply to taxable years beginning on or after January 5, 2021.

■ **Par. 12.** § 1.446–1 is amended:
■ 1. In paragraph (a)(4)(i), by revising the first sentence.
■ 2. By revising paragraph (c)(2)(i).
■ 3. By adding paragraph (c)(3).

The revisions and additions read as follows:

§ 1.446–1 General rule for methods of accounting.

(a) * * *

(4) * * *

(i) Except in the case of a taxpayer qualifying as a small business taxpayer for the taxable year under section 471(c), in all cases in which the production, purchase or sale of merchandise of any kind is an income-producing factor, merchandise on hand (including finished goods, work in progress, raw materials, and supplies) at the beginning and end of the year shall be taken into account in computing the taxable income of the year. * * *

* * * * *

(c) * * *

(2) * * *

(i) In any case in which it is necessary to use an inventory, the accrual method of accounting must be used with regard to purchases and sales unless:

(A) The taxpayer qualifies as a small business taxpayer for the taxable year under section 471(c), or

(B) Otherwise authorized under paragraph (c)(2)(ii) of this section.

* * * * *

(3) *Applicability date.* The first sentence of paragraph (a)(4)(i) of this section and paragraph (c)(2)(i) of this section apply to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the rules provided in the first sentence of this paragraph (c)(3), provided that the taxpayer follows all the applicable rules contained in the regulations under section 446 for such taxable year and all subsequent taxable years.

* * * * *

■ **Par. 13.** Section 1.448–1 is amended by adding new first and second sentences to paragraphs (g)(1) and (h)(1) to read as follows:

§ 1.448–1 Limitation on the use of the cash receipts and disbursements method of accounting.

* * * * *

(g) * * * (1) * * * The rules provided in paragraph (g) of this section

apply to taxable years beginning before January 1, 2018. See § 1.448–2 for rules relating to taxable years beginning after December 31, 2017. * * *

* * * * *

(h) * * * (1) * * * The rules provided in paragraph (h) of this section apply to taxable years beginning before January 1, 2018. See § 1.448–2 for rules relating to taxable years beginning after December 31, 2017. * * *

* * * * *

§ 1.448–2 [Redesignated as § 1.448–3]

■ **Par. 14.** Section 1.448–2 is redesignated as § 1.448–3.

■ **Par. 15.** A new § 1.448–2 is added to read as follows:

§ 1.448–2 Limitation on the use of the cash receipts and disbursements method of accounting for taxable years beginning after December 31, 2017.

(a) *Limitation on method of accounting*—(1) *In general.* The rules of this section relate to the limitation on the use of the cash receipts and disbursements method of accounting (cash method) by certain taxpayers applicable for taxable years beginning after December 31, 2017. For rules applicable to taxable years beginning before January 1, 2018, see §§ 1.448–1 and 1.448–1T.

(2) *Limitation rule.* Except as otherwise provided in this section, the computation of taxable income using the cash method is prohibited in the case of a:

(i) C corporation;

(ii) Partnership with a C corporation as a partner, or a partnership that had a C corporation as a partner at any time during the partnership's taxable year beginning after December 31, 1986; or

(iii) Tax shelter.

(3) *Treatment of combination methods*—(i) *In general.* For purposes of this section, the use of a method of accounting that records some, but not all, items on the cash method is considered the use of the cash method. Thus, a C corporation that uses a combination of accounting methods including the use of the cash method is subject to this section.

(ii) *Example.* The following example illustrates the operation of this paragraph (a)(3). In 2020, A is a C corporation with average annual gross receipts for the prior three taxable years of greater than $30 million, is not a tax shelter under section 448(a)(3) and does not qualify as a qualified personal service corporation, as defined in paragraph (e) of this section. For the last 20 years, A used an accrual method for items of income and expenses related to purchases and sales of inventory, and the cash method for items related to its provision of services. A is using a combination of accounting methods that include the cash method. Thus, A is subject to section 448. A is prohibited from using the cash method for any item for 2020 and is required to change to a permissible method.

(b) *Definitions.* For purposes of this section—

(1) *C corporation*—(i) *In general.* The term *C corporation* means any corporation that is not an S corporation (as defined in section 1361(a)(1)). For example, a regulated investment company (as defined in section 851) or a real estate investment trust (as defined in section 856) is a C corporation for purposes of this section. In addition, a trust subject to tax under section 511(b) is treated, for purposes of this section, as a C corporation, but only with respect to the portion of its activities that constitute an unrelated trade or business. Similarly, for purposes of this section, a corporation that is exempt from Federal income taxes under section 501(a) is treated as a C corporation only with respect to the portion of its activities that constitute an unrelated trade or business. Moreover, for purposes of determining whether a partnership has a C corporation as a partner, any partnership described in paragraph (a)(2)(ii) of this section is treated as a C corporation. Thus, if partnership ABC has a partner that is a partnership with a C corporation, then, for purposes of this section, partnership ABC is treated as a partnership with a C corporation partner.

(ii) [Reserved]

(2) *Tax shelter*—(i) *In general.* The term *tax shelter* means any—

(A) Enterprise, other than a C corporation, if at any time, including taxable years beginning before January 1, 1987, interests in such enterprise have been offered for sale in any offering required to be registered with any Federal or state agency having the authority to regulate the offering of securities for sale;

(B) Syndicate, within the meaning of paragraph (b)(2)(iii) of this section; or

(C) Tax shelter, within the meaning of section 6662(d)(2)(C).

(ii) *Requirement of registration.* For purposes of paragraph (b)(2)(i)(A) of this section, an offering is required to be registered with a Federal or state agency if, under the applicable Federal or state law, failure to register the offering would result in a violation of the applicable Federal or state law. This rule applies regardless of whether the offering is in fact registered. In addition, an offering is required to be registered with a Federal or state agency if, under the applicable Federal or state law, failure to file a notice of exemption from registration would result in a violation of the applicable Federal or state law, regardless of whether the notice is in fact filed. However, an S corporation is not treated as a tax shelter for purposes of section 448(d)(3) or this section merely by reason of being required to file a notice of exemption from registration with a state agency described in section 461(i)(3)(A), but only if all corporations offering securities for sale in the state must file such a notice in order to be exempt from such registration.

(iii) *Syndicate*—(A) *In general.* For purposes of paragraph (b)(2)(i)(B) of this section, the term *syndicate* means a partnership or other entity (other than a C corporation) if more than 35 percent of the losses of such entity during the taxable year (for taxable years beginning after December 31, 1986) are allocated to limited partners or limited entrepreneurs. For purposes of this paragraph (b)(2)(iii), the term *limited entrepreneur* has the same meaning given such term in section 461(k)(4). In addition, in determining whether an interest in a partnership is held by a limited partner, or an interest in an entity or enterprise is held by a limited entrepreneur, section 461(k)(2) applies in the case of the trade or business of farming (as defined in paragraph (d)(2) of this section), and section 1256(e)(3)(C) applies in all other cases. Moreover, for purposes of paragraph (b)(2) of this section, the losses of a partnership, entity, or enterprise (entities) means the excess of the deductions allowable to the entities over the amount of income recognized by such entities under the entities' method of accounting used for Federal income tax purposes (determined without regard to this section). For this purpose, gains or losses from the sale of capital assets or assets described in section 1221(a)(2) are not taken into account.

(B) *Irrevocable annual election to test the allocation of losses from prior taxable year*—(*1*) *In general.* For purposes of paragraph (b)(2)(iii)(A) of this section, to determine if more than 35 percent of the losses of a venture are allocated to limited partners or limited entrepreneurs, entities may elect to use the allocations made in the immediately preceding taxable year instead of using the current taxable year's allocation. An election under this paragraph (b)(2)(iii)(B) applies only to the taxable year for which the election is made. Except as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter), a taxpayer that makes an

election under this paragraph (b)(2)(iii)(B) must apply this election for other provisions of the Code that specifically apply the definition of tax shelter in section 448(a)(3).

(*2*) *Time and manner of making election.* A taxpayer makes this election for the taxable year by attaching a statement to its timely filed original Federal income tax return (including extensions) for such taxable year. The statement must state that the taxpayer is making the election under § 1.448–2(b)(2)(iii)(B). In the case of an S corporation or partnership, the election is made by the S corporation or the partnership and not by the shareholders or partners. An election under this paragraph (b)(2)(iii)(B) may not be made by the taxpayer in any other manner. For example, the election cannot be made through a request under section 446(e) to change the taxpayer's method of accounting. A taxpayer may not revoke an election under this paragraph (b)(2)(iii)(B).

(*3*) *Administrative guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) that provides alternative procedures for complying with paragraph (b)(2)(iii)(B)(*2*) of this section.

(C) *Examples.* The following examples illustrate the rules of paragraph (b)(2)(iii) of this section. For purposes of the examples, the term ''losses'' has the meaning stated in paragraph (b)(2)(iii)(A) of this section.

(*1*) *Example 1.* Taxpayer B is a calendar year limited partnership, with no active management from its limited partner. For 2019, B is profitable and has no losses to allocate to its limited partner. For 2020, B is not profitable and allocates 60 percent of its losses to its general partner and 40 percent of its losses to its limited partner. For 2021, B is not profitable and allocates 50 percent of its losses to its general partner and 50 percent of its losses to its limited partner. For taxable year 2020, B makes an election under paragraph (b)(2)(iii)(B) of this section to use its prior year allocated amounts. Accordingly, for 2020, B is not a syndicate because B was profitable for 2019 and did not allocate any losses to its limited partner in 2019. For 2021, B is a syndicate because B allocated 50 percent of its 2021 losses to its limited partner under paragraph (b)(2)(ii)(3)(A) of this section. Even if B made an election under paragraph (b)(2)(iii)(B) of this section to use prior year allocated amounts, B is a syndicate for 2021 because B allocated 40 percent of its 2020 losses to its limited partner in 2020. Because B is a syndicate under paragraph (b)(2)(iii)(A) of this section for 2021, B is a tax shelter prohibited from using the cash method for taxable year 2021 under paragraph (b)(2)(i)(B) of this section.

(*2*) *Example (2).* Same facts as Example (1) in paragraph (b)(2)(iii)(C)(1) of this section, except for 2021, B is profitable and has no losses to allocate to its limited partner. For 2020, B makes an election under paragraph (b)(2)(iii)(B) of this section to use its prior year allocated amounts. Accordingly, for 2020, B is not a syndicate because it did not any allocate any losses to its limited partner in 2019. For 2021, B chooses not to make the election under paragraph (b)(2)(iii)(B) of this section. For 2021, B is not a syndicate because it does not have any 2021 losses to allocate to a limited partner. For taxable years 2019, 2020 and 2021, B is not a syndicate under paragraph (b)(2)(iii)(A) of this section and is not prohibited from using the cash method for taxable years 2019, 2020 or 2021 under paragraph (b)(2)(i)(B) of this section.

(iv) *Presumed tax avoidance.* For purposes of (b)(2)(i)(C) of this section, marketed arrangements in which persons carrying on farming activities using the services of a common managerial or administrative service will be presumed to have the principal purpose of tax avoidance if such persons use borrowed funds to prepay a substantial portion of their farming expenses. Payments for farm supplies that will not be used or consumed until a taxable year subsequent to the taxable year of payment are an example of one type of such prepayment.

(v) *Taxable year tax shelter must change accounting method.* A tax shelter must change from the cash method for the taxable year that it becomes a tax shelter, as determined under paragraph (b)(2) of this section.

(vi) *Determination of loss amount.* For purposes of section 448(d)(3), the amount of losses to be allocated under section 1256(e)(3)(B) is calculated without regard to section 163(j).

(c) *Exception for entities with gross receipts not in excess of the amount provided in section 448(c)*—(1) *In general.* Except in the case of a tax shelter, this section does not apply to any C corporation or partnership with a C corporation as a partner for any taxable year if such corporation or partnership (or any predecessor thereof) meets the gross receipts test of paragraph (c)(2) of this section.

(2) *Gross receipts test*—(i) *In general.* A corporation meets the gross receipts test of this paragraph (c)(2) if the average annual gross receipts of such corporation for the 3 taxable years (or, if shorter, the taxable years during which such corporation was in existence, annualized as required) ending with such prior taxable year does not exceed the gross receipts test amount provided in paragraph (c)(2)(v) of this section (section 448(c) gross receipts test). In the case of a C corporation exempt from Federal income taxes under section 501(a), or a trust subject to tax under section 511(b) that is treated as a C corporation under paragraph (b)(1) of this section, only gross receipts from the activities of such corporation or trust that constitute unrelated trades or businesses are taken into account in determining whether the gross receipts test is satisfied. A partnership with a C corporation as a partner meets the gross receipts test of paragraph (c)(2) of this section if the average annual gross receipts of such partnership for the 3 taxable years (or, if shorter, the taxable years during which such partnership was in existence annualized as required) ending with such prior year does not exceed the gross receipts test amount of paragraph (c)(2)(v) of this section. Except as provided in paragraph (c)(2)(ii) of this section, the gross receipts of the corporate partner are not taken into account in determining whether a partnership meets the gross receipts test of paragraph (c)(2) of this section.

(ii) *Aggregation of gross receipts.* The aggregation rules in § 1.448–1T(f)(2)(ii) apply for purposes of aggregating gross receipts for purposes of this section.

(iii) *Treatment of short taxable year.* The short taxable year rules in § 1.448–1T(f)(2)(iii) apply for purposes of this section.

(iv) *Determination of gross receipts.* The determination of gross receipts rules in § 1.448–1T(f)(2)(iv) apply for purposes of this section.

(v) *Gross receipts test amount*—(A) *In general.* For purposes of paragraph (c) of this section, the term *gross receipts test amount* means $25,000,000, adjusted annually for inflation in the manner provided in section 448(c)(4). The inflation adjusted gross receipts test amount is published annually in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii) of this chapter).

(B) *Example.* Taxpayer A, a C corporation, is a plumbing contractor that installs plumbing fixtures in customers' homes or businesses. A's gross receipts for the 2017–2019 taxable years are $20 million, $16 million, and $30 million, respectively. A's average annual gross receipts for the three taxable-year period preceding the 2020 taxable year is $22 million (($20 million

+ $16 million + $30 million)/3) = $22 million. A may use the cash method for its trade or business for the 2020 taxable year because its average annual gross receipts for the preceding three taxable years is not more than the gross receipts test amount of paragraph (c)(2)(vi) of this section, which is $26 million for 2020.

(d) *Exception for farming businesses*—(1) *In general.* Except in the case of a tax shelter, this section does not apply to any farming business. A taxpayer engaged in a farming business and a separate non-farming business is not prohibited by this section from using the cash method with respect to the farming business, even though the taxpayer may be prohibited by this section from using the cash method with respect to the non-farming business.

(2) *Farming business*—(i) *In general.* For purposes of paragraph (d) of this section, the term *farming business* means—

(A) The trade or business of farming as defined in section 263A(e)(4) (including the operation of a nursery or sod farm, or the raising or harvesting of trees bearing fruit, nuts or other crops, or ornamental trees),

(B) The raising, harvesting, or growing of trees described in section 263A(c)(5) (relating to trees raised, harvested, or grown by the taxpayer other than trees described in paragraph (d)(2)(i)(A) of this section),

(C) The raising of timber, or

(D) Processing activities which are normally incident to the growing, raising, or harvesting of agricultural products.

(ii) *Example.* Assume a taxpayer is in the business of growing fruits and vegetables. When the fruits and vegetables are ready to be harvested, the taxpayer picks, washes, inspects, and packages the fruits and vegetables for sale. Such activities are normally incident to the raising of these crops by farmers. The taxpayer will be considered to be in the business of farming with respect to the growing of fruits and vegetables, and the processing activities incident to the harvest.

(iii) *Processing activities excluded from farming businesses*—(A) *In general.* For purposes of this section, a farming business does not include the processing of commodities or products beyond those activities normally incident to the growing, raising, or harvesting of such products.

(B) *Examples.* (*1*) *Example 1.* Assume that a C corporation taxpayer is in the business of growing and harvesting wheat and other grains. The taxpayer processes the harvested grains to produce breads, cereals, and similar food products which it sells to customers in the course of its business. Although the taxpayer is in the farming business with respect to the growing and harvesting of grain, the taxpayer is not in the farming business with respect to the processing of such grains to produce breads, cereals, and similar food products which the taxpayer sells to customers.

(*2*) *Example 2.* Assume that a taxpayer is in the business of raising livestock. The taxpayer uses the livestock in a meat processing operation in which the livestock are slaughtered, processed, and packaged or canned for sale to customers. Although the taxpayer is in the farming business with respect to the raising of livestock, the taxpayer is not in the farming business with respect to the meat processing operation.

(e) *Exception for qualified personal service corporation.* The rules in § 1.448–1T(e) relating to the exception for qualified personal service corporations apply for taxable years beginning after December 31, 2017.

(f) *Effect of section 448 on other provisions.* Except as provided in paragraph (b)(2)(iii)(B) of this section, nothing in section 448 shall have any effect on the application of any other provision of law that would otherwise limit the use of the cash method, and no inference shall be drawn from section 448 with respect to the application of any such provision. For example, nothing in section 448 affects the requirement of section 447 that certain corporations must use an accrual method of accounting in computing taxable income from farming, or the requirement of § 1.446–1(c)(2) that, in general, an accrual method be used with regard to purchases and sales of inventory. Similarly, nothing in section 448 affects the authority of the Commissioner under section 446(b) to require the use of an accounting method that clearly reflects income, or the requirement under section 446(e) that a taxpayer secure the consent of the Commissioner before changing its method of accounting. For example, a taxpayer using the cash method may be required to change to an accrual method of accounting under section 446(b) because such method clearly reflects the taxpayer's income, even though the taxpayer is not prohibited by section 448 from using the cash method. Similarly, a taxpayer using an accrual method of accounting that is not prohibited by section 448 from using the cash method may not change to the cash method unless the taxpayer secures the consent of the Commissioner under section 446(e).

(g) *Treatment of accounting method change and rules for section 481(a) adjustment*—(1) *In general.* Any taxpayer to whom section 448 applies must change its method of accounting in accordance with the provisions of this paragraph (g). In the case of any taxpayer required by this section to change its method of accounting, the change shall be treated as a change initiated by the taxpayer to compute the adjustment required under section 481. A taxpayer must change to an overall accrual method of accounting for the first taxable year the taxpayer is subject to this section or a subsequent taxable year in which the taxpayer is newly subject to this section after previously making a change in method of accounting that complies with section 448 (mandatory section 448 year). A taxpayer may have more than one mandatory section 448 year. For example, a taxpayer may exceed the gross receipts test of section 448(c) in non-consecutive taxable years. If the taxpayer complies with the provisions of paragraph (g)(3) of this section for its mandatory section 448 year, the change shall be treated as made with the consent of the Commissioner. The change shall be implemented pursuant to the applicable administrative procedures to obtain the automatic consent of the Commissioner to change a method of accounting under section 446(e) as published in the Internal Revenue Bulletin (see Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see also § 601.601(d)(2) of this chapter)). This paragraph (g) applies only to a taxpayer who changes from the cash method as required by this section. This paragraph (g) does not apply to a change in method of accounting required by any Code section (or applicable regulation) other than this section.

(2) *Section 481(a) adjustment.* The amount of the net section 481(a) adjustment and the adjustment period necessary to implement a change in method of accounting required under this section are determined under § 1.446–1(e) and the applicable administrative procedures to obtain the Commissioner's consent to change a method of accounting as published in the Internal Revenue Bulletin (see Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see also § 601.601(d)(2) of this chapter).

(h) *Applicability dates.* The rules of this section apply for taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the rules provided in this section

provided that the taxpayer follows all the applicable rules contained in the regulations under section 448 for such taxable year and all subsequent taxable years.

■ **Par. 16.** Newly-redesignated § 1.448–3 is amended by revising paragraphs (a)(2) and (h) to read as follows:

§ 1.448–3 Nonaccrual of certain amounts by service providers.

(a) * * *

(2) The taxpayer meets the gross receipts test of section 448(c) and § 1.448–1T(f)(2) (in the case of taxable years beginning before January 1, 2018), or § 1.448–2(c) (in the case of taxable years beginning after December 31, 2017) for all prior taxable years.

* * * * *

(h) *Applicability dates.* (1) Except as provided in paragraph (h)(2) of this section, this section is applicable for taxable years ending on or after August 31, 2006.

(2) The rules of paragraph (a)(2) of this section apply for taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraph described in the first sentence of this paragraph (h)(2), provided that the taxpayer follows all the applicable rules contained in the regulations under section 448 for such taxable year and all subsequent taxable years.

■ **Par. 17.** Section 1.460–0 is amended by:

■ 1. Adding an entry for § 1.460–1(h)(3).

■ 2. Revising the entries for § 1.460–3(b)(3), § 1.460–3(b)(3)(i) and (ii), and adding entries for § 1.460–3(b)(3)(ii)(A), (B), (C) and (D).

■ 3. Removing the entry for § 1.460–3(b)(3)(iii).

■ 4. Adding entries for § 1.460–3(d), § 1.460–4(i), and § 1.460–6(k).

The additions and revisions read as follows:

§ 1.460–0 Outline of regulations under section 460.

* * * * *

§ 1.460–1 Long-term contracts.

* * * * *

(h) * * *

(3) Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).

* * * * *

§ 1.460–3 Long-term construction contracts.

* * * * *

(b) * * *

(3) Gross receipts test of section 448(c)

(i) In general

(ii) Application of gross receipts test

(A) In general

(B) Gross receipts of individuals, etc.

(C) Partners and S corporation shareholders

(D) Examples

(*1*) Example 1.

(*2*) Example 2.

(iii) Method of accounting.

* * * * *

(d) Applicability dates.

§ 1.460–4 Methods of Accounting for long-term contracts.

* * * * *

(i) Applicability date.

* * * * *

§ 1.460–6 Look-back method.

* * * * *

(k) Applicability date.

■ **Par. 18.** Section 1.460–1 is amended by adding three sentences to the end of paragraph (f)(3) and adding paragraph (h)(3) to read as follows:

§ 1.460–1 Long-term contracts.

* * * * *

(f) * * *

(3) * * * A taxpayer may adopt any permissible method of accounting for each classification of contract. Such adoption is not a change in method of accounting under section 446 and the accompanying regulations. For example, a taxpayer that has had only contracts classified as nonexempt long-term contracts and has used the PCM for these contracts may adopt an exempt contract method in the taxable year it first enters into an exempt long-term contract.

* * * * *

(h) * * *

(3) *Changes made by Tax Cuts and Jobs Act (Pub. L. 115–97).* Paragraph (f)(3) of this section, and § 1.460–5(d)(1) and (d)(3), apply for contracts entered into in taxable years beginning on or after January 5, 2021. However, for contracts entered into after December 31, 2017, in a taxable year ending after December 31, 2017, and before January 5, 2021, a taxpayer may apply paragraph (f)(3) of this section, and § 1.460–5(d)(1) and (d)(3), provided that the taxpayer also applies the applicable rules contained in the regulations under section 460 for such taxable year and all subsequent taxable years.

* * * * *

■ **Par. 19.** Section 1.460–3 is amended by revising paragraphs (b)(1)(ii) and (b)(3), and adding paragraph (d) to read as follows:

§ 1.460–3 Long-term construction contracts.

* * * * *

(b) * * *

(1) * * *

(ii) Other construction contract, entered into after December 31, 2017, in a taxable year ending after December 31, 2017, by a taxpayer, other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting (cash method) under section 448(a)(3), who estimates at the time such contract is entered into that such contract will be completed within the 2-year period beginning on the contract commencement date, and who meets the gross receipts test described in paragraph (b)(3) of this section for the taxable year in which such contract is entered into.

* * * * *

(3) *Gross receipts test*—(i) *In general.* A taxpayer, other than a tax shelter prohibited from using the cash method under section 448(a)(3), meets the gross receipts test of this paragraph (b)(3) if it meets the gross receipts test of section 448(c) and § 1.448–2(c)(2). This gross receipts test applies even if the taxpayer is not otherwise subject to section 448(a).

(ii) *Application of gross receipts test*—(A) *In general.* In the case of any taxpayer that is not a corporation or a partnership, and except as provided in paragraphs (b)(3)(ii)(B) and (C) of this section, the gross receipts test of section 448(c) and the accompanying regulations are applied in the same manner as if each trade or business of such taxpayer were a corporation or partnership.

(B) *Gross receipts of individuals, etc.* Except when the aggregation rules of section 448(c)(2) apply, the gross receipts of a taxpayer other than a corporation or partnership are the amount derived from all trades or businesses of such taxpayer. Amounts not related to a trade or business are excluded from the gross receipts of the taxpayer. For example, an individual taxpayer's gross receipts do not include inherently personal amounts, such as personal injury awards or settlements with respect to an injury of the individual taxpayer, disability benefits, Social Security benefits received by the taxpayer during the taxable year, and wages received as an employee that are reported on Form W–2.

(C) *Partners and S corporation shareholders.* Except when the aggregation rules of section 448(c)(2) apply, each partner in a partnership includes a share of partnership gross receipts in proportion to such partner's distributive share (as determined under section 704) of items of gross income that were taken into account by the partnership under section 703. Similarly, a shareholder includes the pro rata share of S corporation gross

receipts taken into account by the S corporation under section 1363(b).

(D) *Example.* The operation of this paragraph (b)(3) is illustrated by the following examples:

(*1*) *Example 1.* Taxpayer A is an individual who operates two separate and distinct trades or business that are reported on Schedule C, *Profit or Loss from Business,* of A's Federal income tax return. For 2020, one trade or business has annual average gross receipts of $5 million, and the other trade or business has average annual gross receipts of $35 million. Under paragraph (b)(3)(ii)(B) of this section, for 2020, neither of A's trades or businesses meets the gross receipts test of paragraph (b)(3) of this section ($5 million + $35 million = $40 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(*2*) *Example 2.* Taxpayer B is an individual who operates three separate and distinct trades or business that are reported on Schedule C of B's Federal income tax return. For 2020, Business X is a retail store with average annual gross receipts of $15 million, Business Y is a dance studio with average annual gross receipts of $6 million, and Business Z is a car repair shop with average annual gross receipts of $12 million. Under paragraph (b)(3)(ii)(B) of this section, B's gross receipts are the combined amount derived from all three of B's trades or businesses. Therefore, for 2020, X, Y and Z do not meet the gross receipts test of paragraph (b)(3)(i) of this section ($15 million + $6 million + $12 million = $33 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(iii) *Method of accounting.* A change in the method of accounting used for exempt construction contracts described in paragraph (b)(1)(ii) of this section is a change in method of accounting under section 446 and the accompanying regulations. For rules distinguishing a change in method from adoption of a method, see § 1.460–1(f)(3). A taxpayer changing its method of accounting must obtain the consent of the Commissioner in accordance with § 1.446–1(e)(3). For rules relating to the clear reflection of income and the pattern of consistent treatment of an item, see section 446 and § 1.446–1. A change in method of accounting shall be implemented pursuant to the applicable administrative procedures to obtain the consent of the Commissioner to change a method of accounting under section 446(e) as published in the Internal Revenue Bulletin (IRB) (see Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see § 601.601(d)(2) of this chapter)). A taxpayer that uses the percentage of completion method for exempt contracts described in paragraph (b)(1)(ii) of this section that wants to change to another exempt contract method is to use the applicable administrative procedures to obtain the automatic consent of the Commissioner to change such method under section 446(e) as published in the IRB. A taxpayer-initiated change in method of accounting will be permitted only on a cut-off basis, and thus, a section 481(a) adjustment will not be permitted or required. See § 1.460–4(g).

* * * * *

(d) *Applicability Dates.* Paragraphs (b)(1)(ii) and (b)(3) of this section apply, for contracts entered into in taxable years beginning on or after January 5, 2021. However, for contracts entered into after December 31, 2017, in a taxable year ending after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (d), provided that the taxpayer follows all the applicable rules contained in the regulations under section 460 for such taxable year and all subsequent taxable years.

■ **Par. 20.** Section 1.460–4 is amended by revising the first sentence of paragraph (f)(1) and adding paragraph (i) to read as follows:

§ 1.460–4 Methods of Accounting for long-term contracts.

* * * * *

(f) * * * (1) * * * Under section 56(a)(3), a taxpayer subject to the AMT must use the PCM to determine its AMTI from any long-term contract entered into on or after March 1, 1986, that is not a home construction contract, as defined in § 1.460–3(b)(2). * * *

* * * * *

(i) *Applicability date.* Paragraph (f)(1) of this section applies to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraph described in the first sentence of this paragraph (i), provided that the taxpayer follows all the applicable rules contained in the regulations under section 460 for such taxable year and all subsequent taxable years.

* * * * *

■ **Par. 21.** Section 1.460–5 is amended:

■ 1. In paragraph (d)(1), by removing the language ''(concerning contracts of homebuilders that do not satisfy the $10,000,000 gross receipts test described in § 1.460–3(b)(3) or will not be completed within two years of the contract commencement date)''.

■ 2. By revising paragraph (d)(3).

The revision reads as follows:

§ 1.460–5 Cost allocation rules.

* * * * *

(d) * * *

(3) *Large homebuilders.* A taxpayer must capitalize the costs of home construction contracts under section 263A, unless the taxpayer estimates, when entering into the contract, that it will be completed within two years of the contract commencement date, and the taxpayer satisfies the gross receipts test of section 448(c) described in § 1.460–3(b)(3) for the taxable year in which the contract is entered into.

* * * * *

■ **Par. 22.** Section 1.460–6 is amended:

■ 1. In paragraph (b)(2) introductory text, by removing the language ''section 460(e)(4)'' and adding in its place the language ''section 460(e)(3)''.

■ 2. By revising the first and last sentences of paragraph (b)(2)(ii).

■ 3. By designating the undesignated text after paragraph (b)(3)(ii) as paragraph (b)(3)(iii).

■ 4. In newly designated paragraph (b)(3)(iii), by adding a sentence to the end of the paragraph.

■ 5. In paragraph (c)(1)(i), by revising the fifth sentence.

■ 6. In paragraph (c)(2)(i), by revising the third sentence.

■ 7. In paragraph (c)(2)(iv), by revising the first sentence.

■ 8. In paragraph (c)(3)(ii), by revising the first sentence.

■ 9. In paragraph (c)(3)(vi), by revising the first sentence.

■ 10. In paragraph (d)(2)(i), by removing the language ''whether or not the taxpayer would have been subject to the alternative minimum tax'' and adding in its place the language ''for taxpayers subject to the alternative minimum tax without regard to whether tentative minimum tax exceeds regular tax for the redetermination year''.

■ 11. By revising paragraph (d)(4)(i)(A).

■ 12. By designating paragraph (h)(8)(ii) *Example 7* as paragraph (h)(8)(iii).

■ 13. By revising newly designated paragraph (h)(8)(iii).

■ 14. By adding paragraph (k).

The revisions and additions read as follows:

§ 1.460–6 Look-back method.

* * * * *

(b) * * *

(2) * * *

(ii) is not a home construction contract but is estimated to be completed within a 2-year period by a taxpayer, other than a tax shelter

prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3), who meets the gross receipts test of section 448(c) and § 1.460–3(b)(3) for the taxable year in which such contract is entered into. * * * The look-back method, however, applies to the alternative minimum taxable income from a contract of this type, for those taxpayers subject to the AMT in taxable years prior to the filing taxable year in which the look-back method is required, unless the contract is exempt from required use of the percentage of completion method under section 56(a)(3).

(3) * * *

(iii) * * * For contracts entered into after December 31, 2017, in a taxable year ending after December 31, 2017, a taxpayer's gross receipts are determined in the manner required by regulations under section 448(c).

* * * * *

(c) * * *

(1) * * *

(i) * * * Based on this reapplication, the taxpayer determines the amount of taxable income (and, when applicable, alternative minimum taxable income and modified taxable income under section 59A(c)) that would have been reported for each year prior to the filing year that is affected by contracts completed or adjusted in the filing year if the actual, rather than estimated, total contract price and costs had been used in applying the percentage of completion method to these contracts, and to any other contracts completed or adjusted in a year preceding the filing year. * * *

* * * * *

(2) * * * (i) * * * The taxpayer then must determine the amount of taxable income (and, when applicable, alternative minimum taxable income and modified taxable income under section 59A(c)) that would have been reported for each affected tax year preceding the filing year if the percentage of completion method had been applied on the basis of actual contract price and contract costs in reporting income from all contracts completed or adjusted in the filing year and in any preceding year. * * *

* * * * *

(iv) * * * In general, because income under the percentage of completion method is generally reported as costs are incurred, the taxable income and, when applicable, alternative minimum taxable income and modified taxable income under section 59A(c), are recomputed only for each year in which allocable contract costs were incurred. * * *

* * * * *

(3) * * *

(ii) * * * Under the method described in this paragraph (c)(3) (actual method), a taxpayer first must determine what its regular and, when applicable, its alternative minimum tax and base erosion minimum tax liability would have been for each redetermination year if the amounts of contract income allocated in Step One for all contracts completed or adjusted in the filing year and in any prior year were substituted for the amounts of contract income reported under the percentage of completion method on the taxpayer's original return (or as subsequently adjusted on examination, or by amended return). * * *

* * * * *

(vi) * * * For purposes of Step Two, the income tax liability must be redetermined by taking into account all applicable additions to tax, credits, and net operating loss carrybacks and carryovers. Thus, the taxes, if any, imposed under sections 55 and 59A (relating to alternative and base erosion minimum tax, respectively) must be taken into account. * * *

* * * * *

(d) * * *

(4) * * * (i) * * *(A) *General rule.* The simplified marginal impact method is required to be used with respect to income reported from domestic contracts by a pass-through entity that is either a partnership, an S corporation, or a trust, and that is not closely held. With respect to contracts described in the preceding sentence, the simplified marginal impact method is applied by the pass-through entity at the entity level. The pass-through entity determines the amount of any hypothetical underpayment or overpayment for a redetermination year using the highest rate of tax in effect for corporations under section 11. However, for redetermination years beginning before January 1, 2018, the pass-through entity uses the highest rates of tax in effect for corporations under section 11 and section 55(b)(1). Further, the pass-through entity uses the highest rates of tax imposed on individuals under section 1 and section 55(b)(1) if, at all times during the redetermination year involved (that is, the year in which the hypothetical increase or decrease in income arises), more than 50 percent of the interests in the entity were held by individuals directly or through 1 or more pass-through entities.

* * * * *

(h) * * *

(8) * * *

(iii) *Example 7.* X, a calendar year C corporation, is engaged in the construction of real property under contracts that are completed within a 24-month period. Its average annual gross receipts for the prior 3-taxable-year period does not exceed $25,000,000. As permitted by section 460(e)(1)(B), X uses the completed contract method (CCM) for regular tax purposes. However, X is engaged in the construction of commercial real property and, for years beginning before January 1, 2018, is required to use the percentage of completion method (PCM) for alternative minimum tax (AMT) purposes. Assume that for 2017, 2018, and 2019, X has only one long-term contract, which is entered into in 2017 and completed in 2019 and that in 2017 X's average annual gross receipts for the prior 3-taxable-years do not exceed $10,000,000. Assume further that X estimates gross income from the contract to be $2,000, total contract costs to be $1,000, and that the contract is 25 percent complete in 2017 and 70 percent complete in 2018, and 5 percent complete in 2019. In 2019, the year of completion, gross income from the contract is actually $3,000, instead of $2,000, and costs are actually $1,000. Because X was required to use the PCM for 2017 for AMT purposes, X must apply the look-back method to its AMT reporting for that year. X has elected to use the simplified marginal impact method. For 2017, X's income using estimated contract price and costs is as follows:

TABLE 1 TO PARAGRAPH (h)(8)(iii)

Estimates	2017
Gross Income	$500 = ($2,000 × 25%)
Deductions	$(250) = ($1,000 × 25%)
Contract Income—PCM.	$250

(A) When X files its federal income tax return for 2019, the contract completion year, X applies the look-back method. For 2017, X's income using actual contract price and costs is as follows:

TABLE 2 TO PARAGRAPH (h)(8)(iii)(A)

Actual	2017
Gross Income	$750 = ($3,000 × 25%)
Deductions	$(250) = ($1,000 × 25%)
Contract Income—PCM.	$500

(B) Accordingly, the reallocation of contract income under the look-back method results in an increase of income for AMT purposes for 2017 of $250 ($500–$250). Under the simplified marginal impact method, X applies the highest rate of tax under section 55(b)(1) to this increase, which produces a hypothetical underpayment for 2017 of $50 (.20 × $250). Interest is charged to X on this $50 underpayment from the due date of X's 2017 return until the due date of X's 2019 return. X, a C corporation, is not subject to the AMT in 2018. X does not compute alternative minimum taxable income or use the PCM in that year. Accordingly, look-back does not apply to 2018.

* * * * *

(k) *Applicability date.* Paragraphs (b)(2), (b)(2)(ii), (b)(3)(iii), (c)(1)(i), (c)(2)(i), (c)(2)(iv), (c)(3)(ii), (c)(3)(vi), (d)(2)(i), (d)(4)(i)(A), and (h)(8)(iii) of this section apply to taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply the paragraphs described in the first sentence of this paragraph (k), provided that the taxpayer follows all the applicable rules contained in the regulations under section 460 for such taxable year and all subsequent taxable years. Further, a taxpayer may apply those portions of paragraphs (b)(2)(ii) and (b)(3)(iii) of this section that relate to section 460(e)(1)(B) for contracts entered into after December 31, 2017, in a taxable year ending after December 31, 2017, provided that the taxpayer follows all the applicable rules contained in the regulations under section 460 for such taxable year and all subsequent taxable years.

■ **Par. 23.** § 1.471–1 is amended by:

■ 1. Designating the undesignated paragraph as paragraph (a).

■ 2. Adding a heading to newly designated paragraph (a) and revising the first sentence.

■ 3. Adding paragraphs (b) and (c).

The revision and addition read as follows:

§ 1.471–1 Need for inventories.

(a) *In general.* Except as provided in paragraph (b) of this section, in order to reflect taxable income correctly, inventories at the beginning and end of each taxable year are necessary in every case in which the production, purchase, or sale of merchandise is an income-producing factor. * * *

(b) *Exemption for certain small business taxpayers*—(1) *In general.* Paragraph (a) of this section shall not apply to a taxpayer, other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting (cash method) under section 448(a)(3), in any taxable year if the taxpayer meets the gross receipts test described in paragraph (b)(2) of this section, and uses as a method of accounting for its inventory a method that is described in paragraph (b)(3) of this section.

(2) *Gross receipts test*—(i) *In general.* A taxpayer, other than a tax shelter prohibited from using the cash method under section 448(a)(3), meets the gross receipts test of this paragraph (b)(2) if it meets the gross receipts test of section 448(c) and § 1.448–2(c). This gross receipts test applies even if the taxpayer is not otherwise subject to section 448(a).

(ii) *Application of the gross receipts test*—(A) *In general.* In the case of any taxpayer that is not a corporation or partnership, and except as otherwise provided in paragraphs (b)(2)(ii)(B) and (C) of this section, the gross receipts test of section 448(c) and the accompanying regulations are applied in the same manner as each trade or business of the taxpayer were a corporation or partnership.

(B) *Gross receipts of individuals, etc.* Except when the aggregation rules of section 448(c)(2) apply, the gross receipts of a taxpayer other than a corporation or partnership are the amount derived from all trades or businesses of such taxpayer. Amounts not related to a trade or businesses are excluded from the gross receipts of the taxpayer. For example, an individual taxpayer's gross receipts do not include inherently personal amounts, such as: personal injury awards or settlements with respect to an injury of the individual taxpayer, disability benefits, Social Security benefits received by the taxpayer during the taxable year, and wages received as an employee that are reported on Form W–2.

(C) *Partners and S corporation shareholders*—(*1*) *In general.* Except when the aggregation rules of section 448(c)(2) apply, each partner in a partnership includes a share of the partnership's gross receipts in proportion to such partner's distributive share (as determined under section 704) of items of gross income that were taken into account by the partnership under section 703. Similarly, a shareholder includes the *pro rata* share of S corporation gross receipts taken into account by the S corporation under section 1363(b).

(*2*) [Reserved]

(D) *Examples.* The operation of this paragraph (b)(2) is illustrated by the following examples:

(*1*) *Example 1.* Taxpayer A, a calendar year S corporation, is a reseller and maintains inventories. In 2017, 2018, and 2019, A's gross receipts were $10 million, $11 million, and $13 million respectively. A is not prohibited from using the cash method under section 448(a)(3). For 2020, A meets the gross receipts test of paragraph (b)(2) of this section.

(*2*) *Example 2.* Taxpayer B operates two separate and distinct trades or businesses that are reported on Schedule C, *Profit or Loss from Business,* of B's Federal income tax return. For 2020, one trade or business has annual average gross receipts of $5 million, and the other trade or business has average annual gross receipts of $35 million. Under paragraph (b)(2)(ii)(B) of this section, for 2020, neither of B's trades or businesses meets the gross receipts test of paragraph (b)(2) of this section ($5 million + $35 million = $40 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(*3*) *Example 3.* Taxpayer C is an individual who operates three separate and distinct trades or business that are reported on Schedule C of C's Federal income tax return. For 2020, Business X is a retail store with average annual gross receipts of $15 million, Business Y is a dance studio with average annual gross receipts of $6 million, and Business Z is a car repair shop with average annual gross receipts of $12 million. Under paragraph (b)(2)(ii)(B) of this section, C's gross receipts are the combined amount derived from all three of C's trades or businesses. Therefore, for 2020, X, Y and Z do not meet the gross receipts test of paragraph (b)(2)(i) of this section ($15 million + $6 million + $12 million = $33 million, which is greater than the inflation-adjusted gross receipts test amount for 2020, which is $26 million).

(3) *Methods of accounting under the small business taxpayer exemption.* A taxpayer eligible to use, and that chooses to use, the exemption described in paragraph (b) of this section may account for its inventory by either:

(i) Using a method that treats its inventory as non-incidental materials and supplies (section 471(c) NIMS inventory method), as described in paragraph (b)(4) of this section; or

(ii) Using the method for each item that is reflected in the taxpayer's applicable financial statement (AFS) (AFS section 471(c) inventory method); or, if the taxpayer does not have an AFS for the taxable year, the books and records of the taxpayer prepared in accordance with the taxpayer's accounting procedures, as defined in

paragraph (b)(6)(ii) of this section (non-AFS section 471(c) inventory method).

(4) *Inventory treated as non-incidental materials and supplies*—(i) *In general.* The costs of inventory treated as non-incidental materials and supplies are recovered through cost of goods sold only in the taxable year in which the inventory is used or consumed in the taxpayer's business, or in the taxable year in which the taxpayer pays for or incurs the cost of the inventory, whichever is later. Inventory treated as non-incidental materials and supplies is used or consumed in the taxpayer's business in the taxable year in which the taxpayer provides the inventory to its customer. The costs of inventory are treated as non-incidental materials and supplies under this paragraph (b)(4) are not eligible for the *de minimis* safe harbor election under § 1.263(a)–1(f)(2).

(ii) *Identification and valuation of inventory treated as non-incidental materials and supplies.* A taxpayer may determine the amount of the costs of its inventory treated as non-incidental materials and supplies that are recoverable through costs of goods sold by using either a specific identification method, a first-in, first-out (FIFO) method, or an average cost method, provided that method is used consistently. See § 1.471–2(d). A taxpayer that uses the section 471(c) NIMS inventory method may not use any other method described in the regulations under section 471, or the last-in, first-out (LIFO) method described in section 472 and the accompanying regulations, to either identify inventory treated as non-incidental materials and supplies, or to value that inventory treated as non-incidental materials and supplies. The inventory costs includible in the section 471(c) NIMS inventory method are the direct material costs of the property produced or the costs of property acquired for resale. However, an inventory cost does not include a cost for which a deduction would be disallowed, or that is not otherwise recoverable but for paragraph (b)(4) of this section, in whole or in part, under a provision of the Internal Revenue Code.

(iii) *Allocation methods.* A taxpayer treating its inventory as non-incidental materials and supplies under this paragraph (b)(4) may allocate the costs of such inventory by using specific identification or any other reasonable method.

(iv) *Example.* Taxpayer D is a baker that reports its baking trade or business on Schedule C, *Profit or Loss From Business,* of the Form 1040, *Individual Tax Return,* and D's baking business has average annual gross receipts for the 3-taxable years prior to 2019 of less than $100,000. D meets the gross receipts test of section 448(c) and is not prohibited from using the cash method under section 448(a)(3) in 2019. Therefore, D qualifies as a small business taxpayer under paragraph (b)(2) of this section. D uses the overall cash method, and the section 471(c) NIMS inventory method. D purchases $50 of peanut butter in November 2019. In December 2019, D uses all of the peanut butter to bake cookies available for immediate sale. D sells those peanut butter cookies to customers in January 2020. The peanut butter cookies are used or consumed under paragraph (b)(4)(i) of this section in January 2020 when the cookies are sold to customers, and D may recover the cost of the peanut butter in 2020.

(5) *AFS section 471(c) inventory method*—(i) *In general.* A taxpayer that meets the gross receipts test described in paragraph (b)(2) of this section and that has an AFS for such taxable year may use the AFS section 471(c) inventory method described in this paragraph to account for its inventory costs for the taxable year. For purposes of the AFS section 471(c) inventory method, an inventory cost is a cost of production or resale that a taxpayer capitalizes to inventory property produced or property acquired for resale in its AFS. For purposes of the AFS section 471(c) inventory method, costs that are generally required to be capitalized to inventory under section 471(a) but that the taxpayer does not capitalize to inventory on its AFS are not required to be capitalized to inventory. However, an inventory cost does not include a cost that is neither deductible nor otherwise recoverable but for paragraph (b)(5) of this section, in whole or in part, under a provision of the Internal Revenue Code (for example, section 162(c), (e), (f), (g), or 274). In lieu of the inventory method described in section 471(a), a taxpayer using the AFS section 471(c) inventory method recovers its inventory costs in accordance with the inventory method used in its AFS.

(ii) *Definition of Applicable Financial Statement (AFS).* The term applicable financial statement (AFS) is defined in section 451(b)(3) and the accompanying regulations. See § 1.451–3(a)(5). The rules relating to additional AFS issues provided in § 1.451–3(h) apply to the AFS section 471(c) inventory method. In the case of a taxpayer with a financial accounting year that differs from the taxpayer's taxable year, the taxpayer must consistently use the same method of accounting described in § 1.451–3(h)(4)(i)(A) through (C) that is used for section 451(b) purposes to also determine its inventory for the taxable year under this paragraph (b)(5)(ii). A taxpayer has an AFS for the taxable year if all of the taxpayer's taxable year is covered by an AFS.

(iii) *Timing of inventory costs.* Notwithstanding the timing rules used in the taxpayer's AFS, the amount of any inventoriable cost may not be capitalized or otherwise taken into account for Federal income tax purposes any earlier than the taxable year during which the amount is paid or incurred under the taxpayer's overall method of accounting, as described in § 1.446–1(c)(1). For example, in the case of an accrual method taxpayer, inventoriable costs must satisfy the all events test, including economic performance, of section 461. See § 1.446–1(c)(1)(ii) and section 461 and the accompanying regulations.

(iv) *Example.* H is a calendar year C corporation that is engaged in the trade or business of selling office supplies and providing copier repair services. H meets the gross receipts test of section 448(c) and is not prohibited from using the cash method under section 448(a)(3) for 2019 or 2020. For Federal income tax purposes, H chooses to account for purchases and sales of inventory using an accrual method of accounting and for all other items using the cash method. For AFS purposes, H uses an overall accrual method of accounting. H uses the AFS section 471(c) inventory method of accounting. In H's 2019 AFS, H incurred $2 million in purchases of office supplies held for resale and recovered the $2 million as cost of goods sold. On January 5, 2020, H makes payment on $1.5 million of these office supplies. For purposes of the AFS section 471(c) inventory method of accounting, H can recover the $2 million of office supplies in 2019 because the amount has been included in cost of goods sold in its AFS inventory method and section 461 has been satisfied.

(6) *Non-AFS section 471(c) inventory method*—(i) *In general.* A taxpayer that meets the gross receipts test described in paragraph (b)(2) of this section for a taxable year and that does not have an AFS, as defined in paragraph (b)(5)(ii) of this section, for such taxable year may use the non-AFS section 471(c) inventory method to account for its inventories for the taxable year in accordance with this paragraph (b)(6). The non-AFS section 471(c) inventory method is the method of accounting used for inventory in the taxpayer's books and records that properly reflect its business activities for non-tax purposes and are prepared in

accordance with the taxpayer's accounting procedures. For purposes of the non-AFS section 471(c) inventory method, an inventory cost is a cost of production or resale that the taxpayer capitalizes to inventory property produced or property acquired for resale in its books and records, except as provided in paragraph (b)(6)(ii) of this section. Costs that are generally required to be capitalized to inventory under section 471(a), but that the taxpayer does not capitalize in its books and records are not required to be capitalized to inventory. However, an inventory cost does not include a cost that is neither deductible nor otherwise recoverable but for paragraph (b)(5) of this section, in whole or in part, under a provision of the Internal Revenue Code (for example, section 162(c), (e), (f), (g), or 274). In lieu of the inventory method described in section 471(a), a taxpayer using the non-AFS section 471(c) inventory method recovers its applicable costs through its book inventory method of accounting. A taxpayer that has an AFS for such taxable year may not use the non-AFS section 471(c) inventory method.

(ii) *Timing and amounts of costs.* Notwithstanding the timing of costs reflected in the taxpayer's books and records, a taxpayer may not recover any costs that have not been paid or incurred under the taxpayer's overall method of accounting, as described in § 1.446–1(c)(1). For example, in the case of an accrual method taxpayer or a taxpayer using an accrual method for purchases and sales, inventory costs must satisfy the all events test, including economic performance, under section 461(h). See § 1.446–1(c)(1)(ii), and section 461 and the accompanying regulations.

(iii) *Examples.* The following examples illustrate the rules of paragraph (b)(6) of this section.

(A) *Example 1.* Taxpayer E is a C corporation that is engaged in the retail trade or business of selling beer, wine, and liquor. In 2019, E has average annual gross receipts for the prior 3-taxable-years of $15 million and is not otherwise prohibited from using the cash method under section 448(a)(3). E does not have an AFS for the 2019 taxable year. E is eligible to use the non-AFS section 471(c) inventory method of accounting. E uses the overall cash method, and the non-AFS section 471(c) inventory method of accounting for Federal income tax purposes. In E's electronic bookkeeping software, E treats all costs paid during the taxable year as presently deductible. As part of its regular business practice, E's employees take a physical count of inventory on E's selling floor and its warehouse on December 31, 2019, and E uses this physical count as part of its books and records for purposes of capitalizing and allocating costs to inventory. E also makes representations to its creditor of the cost of inventory on hand for specific categories of product it sells. E may not expense all of its costs paid during the 2019 taxable year because its books and records do not accurately reflect the inventory records used for non-tax purposes in its regular business activity. Instead, E must use the physical inventory count taken at the end of 2019 to determine how its capitalized costs are allocated and recovered.

(B) *Example 2.* Same facts as Example (1) in paragraph (b)(6)(iii)(A) of this section but E does not use the physical count to capitalize and allocate costs to inventory and does not make any representations about inventory on hand to any creditors. Although E pays or incurs costs that are generally required to be capitalized to inventory under section 471(a), because such costs are not capitalized to inventory in E's books and records, they are not required to be capitalized to inventory under paragraph (b)(6)(i) of this section.

(C) *Example 3.* Same facts as Example (1) in paragraph (b)(6)(iii)(A) of this section but E does not use the physical count to capitalize and allocate costs to inventory in its electronic bookkeeping software and does not make any representations about inventory on hand to any external parties. E does use the physical count to value inventory on hand for internal reports to its shareholders. The internal reports to its shareholders are part of E's books and records and must be taken into account for E's non-AFS section 471(c) inventory method. E recovers its inventory costs consistent with its non-AFS section 471(c) inventory method.

(D) *Example 4.* Taxpayer F is a C corporation that is engaged in the manufacture of baseball bats. In 2019, F has average annual gross receipts for the prior 3-taxable-years of less than $25 million and is not otherwise prohibited from using the cash method under section 448(a)(3). F does not have an AFS for the 2019 taxable year. For Federal income tax purposes, F uses the overall cash method of accounting, and the non-AFS section 471(c) inventory method of accounting. For its books and records, F uses an overall accrual method and maintains inventories. In December 2019, F's financial statements show $500,000 of direct and indirect material costs. F pays its supplier in January 2020. Under paragraph (b)(6)(ii) of this section, F recovers its direct and indirect material costs in 2020.

(E) *Example 5.* Taxpayer G is a baker that reports its baking trade or business on Schedule C, Profit or Loss From Business, of the Form 1040, Individual Tax Return. In 2020, G's baking business has average annual gross receipts for the prior 3-taxable years of less than $100,000 and is not otherwise prohibited from using the cash method under section 448(a)(3). G does not have an AFS for the 2020 taxable year. For Federal income tax purposes, G uses the overall cash method of accounting and the non-AFS section 471(c) inventory method. In G's books and records for 2020 that properly reflects its business activities for non-tax purposes, G capitalizes the cost of its cookie ingredients to inventory but immediately expenses the cost of labor for G's employee who bakes the cookies. Under paragraphs (b)(6)(i) and (ii) of this section, G treats as an inventory cost the cost of its cookie ingredients and recovers such costs in accordance with the accounting procedures used to prepare its books and records, or, if later, when paid. Additionally, although the cost of direct labor is generally required to be capitalized to inventory under section 471(a), because such cost is not capitalized to inventory in G's books and records, it is not required to be capitalized to inventory under paragraph (b)(6)(i) of this section. Further, because such direct labor cost is generally deductible under section 162, and not otherwise required to be capitalized under section 263(a), G may deduct the cost of labor in the year G pays that expense.

(F) *Example 6.* Taxpayer H is a partnership engaged in the resale of beer, wine, and liquor. In 2020, H has average annual gross receipts for the prior 3-taxable-years of less than $25 million and is not otherwise prohibited from using the cash method under section 448(a)(3). H does not have an AFS for the 2020 taxable year. For Federal income tax purposes, H uses the overall cash method of accounting, and the non-AFS section 471(c) inventory method of accounting. For its books and records, H uses the overall cash method. As part of its regular business practice, H's employees take regular physical counts of the inventory on the shop floor and in the storeroom, however H's method of accounting for inventory for its books and records does not allocate costs between ending inventory and cost of goods sold, and instead expenses the cost of the inventory in the year it was paid for. Prior to December 2020, H acquires and pays for $500,000 of beer, wine, and liquor. In addition, on

December 1, 2020, H acquires $50,000 in beer and wine, and pays for this beer and wine on December 20, 2020. H may recover as deductions in 2020 the $550,000 of inventory costs.

(G) *Example 7.* Taxpayer J is a partnership engaged in the resale of beer, wine, and liquor. In 2020, J has average annual gross receipts for the prior 3-taxable-years of less than $25 million and is not otherwise prohibited from using the cash method under section 448(a)(3). J does not have an AFS for the 2020 taxable year. For Federal income tax purposes, J uses the overall cash method of accounting, and the non-AFS section 471(c) inventory method of accounting. For its books and records, J uses the overall cash method. J maintains a point-of-sale computer system that tracks acquisition costs and inventory levels of the beer, wine, and liquor. The ledger is periodically reconciled with physical counts performed by J's employees. J must use the physical inventory count and ledger to determine its ending inventory. J includes in cost of goods sold for 2020 those inventory costs that are not properly allocated to ending inventory.

(7) *Effect of section 471(c) on other provisions.* Nothing in section 471(c) shall have any effect on the application of any other provision of law that would otherwise apply, and no inference shall be drawn from section 471(c) with respect to the application of any such provision. For example, an accrual method taxpayer that includes inventory costs in its AFS is required to satisfy section 461 before such cost can be included in cost of goods sold for the taxable year. Similarly, nothing in section 471(c) affects the requirement under section 446(e) that a taxpayer secure the consent of the Commissioner before changing its method of accounting. If an item of income or expense is not treated consistently from year to year, that treatment may not clearly reflect income, notwithstanding the application of this section. Finally, nothing in section 471(c) permits the deduction or recovery of any cost that a taxpayer is otherwise precluded from deducting or recovering under any other provision in the Code or Regulations.

(8) *Method of accounting*—(i) *In general.* A change in the method of treating inventory under this paragraph (b) is a change in method of accounting under sections 446 and 481 and the accompanying regulations. A taxpayer changing its method of accounting under paragraph (b) of this section may do so only with the consent of the Commissioner as required under section 446(e) and § 1.446–1. For example, a taxpayer using the AFS section 471(c) inventory method or non-AFS section 471(c) inventory method that wants to change its method of accounting for inventory in its AFS, or its books and records, respectively, is required to secure the consent of the Commissioner before using this new method for Federal income tax purposes. However, a change from having an AFS to not having an AFS, or vice versa, without a change in the underlying method for inventory for financial reporting purposes that affects Federal income tax is not a change in method of accounting for such inventory under section 446(e). In the case of any taxpayer required by this section to change its method of accounting for any taxable year, the change shall be treated as a change initiated by the taxpayer. For rules relating to the clear reflection of income and the pattern of consistent treatment of an item, see section 446 and § 1.446–1. The amount of the net section 481(a) adjustment and the adjustment period necessary to implement a change in method of accounting required under this section are determined under § 1.446–1(e) and the applicable administrative procedures to obtain the Commissioner's consent to change a method of accounting as published in the Internal Revenue Bulletin (see Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see also § 601.601(d)(2) of this chapter).

(ii) *Automatic consent for certain method changes.* Certain changes in method of accounting made under paragraph (b) of this section may be made under the procedures to obtain the automatic consent of the Commissioner to change a method of accounting. See Revenue Procedure 2015–13 (2015–5 IRB 419) (or successor) (see § 601.601(d)(2) of this chapter)). In certain situations, special terms and conditions may apply.

(c) *Applicability dates.* This section applies for taxable years beginning on or after January 5, 2021. However, for a taxable year beginning after December 31, 2017, and before January 5, 2021, a taxpayer may apply this section provided that the taxpayer follows all the applicable rules contained in this section for such taxable year and all subsequent taxable years.

Douglas W. O'Donnell,

Acting Deputy Commissioner for Services and Enforcement.

Approved: December 18, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–28888 Filed 12–31–20; 8:45 am]

BILLING CODE P

Proposed Rules

Federal Register

Vol. 86, No. 2

Tuesday, January 5, 2021

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 201223–0353]

RIN 0648–BJ26

International Fisheries; Pacific Tuna Fisheries; 2021 Commercial Fishing Restrictions for Pacific Bluefin Tuna in the Eastern Pacific Ocean

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS is proposing regulations under the Tuna Conventions Act of 1950, as amended (TCA), to implement Inter-American Tropical Tuna Commission (IATTC) Resolution C–20–02 (''Measures for the Conservation and Management of Bluefin Tuna in the Eastern Pacific Ocean, 2021''). This proposed rule would implement annual limits on commercial catch of Pacific bluefin tuna (*Thunnus orientalis*) in the eastern Pacific Ocean (EPO) for 2021. This action is necessary to conserve Pacific bluefin tuna and for the United States to satisfy its obligations as a member of the IATTC.

DATES: Comments on the proposed rule and supporting documents must be submitted in writing by February 4, 2021.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2020–0163, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0163,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Celia Barroso, NMFS West Coast Region Long Beach Office, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier ''NOAA–NMFS–2020–0163'' in the comments.

Instructions: Comments must be submitted by one of the above methods to ensure they are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to NMFS West Coast Region Long Beach Office and 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.

Copies of the draft Regulatory Impact Review (RIR) and other supporting documents are available via the Federal eRulemaking Portal: *http://www.regulations.gov,* docket NOAA–NMFS–2020–0163 or contact the Highly Migratory Species Branch Chief, Lyle Enriquez, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802, or *WCR.HMS@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Celia Barroso, NMFS, 562–432–1850, *Celia.Barroso@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background on the IATTC

The United States is a member of the IATTC, which was established in 1949 and operates under the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (Antigua Convention). See: *https://www.iattc.org/PDFFiles/IATTC-Instruments/_English/IATTC_Antigua_Convention%20Jun%202003.pdf.*

The IATTC consists of 21 member nations and 5 cooperating non-member nations. The IATTC facilitates scientific research into, as well as the conservation and management of, tuna and tuna-like species in the IATTC Convention Area (Convention Area). The Convention Area is defined as waters of the EPO within the area bounded by the west coast of the Americas and by 50° N latitude, 150° W longitude, and 50° S latitude. The IATTC maintains a scientific research and fishery monitoring program, and regularly assesses the status of tuna, shark, and billfish stocks in the EPO to determine appropriate catch limits and other measures to promote sustainable fisheries and prevent overexploitation.

International Obligations of the United States Under the Convention

As a Party to the Antigua Convention and a member of the IATTC, the United States is legally bound to implement decisions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951 *et seq.*) directs the Secretary of Commerce, in consultation with the Secretary of State and, with respect to enforcement measures, the U.S. Coast Guard, to promulgate such regulations as may be necessary to carry out the United States' obligations under the Antigua Convention, including recommendations and decisions adopted by the IATTC. The authority of the Secretary of Commerce to promulgate such regulations has been delegated to NMFS.

Pacific Bluefin Tuna Stock Status

In 2011, NMFS determined overfishing was occurring on Pacific bluefin tuna (76 FR 28422, May 17, 2011), which is considered a single Pacific-wide stock. Based on the results of a 2012 stock assessment conducted by the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean (ISC), NMFS determined that Pacific bluefin tuna was not only subject to overfishing, but was also overfished (78 FR 41033, July 9, 2013). Subsequently, based on the results of the 2014, 2016, and 2018 ISC stock assessments, NMFS

determined that Pacific bluefin tuna continued to be overfished and subject to overfishing (80 FR 12621, March 10, 2015; 82 FR 18434, April 19, 2017; 84 FR 19905, May 7, 2019). The ISC completed a stock assessment in July 2020, which showed that the stock continues to be overfished and subject to overfishing when compared to commonly used reference points.

Pacific Bluefin Tuna Resolutions

Recognizing the need to reduce fishing mortality of Pacific bluefin tuna, the IATTC has adopted catch limits in the Convention Area since 2012 (see the final rules implementing Resolution C–14–06, Resolution C–16–08, and Resolution C–18–01 and Resolution C–18–02 for more information on previous management measures (80 FR 38986, July 8, 2015; 82 FR 18704, April 21, 2017; 84 FR 18409, May 1, 2019)). At its 95th Meeting in December 2020, the IATTC adopted Resolution C–20–02. Resolution C–20–02 is consistent with the recommendations of the IATTC Scientific Advisory Committee that the Commission ''[e]xtend the provisions of Resolution C–18–01 through 2021''; and, although applicable for 2021 only, is consistent with the IATTC staff recommendation that the Commission ''[e]xtend the provisions of Resolution C–18–01 through 2021–2022.'' Resolution C–20–02 establishes catch limits and reporting requirements for 2021. This resolution was approved by the Secretary of State, prompting implementation by NMFS in this rulemaking.

Since 2016, the IATTC and the Northern Committee (NC) to the Western and Central Pacific Fisheries Commission (WCPFC) have held annual joint working group meetings intended to develop a Pacific-wide approach to management of Pacific bluefin tuna. Conservation measures adopted by the IATTC and WCPFC have considered the recommendations of the Joint IATTC–WCPFC NC Working Group (Joint WG). Joint WG recommendations have included rebuilding targets and criteria that must be met before considering increased catch limits. At its 5th meeting held October 6–7 (Japan Standard Time), 2020, the Joint WG recommended the IATTC and WCPFC continue measures in effect for 2020 into 2021. Subsequently, the IATTC considered the Joint WG recommendation when it adopted Resolution C–20–02.

Similar to previous IATTC resolutions on Pacific bluefin tuna, the main objective of Resolution C–20–02 is to reduce overfishing and to rebuild the stock by setting limits on commercial catch in the IATTC Convention Area during 2021. Resolution C–20–02 establishes an annual limit of 425 metric tons (mt) for U.S. commercial vessels in 2021.

Pacific Fishery Management Council (PFMC) Recommendations for the Implementation of C–20–02

In 2017, NMFS implemented the catch limits in Resolution C–16–08 with a 25-mt trip limit until catch was within 50 mt of the annual limit (*i.e.,* the annual limit was 425 mt in 2017) and a 2-mt trip limit when catch was within 50 mt of the annual limit (82 FR 18704, April 21, 2017). However, the catch rate was more rapid than anticipated, which caused the annual limit to be exceeded before the fishery was closed on August 28, 2017 (82 FR 40720). This series of events prompted NMFS and the PFMC to reconsider management measures for 2018, as well as 2019–2020, to avoid exceeding catch limits. In 2018, NMFS implemented a 1-mt Pacific bluefin tuna trip limit applicable to commercial U.S. vessels, except large-mesh drift gillnet vessels, which were subject to a 2-mt trip limit (83 FR 13203, March 28, 2018). For 2019–2020, NMFS implemented C–18–01 with a 15-mt trip limit until catch was within 50 mt of the annual limit (*i.e.,* the annual limit was 425 mt in 2019) and a 2-mt trip limit when catch was within 50 mt of the annual limit (84 FR 18409, May 1, 2019). NMFS also included three additional elements when implementing C–18–01: (1) Required purse seine vessels to notify NMFS 24 hours in advance of departing on a trip in order to retain or land more than 2 mt of Pacific bluefin tuna (pre-trip notification); (2) required that Pacific bluefin tuna landings in California be reported within 24 hours of landing using the California electronic landing receipt (e-ticket) reporting system; and (3) required that NMFS take inseason action by posting on the NMFS website and U.S. Coast Guard Notice to Mariners radio broadcast, followed by a **Federal Register** notice as soon as practicable.

In 2019 and 2020, NMFS hosted Pacific bluefin tuna stakeholder meetings. Attendees expressed concerns about the pre-trip notification and trip limit implemented in 2019–2020. Attendees considered the pre-trip notification burdensome. Attendees were also concerned that NMFS may take inseason action based an assumption that 15 mt of Pacific bluefin tuna would be caught on each trip noticed, which led to an overestimation of catch in 2019 resulting in a premature reduction in the trip limit to 2 mt. The pre-trip notification did not appear to accurately predict catch. Purse seine stakeholders have also noted that the 15-mt trip limit is too low because Pacific bluefin tuna schools are larger than 15 mt.

At its November 2020 meeting, the PFMC made recommendations for implementing catch limits established in Resolution C–20–02 for 2021. Because the Joint WG recommendations were expected to be adopted by the IATTC and WCPFC at their upcoming meetings, NMFS was able to anticipate the upcoming U.S. commercial catch limit. NMFS received Council input on domestic implementation at its November meeting before the IATTC met and adopted Resolution C–20–02. At the November 2020 PFMC meeting, the Highly Migratory Species Advisory Subpanel (HMSAS) and Management Team (HMSMT) raised concerns regarding the pre-trip notification that align with those raised during stakeholder meetings described above. The Council considered the HMSAS and HMSMT statements when it recommended eliminating the current pre-trip notification requirement while maintaining the e-ticket requirement and inseason action procedures. In addition, the Council recommended the following applicable to trip limits in 2021:

- Set an initial trip limit of 20 mt.
- January–March: If cumulative catch reaches 250 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 325 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met.
- April–June: If cumulative catch reaches 275 mt, then the trip limit is reduced to 15 mt; and if cumulative catches reach 350 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met.
- July–September: If cumulative catch reaches 300 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 375 mt, then the trip limit is reduced 2 mt for the remainder of the year or until the annual catch limit is met.
- October–December: If cumulative catch reaches 325 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 375 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met.

Pacific Bluefin Tuna Catch History

While Pacific bluefin tuna catch by U.S. commercial vessels fishing in the Convention Area exceeded 1,000 mt per year in the early 1990s, annual catches

have remained below 500 mt for more than a decade. Since 2010, catches have ranged from 1 to 487 mt with an annual average of 186 mt. Average annual Pacific bluefin tuna landings by U.S. commercial vessels fishing in the Convention Area from 2011 to 2015 represent only 1 percent of the average annual landings of Pacific bluefin tuna for all fleets fishing in the Convention Area. For information on Pacific bluefin tuna harvests in the Convention Area through 2019, see *http://isc.fra.go.jp/fisheries_statistics/index.html;* for preliminary information for 2020, see *http://www.iattc.org/CatchReportsDataENG.htm;* additionally, preliminary data in the Pacific Fisheries Information Network estimate 2020 catch to be approximately 210 mt.

Proposed Regulations for Pacific Bluefin Tuna for 2021

This proposed rule would establish catch and trip limits for U.S. commercial vessels that catch Pacific bluefin tuna in the Convention Area, and landing receipt submission deadlines for 2021. In 2021, the catch limit for the entire U.S. fleet would be 425 mt.

In 2021, NMFS would impose an initial trip limit of 20 mt. If cumulative catch reaches certain amounts depending on the quarter of the year, NMFS would impose an intermediate 15 mt trip limit, and a low 2 mt trip limit through the end of the year, or until the annual catch limit is met and the fishery is closed, as follows:

- January–March: If cumulative catch reaches 250 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 325 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met and the fishery is closed.
- April–June: If cumulative catch reaches 275 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 350 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met and the fishery is closed.
- July–September: If cumulative catch reaches 300 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 375 mt, then the trip limit is reduced 2 mt for the remainder of the year or until the annual catch limit is met and the fishery is closed.
- October–December: If cumulative catch reaches 325 mt, then the trip limit is reduced to 15 mt; and if cumulative catch reaches 375 mt, then the trip limit is reduced to 2 mt for the remainder of the year or until the annual catch limit is met and the fishery is closed.

Under California law and regulations, electronic landing receipts (*i.e.,* e-tickets) are required for landings in California and are required to be submitted to the California Department of Fish and Wildlife within three business days (see California Fish and Game Code section 8046 and 14 California Code of Regulations section 197). Under this proposed rule, e-tickets would be required to be submitted within 24 hours if any Pacific bluefin tuna is included in a landing into California. This accelerated submission deadline is required in order to better monitor catch limits.

NMFS would estimate when the overall catch is expected to reach the thresholds to reduce the trip limit (*i.e.,* from 20 mt to 15 mt, or from 15 mt to 2 mt) or the annual limit based on available fishery information, such as landing receipts. NMFS would then make decisions on inseason actions based on those estimates. NMFS would encourage owners or operators of purse seine vessels to call NMFS at 562–432–1850 in advance of landing with an estimate of how much Pacific bluefin tuna was caught on the trip.

Inseason Action Announcements

Inseason actions to reduce trip limits would be imposed by NMFS, effective upon the time and date that would appear in a notice on the NMFS website (*https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/pacific-bluefin-tuna-commercial-harvest-status*). Inseason actions would also be announced over a United States Coast Guard (USCG) Notice to Mariners broadcast three times per day for 4 days on USCG channel 16 VHF. NMFS would then publish a notice of the reduced trip limit in the **Federal Register** as soon as practicable.

In 2021, if NMFS determines that cumulative catch is expected to be 250 mt during January–March, 275 mt during April–June, 300 mt during July–September, or 325 mt during October–December (based on landing receipts, or other available information), a 15-mt trip limit would be imposed by NMFS using the inseason action procedures described above.

In 2021, if NMFS determines that cumulative catch is expected to be 325 mt during January–March, 350 mt during April–June, or 375 mt during July–December, a 2-mt trip limit would be imposed by NMFS using the inseason action procedures described above.

When NMFS determines that the annual catch limit is expected to be reached in 2021 (based on landings receipts or other available fishery information), NMFS would prohibit United States commercial fishing vessels from targeting, retaining, transshipping or landing Pacific bluefin tuna captured in the Convention Area for the remainder of the calendar year (*i.e.,* fishery closure). NMFS would provide a notice on the NMFS website and the USCG would provide a Notice to Mariners three times per day for 4 days on USCG channel 16 VHF announcing that targeting, retaining, transshipping or landing of Pacific bluefin tuna captured in the Convention Area will be prohibited on a specified effective time and date through the end of that calendar year. Upon that effective date, a commercial fishing vessel of the United States may not be used to target, retain on board, transship, or land Pacific bluefin tuna captured in the Convention Area. However, any Pacific bluefin tuna already on board a fishing vessel on the effective date could be retained on board, transshipped, and/or landed within 14 days of the effective date, to the extent authorized by applicable laws and regulations. NMFS would then publish a notice of the fishery closure in the **Federal Register** as soon as practicable. In the event the trip limit was reduced early or the fishery was closed due to an overestimation of catch, NMFS could reverse immediately the prior inseason action to increase the trip limit or re-open the fishery after landing receipts have been received and the landed catch quantity confirmed. NMFS would announce these actions on the NMFS website and by USCG Notice to Mariners on USCG channel 16 VHF.

Proposed Catch Reporting

NMFS would provide updates on Pacific bluefin tuna catches in the Convention Area to the public via the NMFS website: *https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/pacific-bluefin-tuna-commercial-harvest-status.* NMFS would update the NMFS website provided the updates do not disclose confidential information (in accordance with Magnuson-Stevens Fishery Conservation and Management Act section 402(b), 16 U.S.C. 1881a(b)). These updates are intended to help participants in the U.S. commercial fishery plan for reduced trip limits and attainment of the annual limits.

Classification

The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Tuna Conventions Act and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This proposed rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Under the Regulatory Flexibility Act (RFA), the SBA defines a ''small business'' (or ''small entity'') as one with annual revenue that meets or is below an established size standard. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of $11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for RFA compliance purposes only (80 FR 81194). The $11 million standard became effective on July 1, 2016, and is to be used in place of the U.S. SBA current standards of $20.5 million, $5.5 million, and $7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016. Id. at 81194.

The 85 small entities the proposed action would directly affect are all U.S. commercial fishing vessels that may target (*e.g.,* coastal pelagic purse seine vessels) or incidentally catch (*e.g.,* drift gillnet vessels) Pacific bluefin tuna in the Convention Area; however, not all vessels that have participated in this fishery decide to do so every year, with annual participation as low as 8 vessels. These vessels are characterized in greater detail below. U.S. commercial catch of Pacific bluefin tuna from the IATTC Convention Area is primarily made in waters off of California by the coastal pelagic small purse seine fleet, which targets Pacific bluefin tuna opportunistically, and other fleets (*e.g.,* California large-mesh drift gillnet, surface hook-and-line, west coast longline, and Hawaii's pelagic fisheries) that catch Pacific bluefin tuna in small quantities, such as incidentally.

Since 2006, the average annual revenue per vessel from all finfish fishing activities for the U.S. purse seine fleet that have landed Pacific bluefin tuna has been less than $11 million, whether considering an individual vessel or per vessel average. From 2015–2019, purse seine vessels that caught Pacific bluefin tuna had an average ex-vessel revenue of about $986,000 per vessel per year in inflation-adjusted 2019 dollars (based on all species landed). Annually, from 2015 to 2019, the number of small coastal pelagic purse seine vessels that landed Pacific bluefin tuna to the U.S. West Coast ranged from five to nine. Table 1 below summarizes the number of coastal purse seine vessels landing Pacific bluefin tuna in each year 2015–2019, along with total annual landings and revenues.

TABLE 1—NUMBER OF SMALL COASTAL PURSE SEINE VESSELS LANDING PACIFIC BLUEFIN TUNA TO THE U.S. WEST COAST, ALONG WITH ANNUAL LANDINGS AND REVENUES FROM PACIFIC BLUEFIN TUNA, 2015–2019

Year	Number of vessels	Landings (mt)	Ex-vessel revenue
2015	5	86.4	$74,806
2016	5	315.7	351,767
2017	8	466.4	516,135
2018	8	11.5	11,378
2019	9	226.1	258,937

Note: Landings and ex-vessel revenue are for all small coastal purse seine vessels that landed Pacific bluefin tuna in the year. Source Pacific Fisheries Information Network.

The revenue derived from Pacific bluefin tuna is 2.4 percent of the overall revenue for coastal pelagic purse seine vessels that landed Pacific bluefin tuna (annually from 2015–2019), with the majority of revenue in recent years from Pacific sardine, market squid, and to a lesser extent yellowfin tuna. Since implementing a 25 mt trip limit (*i.e.,* since 2015), average catch was 11.2 mt per trip. 35 of 96 trips (*i.e.,* 36 percent) conducted by purse seine vessels landing Pacific bluefin tuna from 2015–2019 exceeded 15 mt. Vessels meeting the trip limit before completion of a trip or fishing after the trip limit is reduced to 2 mt will likely shift their focus and target other species, such as yellowfin tuna, if available, or coastal pelagic species. This rule is not expected to impose any direct regulatory costs on pelagic purse seine vessels, although vessels would face indirect operational costs if they approach the trip limits or the total catch approaches the annual limit. Because this rule is expected to affect about one third of trips of a fishery that accounts for about 2 percent of annual revenues, there is not expected to be a significant negative impact to profitability. Revenues and costs, and corresponding profitability, of coastal purse seine vessels are not expected to be significantly altered as a result of this rule, which is applicable to 2021 only.

Since 2006, the average annual revenue per vessel from all finfish fishing activities for the U.S. fleet with landings of Pacific bluefin tuna in small quantities, such as from incidental catch or hook-and-line, has been less than $11 million. These vessels include drift gillnet, surface hook-and-line, and longline gear-types. The revenues of these vessels are also not expected to be significantly altered by the rule. From 2015 to 2019, between 7 and 14 drift gillnet vessels, 40 to 80 surface hook-and-line vessels, and 1 longline vessel landed Pacific bluefin tuna. During these years, vessels with gears other than purse seine landed an annual average of 35.2 mt of Pacific bluefin tuna, worth approximately $290,735. Of these landings, only two trips out of approximately 1,450 over 5 years exceeded 2 mt of incidental Pacific bluefin tuna catch, and three additional trips were within 25 percent of the limit. The four vessels who took these five trips close to or in excess of the 2 mt limit would be most likely to be impacted by this rule; however, these trips represented less than 1 percent of these vessels' average annual revenue from all species. As a result, it is anticipated that proposed reduced trip limits will not have a significant impact on these vessels. If the fishery is closed before the end of the calendar year, regulatory discards by these fleets are likely. Such a scenario would result in a greater impact to the fleet that catches Pacific bluefin tuna in small quantities, as opposed to the coastal purse seine fleet, which would simply cease targeting of Pacific bluefin tuna. This

could result in a greater conservation benefit for the overfished Pacific bluefin stock.

Although there are no disproportionate impacts between small and large business entities because all affected business entities are small, the impacts among the different types of vessel business entities will be different. Implementation of the reduced trip limit for an entire calendar year in this proposed action would impose a greater economic impact on the U.S. coastal purse seine fleet. Prior to the implementation of a 25-mt trip limit in 2015, these vessels landed an average of 41 mt per trip, and were capable of landing over 70 mt in a single trip (based on landings from purse seine vessels landing Pacific bluefin tuna in the EPO from 2011–2014). It is possible that the affected vessels will not target Pacific bluefin tuna if the trip limit is 2 mt or less; however, as observed in 2018 while the trip limit was restricted to 1 mt for purse seine vessels, some purse seine vessels did land Pacific bluefin tuna in small quantities. A total of 425 mt is available to U.S. vessels in 2021.

Pursuant to the RFA and NMFS' December 29, 2015, final rule (80 FR 81194), this certification was developed using NMFS' revised size standards. NMFS considers all entities subject to this action, which based on recent participation ranges from 8 to 85 because participation fluctuates substantially from year-to-year, to be small entities as defined by both the former, lower size standards and the revised size standards. Because each affected vessel is a small business, there are no disproportional affects to small versus large entities. Based on profitability analysis above, the proposed action, if adopted, will not have significant adverse economic impacts on these small business entities. As a result, an initial regulatory flexibility analysis is not required and was not prepared for this proposed rule.

This proposed rule contains revisions to a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). These revisions have been submitted to OMB for approval. This rule revises the existing requirements for the collection of information 0648–0778 by removing the pre-trip notification requirement. This reduces the number of respondents and anticipated number of responses, reducing the burden by an estimated 4.55 hours. Public reporting burden for e-ticket submission is estimated to average 0 hours because the submission will already be required by the California Code of Regulations. The voluntary pre-landing notification is estimated to average 2.55 hours, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: Whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; 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, including through the use of automated collection techniques or other forms of information technology. Submit comments on these or any other aspects of the collection of information at *www.reginfo.gov/public/do/PRAMain.*

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

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: December 28, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 300 is proposed to be amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart C—Eastern Pacific Tuna Fisheries

■ 1. The authority citation for part 300, subpart C, continues to read as follows:

Authority: 16 U.S.C. 951 *et seq.*

■ 2. In § 300.24, revise paragraph (u) to read as follows:

§ 300.24 Prohibitions.

* * * * *

(u) Use a United States commercial fishing vessel in the Convention Area to target, retain on board, transship, or land Pacific bluefin tuna in contravention of § 300.25(g)(2) through (4) and (g)(7).

* * * * *

■ 3. In § 300.25, revise paragraph (g) to read as follows:

§ 300.25 Fisheries management.

* * * * *

(g) *Pacific bluefin tuna (Thunnus orientalis) commercial catch limits in the eastern Pacific Ocean for 2021.* The following is applicable to the U.S. commercial fishery for Pacific bluefin tuna in the Convention Area in the year 2021.

(1) All commercial fishing vessels of the United States combined may capture, retain, transship, or land no more than 425 metric tons.

(2) A 20-metric ton trip limit will be in effect until any of the following criteria are met:

(i) If NMFS anticipates cumulative catch will reach 250 metric tons during January through March, a 15-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section. If NMFS anticipates cumulative catch will reach 325 metric tons during January through March, a 2-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section.

(ii) If NMFS anticipates cumulative catch will reach 275 metric tons during April through June, a 15-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section. If NMFS anticipates cumulative catch will reach 350 metric tons during April through June, a 2-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section.

(iii) If NMFS anticipates cumulative catch will reach 300 metric tons during July through September, a 15-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section. If NMFS anticipates cumulative catch will reach 375 metric tons during July through September, a 2-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section.

(iv) If NMFS anticipates cumulative catch will reach 325 metric tons during October through December, a 15-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section. If NMFS anticipates cumulative catch will reach 375 metric tons during October through

December, a 2-metric ton trip limit will be in effect upon the effective date provided in the actual notice, in accordance with paragraph (g)(6) of this section.

(3) After NMFS determines that the catch limit under paragraph (g)(1) of this section is expected to be reached, NMFS will close the fishery effective upon the date provided in the actual notice, in accordance with paragraph (g)(6) of this section. Upon the effective date in the actual notice, targeting, retaining on board, transshipping, or landing Pacific bluefin tuna captured in the Convention Area shall be prohibited as described in paragraph (g)(4) of this section.

(4) Beginning on the date provided in the actual notice of the fishing closure announced under paragraph (g)(3) of this section, a commercial fishing vessel of the United States may not be used to target, retain on board, transship, or land Pacific bluefin tuna captured in the Convention Area through the end of the calendar year. Any Pacific bluefin tuna already on board a fishing vessel on the effective date of the notice may be retained on board, transshipped, and/or landed within 14 days after the effective date published in the fishing closure notice, to the extent authorized by applicable laws and regulations.

(5) If an inseason action taken under paragraph (g)(2), (3), or (4) of this section is based on overestimate of actual catch, NMFS will reverse that action in the timeliest possible manner, provided NMFS finds that reversing that action is consistent with the management objectives for the affected species. The fishery will reopen effective on the date provided in the actual notice in accordance with paragraph (g)(6) of this section.

(6) Inseason actions taken under paragraphs (g)(2), (3), (4), and (5) of this section will be by actual notice from posting on the National Marine Fisheries website (*https://www.fisheries.noaa.gov/west-coast/sustainable-fisheries/pacific-bluefin-tuna-commercial-harvest-status*) and a United States Coast Guard Notice to Mariners. The Notice to Mariners will be broadcast three times daily for 4 days. This action will also be published in the **Federal Register** as soon as practicable. Inseason actions will be effective from the time specified in the actual notice of the action (*i.e.,* website posting and United States Coast Guard Notice to Mariners), or at the time the inseason action published in the **Federal Register** is effective, whichever comes first.

(7) If landing Pacific bluefin tuna into the State of California, fish landing receipts must be submitted to the California Department of Fish and Wildlife in accordance with the requirements of applicable State law and regulations, with the exception that the submission must occur within 24 hours of landing.

[FR Doc. 2020–28999 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 86, No. 2
Tuesday, January 5, 2021

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.

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the New York Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the New York Advisory Committee (Committee) will hold a meeting via WebEx on Friday, January 15, 2021 from 1:00–2:15 p.m. EST for the purpose of discussing the Committee's project and upcoming briefings on eviction policies and enforcement in New York.

DATES: The meeting will be held on Friday, January 15, 2021 from 1:00 p.m.–2:15 p.m. EST.

- *To join by web conference: https://tinyurl.com/ybmnp7s4.*
- *To join by phone only, dial:* 1–800–360–9505; Access code: 199 602 9139.

FOR FURTHER INFORMATION CONTACT: Mallory Trachtenberg, DFO, at *mtrachtenberg@usccr.gov* or 202–809–9618.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference operator will ask callers to identify themselves, the organizations they are affiliated with (if any), and an email address prior to placing callers into the conference call. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Mallory Trachtenberg at *mtrachtenberg@usccr.gov* in the Regional Programs Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Program Unit at 202–809–9618.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *https://www.facadatabase.gov/FACA/apex/FACAPublicCommittee?id=a10t0000001gzmAAAQ* under the Commission on Civil Rights, New York Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or phone number.

Agenda

I. Welcome and Roll Call
II. Announcements and Updates
III. Approval of Minutes
IV. Discussion: Committee's Project on Eviction Policy and Enforcement in New York
V. Public Comment
VI. Review Next Steps
VII. Adjournment

Dated: December 30, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–29185 Filed 1–4–21; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Georgia Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Georgia Advisory Committee (Committee) will hold a meeting via web conference on Monday, January 25, 2021, at 1:00 p.m. Eastern Time for the purpose of discussing next steps in their study of civil asset forfeiture in Georgia.

DATES: The meeting will be held on Monday, January 25, 2021 at 1:00 p.m. Eastern Time.

Public Call Information:
Register online: https://bit.ly/2Jrry2b.
Join by phone:

- 800–360–9505 USA Toll Free
- Access code: 199 118 1292

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 202–618–4158.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind, or hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov* in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Programs Unit Office at 202–618–4158.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they

become available, both before and after the meeting. Records of the meeting will be available via *facadatabase.gov* under the Commission on Civil Rights, Georgia Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or phone number.

Agenda

Welcome and Roll Call
Discussion: Civil Rights in Georgia (Civil Asset Forfeiture)
Public Comment
Adjournment

Dated: December 30, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–29189 Filed 1–4–21; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Michigan Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meetings.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Michigan Advisory Committee (Committee) will continue a series of web-based meetings to hear testimony on the impact of the COVID–19 pandemic on voting rights in the state. The Committee heard its first panel of testimony on this topic during a meeting on September 12, 2020. The Committee's report based on its first panel of testimony is available here: *https://www.usccr.gov/files/2020-11-10-preelection-memo-COVID19-voting-rights.pdf.*

DATES:

Public Access Information

- Panel II: Monday, February 8, 2021 at 2:00 p.m. Eastern Time
  - Register online (audio/visual): *https://bit.ly/3aNT2dr*
  - Telephone (audio only): Dial 800–360–9505; Access code: 199 726 1846
- Panel III: Wednesday February 17, 2021 at 12:00 p.m. Eastern Time
  - Register online (audio/visual): *https://bit.ly/37V0Ecr*
  - Telephone (audio only) Dial: 800–360–9505; Access code: 199 107 7284

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 202–618–4158.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the above listed toll-free number or online through the above registration link. An open comment period will be provided to allow members of the public to make a statement as time allows. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Individuals who are deaf, deafblind, or hard of hearing may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to Melissa Wojnaroski at *mwojnaroski@usccr.gov* in the Regional Program Unit Office/Advisory Committee Management Unit. Persons who desire additional information may contact the Regional Programs Unit Office at 202–618–4158.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Unit Office, as they become available, both before and after the meeting. Records of the meeting will be available via *https://www.facadatabase.gov/FACA/FACAPublicViewCommitteeDetails?id=a10t0000001gzjPAAQ* under the Commission on Civil Rights, Michigan Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Unit office at the above email or phone number.

Agenda

Welcome and Roll Call
Discussion: COVID–19 & Voting Rights in Michigan
Public Comment
Adjournment

Dated: December 30, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–29187 Filed 1–4–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–231–2020]

Foreign-Trade Zone 262—Southaven, Mississippi, Application for Subzone, Baxter Healthcare Corporation, Byhalia, Mississippi

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by Northern Mississippi FTZ, Inc., grantee of FTZ 262, requesting subzone status for the facility of Baxter Healthcare Corporation, located in Byhalia, Mississippi. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on December 29, 2020.

The proposed subzone (57.2 acres) is located at 629 Mount Carmel Road, Byhalia, Marshall County, Mississippi. No authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 262.

In accordance with the FTZ Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is February 16, 2021. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to March 1, 2021.

A copy of the application will be available for public inspection in the ''Reading Room'' section of the FTZ Board's website, which is accessible via *www.trade.gov/ftz.*

For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: December 29, 2020.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2020–29177 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–878, A–580–881, C–580–879, C–580–882]

Certain Cold-Rolled Steel Flat Products and Certain Corrosion-Resistant Steel Products From the Republic of Korea: Preliminary Results of Antidumping Duty and Countervailing Duty Changed Circumstances Reviews

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that KG Dongbu Steel Co., Ltd. (KG Dongbu Steel) is the successor in interest to Dongbu Steel Co., Ltd. (Dongbu Steel) and Dongbu Incheon Steel Co., Ltd. (Dongbu Incheon) for purposes of determining antidumping duty (AD) cash deposits and liabilities pursuant to the AD orders on certain cold-rolled steel flat products (cold-rolled steel) and certain corrosion-resistant steel products (CORE) from the Republic of Korea (Korea). Additionally, Commerce preliminarily determines that KG Dongbu Steel is not the successor in interest to Dongbu Steel and Dongbu Incheon for purposes of countervailing duty (CVD) cash deposits and liabilities pursuant to the CVD orders on cold-rolled steel and CORE, because there was a significant change in ownership and operations that could have affected the nature and extent of the countervailable subsidies attributable to KG Dongbu Steel. Interested parties are invited to comment on these preliminary results.

DATES: Applicable January 5, 2021.

FOR FURTHER INFORMATION CONTACT: Joshua A. DeMoss, 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) 482–3362.

SUPPLEMENTARY INFORMATION:

Background

On April 13, 2020, KG Dongbu Steel informed Commerce that effective September 1, 2019, KG Steel Co., Ltd. (KG Steel) purchased a substantial portion of Dongbu Steel's shares and, as a result, became the major shareholder of Dongbu Steel.[1] On March 2, 2020, Dongbu Steel publicly announced its merger with its wholly-owned subsidiary Dongbu Incheon after Dongbu Steel's Board of Directors had approved the merger.[2] Further, on March 27, 2020, Dongbu Steel received shareholder approval for the newly-merged Dongbu Steel to change its name to KG Dongbu Steel.[3] As such, KG Dongbu Steel requested that Commerce conduct changed circumstances reviews (CCRs) and find that KG Dongbu Steel is the successor in interest to Dongbu Steel and Dongbu Incheon, and that it be subject to cash deposit requirements at the AD margins and CVD rates currently in effect for entries of cold-rolled steel and CORE by Dongbu Steel and Dongbu Incheon, pursuant to section 751(b) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.216(b). We did not receive comments from other interested parties concerning these requests.

On June 4, 2020, Commerce initiated the CCRs of the AD and CVD orders on cold-rolled steel and CORE from Korea. On June 12, 2020, Commerce requested more information from KG Dongbu Steel regarding the ''look-back window'' for purposes of the CVD CCRs,[4] and on June 30, 2020, KG Dongbu Steel filed its response.[5] For a complete description of the successor-in-interest analysis, *see* the Preliminary Decision Memorandum.[6] A list of topics addressed in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *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 Orders

The products covered by these CCRs are certain cold-rolled steel products (cold-rolled steel) and certain corrosion-resistant steel products (CORE) from Korea. For full descriptions of the scope of the orders, *see* the Preliminary Decision Memorandum.

Preliminary Results of Changed Circumstances Reviews

In accordance with 19 CFR 351.216, we preliminarily determine that KG Dongbu Steel is the successor in interest to Dongbu Steel and Dongbu Incheon for purposes of the AD orders on cold-rolled steel and CORE. Record evidence, as submitted by KG Dongbu Steel, indicates that, based on the totality of the circumstances under Commerce's successor-in-interest criteria, KG Dongbu Steel's operations are not materially dissimilar to those of Dongbu Steel and Dongbu Incheon before the acquisition and name change with respect to the merchandise under review, for purposes of the AD CCRs. Moreover, we preliminarily find that KG Dongbu Steel's production facilities, supplier relationships, and customer base with regard to the merchandise subject to the AD orders are substantially the same as Dongbu Steel's and Dongbu Incheon's before the acquisition and name change.

However, with respect to the CVD CCRs, we preliminarily find that there is evidence of significant changes in ownership during the ''look-back window'' that could have affected the nature and extent of the countervailable subsidies attributable to the successor entity vs. the predecessor entity. These changes in management and ownership would likely have affected subsidization of the companies. An examination of the actual amount and rate of countervailable subsidies attributable to KG Dongbu Steel subsidy, therefore, would be more appropriate in the context of an administrative review.

Therefore, based on record evidence, we preliminarily determine that it is appropriate to apply to KG Dongbu Steel AD cash deposits requirements and liabilities at the rates currently in effect for Dongbu Steel/Dongbu Incheon. For CVD purposes, we preliminarily determine that changes in ownership and management were significant, and thus preliminarily determine that it is not appropriate to apply to KG Dongbu Steel the CVD cash deposit requirements and liabilities currently in effect for Dongbu Steel/Dongbu Incheon. For additional details regarding the

[1] *See* KG Dongbu Steel's Letter, ''Request for Changed Circumstances Review: Change of Name for Dongbu Steel Co., Ltd. and Dongbu Incheon Steel Co., Ltd.,'' dated April 13, 2020.

[2] *Id.* at 2.

[3] *Id.*

[4] *See* Commerce's Letter, ''Countervailing Duty Changed Circumstances Reviews of Cold-Rolled Steel and Corrosion Resistant Steel (CORE) from the Republic of Korea,'' dated June 12, 2020.

[5] *See* KG Dongbu Steel's Letter, ''Certain Corrosion Resistant Steel Products and Cold-Rolled Steel Products from the Republic of Korea Changed Circumstance Review, Case Nos. C–580–879 and C–580–882: First Supplemental Questionnaire Response,'' dated June 30, 2020.

[6] *See* Memorandum, ''Preliminary Results of the Changed Circumstances Reviews Regarding Successor-In-Interest Analysis: Antidumping Duty Orders and Countervailing Duty Orders on Certain Cold-rolled Steel Flat Products and Certain Corrosion-resistant Steel Products from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

preliminary successor-in-interest analysis, *see* the Preliminary Decision Memorandum.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of such case briefs and written comments at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[7] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Consistent with 19 CFR 351.216(e), we will intend to issue the final results of this changed circumstances review no later than 270 days after the date on which this review was initiated, or within 45 days if all parties agree to our preliminary finding.

Notification to Interested Parties

This notice is published in accordance with sections 751(b)(1) and 777(i)(1) of the Act and 19 CFR 351.216(b), 351.221(b) and 351.221(c)(3).

Dated: December 29, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Orders
IV. Successor-In-Interest Determination
V. Recommendation

[FR Doc. 2020–29178 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Review

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

SUPPLEMENTARY INFORMATION:

Background

Every five years, pursuant to the Tariff Act of 1930, as amended (the Act), the Department of Commerce (Commerce) and the International Trade Commission automatically initiate and conduct reviews to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for February 2021

Pursuant to section 751(c) of the Act, the following Sunset Reviews are scheduled for initiation in February 2021 and will appear in that month's *Notice of Initiation of Five-Year Sunset Reviews* (Sunset Review).

	Department contact
Antidumping Duty Proceedings	
Uncoated Paper from Australia, A–602–807 (1st Review)	Mary Kolberg, (202) 482–1785.
Uncoated Paper from Brazil, A–351–842 (1st Review)	Mary Kolberg, (202) 482–1785.
Floor-Standing, Metal-Top Ironing Tables and Parts Thereof from China, (A–570–888) (3rd Review)	Jacqueline Arrowsmith, (202) 482–5255.
Potassium Permanganate from China, (A–570–001) (5th Review)	Thomas Martin, (202) 482–3936.
Seamless Carbon and Alloy Steel Standard, Line And Pressure Pipe from China, (A–570–956) (2nd Review).	Thomas Martin, (202) 482–3936.
Uncoated Paper from China, (A–570–022) (1st Review)	Mary Kolberg, (202) 482–1785.
Uncoated Paper from Indonesia, (A–560–828) (1st Review)	Mary Kolberg, (202) 482–1785.
Uncoated Paper from Portugal, (A–471–807) (1st Review)	Mary Kolberg, (202) 482–1785.
Countervailing Duty Proceedings	
Uncoated Paper from China (C–570–023) (1st Review)	Mary Kolberg, (202) 482–1785.
Seamless Carbon and Alloy Steel Standard, Line And Pressure Pipe from China (C–570–957) (2nd Review).	Mary Kolberg, (202) 482–1785.
Uncoated Paper from Indonesia (C–560–829) (1st Review)	Mary Kolberg, (202) 482–1785.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in February 2021.

Commerce's procedures for the conduct of Sunset Review are set forth in 19 CFR 351.218. The *Notice of Initiation of Five-Year (Sunset) Review* provides further information regarding what is required of all parties to participate in Sunset Review.

Pursuant to 19 CFR 351.103(c), Commerce will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition

[7] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

as interested parties to a proceeding contact Commerce in writing within 10 days of the publication of the Notice of Initiation.

Please note that if Commerce receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue.

Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation. Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information, until further notice.[1]

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 18, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–29121 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–807]

Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Amended Final Results of Antidumping Duty Administrative Review; 2017–2018

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 circular welded carbon-quality steel pipe (CWP) from the United Arab Emirates (UAE) to correct a ministerial error.

DATES: Applicable January 5, 2021.

FOR FURTHER INFORMATION CONTACT: Benjamin Luberda, AD/CVD Operations, Office II, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2185.

SUPPLEMENTARY INFORMATION:

Background

On December 1, 2020, Commerce published the *Final Results* of the 2017–2018 administrative review of CWP from the UAE in the **Federal Register**.[1] On November 30, 2020, Universal Tube and Plastic Industries, Ltd., KHK Scaffolding and Framework LLC, and THL Pipe and Tube Industries LLC (collectively, Universal), one of two companies selected for individual examination in this administrative review, alleged the existence of a ministerial error in Commerce's *Final Results.*[2]

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.'' [3] 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

Commerce committed an inadvertent error within the meaning of section 751(h) of the Act and 19 CFR 351.224(f) by incorrectly calculating Universal's home market commissions. Accordingly, we determine, in accordance with section 751(h) of the Act and 19 CFR 351.224(f), that we made a ministerial error in the *Final Results.* Pursuant to 19 CFR 351.224(e), we are amending the *Final Results* to correct this error. This correction results in a change to Universal's weighted-average dumping margin and also changes the rate calculated for the non-individually-examined companies. For a detailed discussion of the ministerial error allegation, as well as Commerce's analysis, *see* Ministerial Error Memorandum.[4]

Correction

Subsequent to the publication of the notice in the **Federal Register**, we identified an inadvertent error in the *Final Results* in addition to the one alleged by Universal. Specifically, Commerce inadvertently referenced the review-specific rate of 3.14 percent as the all-others rate in the cash deposit section of the notice. However, the all-others rate, established in the investigation, is 5.95 percent.[5] The corrected cash deposit section of the notice is below.

Amended Final Results of the Review

We are assigning the following weighted-average dumping margins to the firms listed below for the period December 1, 2017 through November 30, 2018:

Producers/exporters	Weighted-average dumping margin (percent)
Conares Metal Supply Ltd	2.49
Universal Tube and Plastic Industries, Ltd./THL Tube and Pipe Industries LLC/KHK Scaffolding and Framework LLC [8]	3.63
Review-Specific Average Rate Applicable to the Following Companies: [6]	
Abu Dhabi Metal Pipes and Profiles Industries Complex	3.06
Ajmal Steel Tubes & Pipes Ind. L.L.C./Noble Steel Industries L.L.C. [7]	3.06
Al Mansoori Industrial Supply	3.06
Baker Hughes EHO Ltd	3.06
BioAir Solutions LLC	3.06

[1] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020).

[1] *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2017–2018,* 85 FR 77159 (December 1, 2020) (*Final Results*), and accompanying Issues and Decision Memorandum.

[2] *See* Universal's Letter, ''Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates—Ministerial Error Comments,'' dated November 30, 2020.

[3] *See* 19 CFR 351.224(f).

[4] *See* Memorandum, ''Less-Than-Fair-Value Administrative Review of Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Allegation of Ministerial Errors in the Final Determination,'' dated concurrently with this notice (Ministerial Error Memorandum).

[5] *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 81 FR 91906, 91908 (December 19, 2016).

Producers/exporters	Weighted-average dumping margin (percent)
Bridgeway Shipping & Clearing Services, LLC	3.06
Ferrofab FTZ	3.06
Ferrolab LLC	3.06
Global Steel Industries	3.06
Halima Pipe Co., Ltd	3.06
K.D. Industries Inc	3.06
Lamprell	3.06
Link Middle East Ltd	3.06
Noble Marine Metals Co., W.L.L	3.06
PSL FZE	3.06
Reyah Metal Trading FZE	3.06
Three Star Metal Ind LLC	3.06
Tiger Steel Industries LLC	3.06

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 has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the amended final results of this review.

Pursuant to 19 CFR 351.212(b)(1), because Conares Metal Supply Ltd and Universal reported the entered value of their U.S. sales, we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of the sales for which entered value was reported. Where an importer-specific rate is zero or *de minimis* within the meaning of 19 CFR 351.106(c)(1), we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

For the companies which were not selected for individual review, we will assign an assessment rate based on the average [8] of the cash deposit rates calculated for Conares Metal Supply Ltd and Universal. The amended final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the amended final results of this review and for future deposits of estimated duties, where applicable.[9]

Commerce's ''automatic assessment'' practice will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.

We intend to issue liquidation instructions for Universal and the companies covered by the non-reviewed companies' rate to CBP 15 days after publication of these amended final results of this administrative review.

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after December 1, 2020, the date of publication date of the *Final Results* of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each specific company listed above will be that established in the amended final results; (2) for previously reviewed or investigated companies, including those for which Commerce may have determined had no shipments during the POR, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this or an earlier review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the manufacturer of the merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered in this or any previously completed segment of this proceeding, then the cash deposit rate will be the all-others rate of 5.95 percent established in the LTFV investigation.[10] These 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.

Administrative Protective Order

This notice serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance

[6] This rate is based on the simple average of the margins calculated for those companies selected for individual review. Because we cannot apply our normal methodology of calculating a weighted-average margin due to requests to protect business proprietary information, we find this rate to be the best proxy of the actual weighted-average margin determined for the mandatory respondents. *See Ball Bearings and Parts Thereof from France, et al.: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010).

[7] We collapsed Ajmal Steel Tubes and Pipes Ind. L.L.C. and Noble Steel Industries L.L.C. together in the final results of the 2016–2017 administrative review. *See Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2016–2017,* 84 FR 44845 (August 27, 2019).

[8] This rate was calculated as discussed in a n.6, *supra.*

[9] *See* section 751(a)(2)(C) of the Act.

[10] *See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, Pakistan, and the United Arab Emirates: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 81 FR 91906 (December 19, 2016).

with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of 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

This amended notice is issued and published in accordance with sections 751(h) and 777(i) of the Act.

Dated: December 28, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2020–29180 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

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

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, Office of AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–4735.

SUPPLEMENTARY INFORMATION:

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (the Act), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (Commerce) conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event Commerce limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, Commerce intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. Commerce invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event Commerce decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, Commerce finds that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, Commerce will not conduct collapsing analyses at the respondent selection phase of a review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to a review, if Commerce determined, or continued to treat, that company as collapsed with others, Commerce will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, Commerce will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete a Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of a proceeding where Commerce considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that requests a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that Commerce may extend this time if it is reasonable to do so. Determinations by Commerce to extend the 90-day deadline will be made on a case-by-case basis.

Deadline for Particular Market Situation Allegation

Section 504 of the Trade Preferences Extension Act of 2015 amended the Act by adding the concept of particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[1] Section 773(e) of the Act states that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested party submits a PMS allegation pursuant to section 773(e) of the Act, Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a PMS exists under section 773(e) of the Act, then it will modify its dumping calculations appropriately.

Neither section 773(e) of the Act nor 19 CFR 351.301(c)(2)(v) set a deadline for the submission of PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of initial Section D responses.

[1] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

Opportunity To Request a Review: Not later than the last day of January 2021,[2] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in January for the following periods:

	Period to be reviewed
Antidumping Duty Proceedings	
BELARUS: Carbon and Alloy Steel Wire Rod, A–822–806	1/1/20–12/31/20
BRAZIL: Prestressed Concrete Steel Wire Stand, A–351–837	1/1/20–12/31/20
CANADA: Softwood Lumber, A–122–857	1/1/20–12/31/20
INDIA:	
Prestressed Concrete Steel Wire Strand, A–533–828	1/1/20–12/31/20
Polyester Textured Yarn, A–533–885	7/1/19–12/31/20
MEXICO: Prestressed Concrete Steel Wire Strand, A–201–831	1/1/20–12/31/20
REPUBLIC OF KOREA: Prestressed Concrete Steel Wire Strand, A–580–852	1/1/20–12/31/20
RUSSIA: Carbon and Alloy Steel Wire Strand, A–821–824	1/1/20–12/31/20
SOUTH AFRICA: Ferrovanadium, A–791–815	1/1/20–12/31/20
THAILAND: Prestressed Concrete Steel Wire Strand, A–549–820	1/1/20–12/31/20
THE PEOPLE'S REPUBLIC OF CHINA:	
Calcium Hypochlorite, A–570–008	1/1/20–12/31/20
Carbon and Certain Alloy Steel Wire Rod, A–570–012	1/1/20–12/31/20
Certain Crepe Paper Products, A–570–895	1/1/20–12/31/20
Ferrovanadium, A–570–873	1/1/20–12/31/20
Folding Gift Boxes, A–570–866	1/1/20–12/31/20
Certain Hardwood Plywood Products, A–570–051	1/1/20–12/31/20
Polyester Textured Yarn, A–570–097	7/1/19–12/31/20
Potassium Permanganate, A–570–001	1/1/20–12/31/20
Wooden Bedroom Furniture, A–570–890	1/1/20–12/31/20
UNITED ARAB EMIRATES: Carbon and Alloy Steel Wire Rod, A–520–808	1/1/20–12/31/20
Countervailing Duty Proceedings	
ARGENTINA: Biodiesel, C–357–821	1/1/20–12/31/20
CANADA: Softwood Lumber, C–122–858	1/1/20–12/31/20
INDIA: Polyester Textured Yarn, C–533–886	5/3/19–12/31/20
INDONESIA: Biodiesel, C–560–831	1/1/20–12/31/20
THE PEOPLE'S REPUBLIC OF CHINA:	
Calcium Hypochlorite, C–570–009	1/1/20–12/31/20
Carbon and Certain Alloy Steel Wire Rod, C–570–013	1/1/20–12/31/20
Circular Welded Carbon Quality Steel Line Pipe, C–570–936	1/1/20–12/31/20
Certain Hardwood Plywood Products, C–570–052	1/1/20–12/31/20
Oil Country Tubular Goods, C–570–944	1/1/20–12/31/20
Polyester Textured Yarn, C–570–098	5/3/19–12/31/20
Certain Tool Chests and Cabinets, C–570–057	1/1/20–12/31/20
Suspension Agreements	
RUSSIA: Certain Cut-To-Length Carbon Steel Plate, A–821–808	1/1/20–12/31/20

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters. If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which was produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Note that, for any party Commerce was unable to locate in prior segments, Commerce will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), and *Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011), Commerce clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where

[2] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when Commerce is closed.

intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders.[3]

Commerce no longer considers the non-market economy (NME) entity as an exporter conditionally subject to an antidumping duty administrative reviews.[4] Accordingly, the NME entity will not be under review unless Commerce specifically receives a request for, or self-initiates, a review of the NME entity.[5] In administrative reviews of antidumping duty orders on merchandise from NME countries where a review of the NME entity has not been initiated, but where an individual exporter for which a review was initiated does not qualify for a separate rate, Commerce will issue a final decision indicating that the company in question is part of the NME entity. However, in that situation, because no review of the NME entity was conducted, the NME entity's entries were not subject to the review and the rate for the NME entity is not subject to change as a result of that review (although the rate for the individual exporter may change as a function of the finding that the exporter is part of the NME entity). Following initiation of an antidumping administrative review when there is no review requested of the NME entity, Commerce will instruct CBP to liquidate entries for all exporters not named in the initiation notice, including those that were suspended at the NME entity rate.

All requests must be filed electronically in Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) on Enforcement and Compliance's ACCESS website at *https://access.trade.gov*.[6] Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[7]

Commerce will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of January 2021. If Commerce does not receive, by the last day of January 2021, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, Commerce will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: December 17, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–29122 Filed 1–4–21; 8:45 am]

BILLING CODE 3510–DS–P

[3] *See* the Enforcement and Compliance website at *https://legacy.trade.gov/enforcement/*.

[4] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963 (November 4, 2013).

[5] In accordance with 19 CFR 351.213(b)(1), parties should specify that they are requesting a review of entries from exporters comprising the entity, and to the extent possible, include the names of such exporters in their request.

[6] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[7] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 41363 (July 10, 2020).

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0166]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Family Educational Rights and Privacy Act (FERPA) Regulatory Requirements

AGENCY: Office of Management (OM), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved information collection.

DATES: Interested persons are invited to submit comments on or before February 4, 2021.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Dale King, 202–453–5934.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Family Educational Rights and Privacy Act (FERPA) Regulatory Requirements.

OMB Control Number: 1880–0543.

Type of Review: An extension without change of a currently approved information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 20,293,021.

Total Estimated Number of Annual Burden Hours: 1,914,593.

Abstract: The Family Educational Rights and Privacy Act (FERPA) requires that subject educational agencies and institutions notify parents and students of their rights under FERPA and requires that they record disclosures of personally identifiable information from education records, with certain exceptions.

Dated: December 29, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–29152 Filed 1–4–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Nevada

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open virtual meeting.

SUMMARY: This notice announces an online virtual meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Nevada. The Federal Advisory Committee Act requires that public notice of this online virtual meeting be announced in the **Federal Register**.

DATES: Wednesday, January 20, 2021; 4:00 p.m.–7:30 p.m.

ADDRESSES: Online Virtual Meeting. To attend, please send an email to: *nssab@emcbc.doe.gov* by no later than 4:00 p.m. PST on Monday, January 18, 2021.

To Submit Public Comments: Public comments will be accepted via email prior to and after the meeting. Comments received by no later than 4:00 p.m. PST on Monday, January 18, 2021, will be read aloud during the virtual meeting. Comments will also be accepted after the meeting, by no later than 4:00 p.m. PST on Friday, February 5, 2021. Please submit comments to *nssab@emcbc.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Barbara Ulmer, Nevada Site Specific Advisory Board (NSSAB) Administrator, by Phone: (702) 523–0894 or Email: *nssab@emcbc.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

1. Follow-up and Recommendation Development for NSSAB Long-term Strategy Briefing—Work Plan Item #4
2. Communication Plan for Pahute Mesa Groundwater Sampling Results Briefing and Path Forward—Work Plan Item #6
3. Election of Vice-Chair
4. Development of EM SSAB Charges

Public Participation: The online virtual meeting is open to the public. Written statements may be filed with the Board either before or after the meeting as there will not be opportunities for live public comment during this online virtual meeting. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should email them as directed above.

Minutes: Minutes will be available by writing or calling Barbara Ulmer, NSSAB Administrator, U.S. Department of Energy, EM Nevada Program, 100 North City Parkway, Suite 1750, Las Vegas, NV 89106; Phone: (702) 523–0894. Minutes will also be available at the following website: *http://www.nnss.gov/NSSAB/pages/MM_FY21.html.*

Signed in Washington, DC, on December 30, 2020.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2020–29162 Filed 1–4–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1585–018; ER10–1594–018; ER16–733–009; ER10–1617–018; ER10–1619–006; ER19–2908–001; ER16–1148–009; ER10–1625–008; ER12–60–020; ER10–1632–020; ER10–1628–018.

Applicants: Alabama Electric Marketing, LLC, California Electric Marketing, LLC, LQA, LLC, New Mexico Electric Marketing, LLC, Tenaska Alabama Partners, L.P., Tenaska Clear Creek Wind, LLC, Tenaska Energía de Mexico, S. de R.L. de C.V., Tenaska Georgia Partners, L.P., Tenaska Power Management, LLC, Tenaska Power Services Co., Texas Electric Marketing, LLC.

Description: Updated Market Power Analysis for Southeast Region of Tenaska MBR Sellers.

Filed Date: 12/28/20.

Accession Number: 20201228–5488.

Comments Due: 5 p.m. ET 2/26/21.

Docket Numbers: ER10–2721–009.

Applicants: El Paso Electric Company.

Description: Response of El Paso Electric Company.

Filed Date: 12/7/20.

Accession Number: 20201207–5164.

Comments Due: 5 p.m. ET 1/8/21.

Docket Numbers: ER18–1906–006; ER16–221–007; ER18–1907–006; ER17–1757–007; ER10–1767–009; ER10–1532–009; ER10–1541–010; ER10–1642–011; ER13–2349–008; ER13–2350–008.

Applicants: Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, Entergy Texas, Inc., Entergy Nuclear Palisades, LLC, Entergy Power, LLC, EWO Marketing, LLC, EAM Nelson Holding, LLC, RS Cogen LLC.

Description: Triennial Market Power Analysis for Central Region and Notice of Non-Material Change in Status of Entergy Central MBR Utilities.

Filed Date: 12/28/20.

Accession Number: 20201228–5573.

Comments Due: 5 p.m. ET 2/26/21.

Docket Numbers: ER19–1217–001.

Applicants: Montana-Dakota Utilities Co.

Description: Triennial Market Power Analysis for Central Region Notice of Change in Status of Montana-Dakota Utilities Co.

Filed Date: 12/28/20.

Accession Number: 20201228–5572.

Comments Due: 5 p.m. ET 2/26/21.

Docket Numbers: ER19–2373–004; ER10–2005–021; ER11–26–021; ER10–1841–021; ER20–1987–002; ER20–1769–002; ER20–122–003; ER19–2461–004; ER20–975–002; ER19–987–008; ER19–1003–008; ER10–1845–021; ER19–2437–004; ER19–1393–008; ER19–1394–008; ER10–1852–049; ER10–1905–021; ER10–1907–020; ER10–1918–021; ER10–1950–021; ER19–2398–005; ER18–2246–009; ER18–1771–010; ER16–1872–011; ER10–1970–020; ER10–1972–020; ER20–1879–002; ER20–1220–002; ER16–2506–012; ER18–2224–010; ER13–2461–015; ER19–2382–004; ER17–2270–012; ER12–1660–020; ER13–2458–015; ER10–2078–021; ER11–4462–052; ER10–1951–031; ER17–838–027.

Applicants: Ashtabula Wind I, LLC, Ashtabula Wind II, LLC, Ashtabula Wind III, LLC, Butler Ridge Wind Energy Center, LLC, Cerro Gordo Wind, LLC, Chicot Solar, LLC, Crowned Ridge Interconnection, LLC, Crowned Ridge Wind, LLC, Crowned Ridge Wind II,

LLC, Crystal Lake Wind Energy I, LLC, Crystal Lake Wind Energy II, LLC, Crystal Lake Wind III, LLC, Emmons-Logan Wind, LLC, Endeavor Wind I, LLC, Endeavor Wind II, LLC, Florida Power & Light Company, FPL Energy Mower County, LLC, FPL Energy North Dakota Wind, LLC, FPL Energy North Dakota Wind II, LLC, Garden Wind, LLC, Hancock County Wind, LLC, Heartland Divide Wind Project, LLC, Langdon Renewables, LLC, Marshall Solar, LLC, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, Oliver Wind I, LLC, Oliver Wind Energy Center II, LLC, Oliver Wind III, LLC, Pegasus Wind, LLC, Pheasant Run Wind, LLC, Story County Wind, LLC, Stuttgart Solar, LLC, Tuscola Bay Wind, LLC, Tuscola Wind II, LLC, White Oak Energy LLC, NEPM II, LLC, NextEra Energy Services Massachusetts, LLC, NextEra Energy Marketing, LLC.

Description: Notice of Change in Status of NextEra Resources.

Filed Date: 12/21/20.

Accession Number: 20201221–5501.

Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: ER21–301–001.

Applicants: San Diego Gas & Electric Company.

Description: Tariff Amendment: 2021 TRBAA Update Amendment to be effective 1/1/2021.

Filed Date: 12/28/20.

Accession Number: 20201228–5332.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–750–000.

Applicants: Public Service Company of Colorado.

Description: Tariff Cancellation: 2020–12–29 PSC–NXER–E&P–Thunderwolf–563–NOC–0.1.0 to be effective 12/30/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5007.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–751–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original ISA, Service Agreement No. 5859; Queue No. AC1–078 to be effective 11/30/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5010.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–752–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1067R11 East Texas Electric Cooperative NITSA NOA to be effective 12/1/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5132.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–753–000.

Applicants: GenOn California South, LP.

Description: § 205(d) Rate Filing: Market-Based Rate Tariff Revisions to be effective 12/30/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5173.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–754–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: Baseline eTariff Filing: Tri-State Submission of Western Nebraska Joint Transmission Agreement to be effective 12/29/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5206.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–755–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 1875R4 Kansas Electric Power Cooperative, Inc. NITSA and NOA to be effective 12/1/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5213.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–756–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: Tariff Cancellation: Tri-State Notice of Termination to be effective 3/1/2021.

Filed Date: 12/29/20.

Accession Number: 20201229–5225.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–758–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 2065R4 Evergy Kansas Central, Inc. NITSA NOA to be effective 12/1/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5276.

Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–759–000.

Applicants: Unitil Energy Systems, Inc.

Description: § 205(d) Rate Filing: UES and Briar Hydro Wheeling Agreement to be effective 12/28/2020.

Filed Date: 12/29/20.

Accession Number: 20201229–5285.

Comments Due: 5 p.m. ET 1/19/21.

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 29, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29163 Filed 1–4–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER21–746–000]

Mayflower Power & Gas LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced Mayflower Power & Gas LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 18, 2021.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Dated: December 29, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29166 Filed 1–4–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filing

	Docket Nos.
Louisiana Public Service Commission v. Entergy Corporation	EL10–65–009
Entergy Services, Inc	ER14–2085–005
Entergy Louisiana, LLC	ER11–3658–005
Entergy Arkansas, Inc	ER12–1920–005
Entergy Mississippi, Inc	ER13–1595–005
Entergy New Orleans, Inc	ER10–1350–008
Entergy Gulf States of Louisiana, L.L.C.	ER15–1826–001
Entergy Texas, Inc	ER16–1806–001
Entergy Services, Inc	(Consolidated)

On December 21, 2020, Entergy Services, LLC,[1] acting as agent for Entergy Operating Companies[2] filed a compliance filing consisting of the bandwidth formula rate recalculations with true-up payments and receipts based on 2009 test year data and supporting workpapers for the identified adjustment, pursuant to the Federal Energy Regulatory Commission's (Commission) Order issued dated November 19, 2020.[3]

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. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

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*) 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 Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on January 11, 2021.

December 29, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29165 Filed 1–4–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP21–336–000.
Applicants: Transcontinental Gas Pipe Line Company.
Description: § 4(d) Rate Filing: Rate Schedule S–2 Tracker Filing (ASA/PCB) eff 12/1/2020 to be effective 12/1/2020.
Filed Date: 12/28/20.
Accession Number: 20201228–5011.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–337–000.
Applicants: Columbia Gas Transmission, LLC.
Description: Compliance filing Penalty Revenue Crediting Report 2020 to be effective N/A.
Filed Date: 12/28/20.
Accession Number: 20201228–5048.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–338–000.
Applicants: Columbia Gulf Transmission, LLC.
Description: Compliance filing Penalty Revenue Crediting Report 2020 to be effective N/A.
Filed Date: 12/28/20.
Accession Number: 20201228–5052.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–339–000.
Applicants: Crossroads Pipeline Company.
Description: Compliance filing 2020 Penalty Revenue Crediting Report to be effective N/A.
Filed Date: 12/28/20.
Accession Number: 20201228–5058.
Comments Due: 5 p.m. ET 1/11/21.

Docket Numbers: RP21–340–000.
Applicants: ANR Pipeline Company.
Description: § 4(d) Rate Filing: Cashout Mechanism Update to be effective 2/1/2021.
Filed Date: 12/28/20.
Accession Number: 20201228–5101.
Comments Due: 5 p.m. ET 1/11/21.

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

[1] Effective September 30, 2018, Entergy Services, Inc., changed its name to Entergy Services, LLC.

[2] The Entergy Operating Companies (Operating Companies) are currently Entergy Arkansas, LLC (formerly Entergy Arkansas, Inc.), Entergy Louisiana, LLC, Entergy Mississippi, LLC (formerly Entergy Mississippi, Inc.), Entergy New Orleans, LLC (formerly Entergy New Orleans, Inc.), and Entergy Texas, Inc.

[3] *La. Pub. Serv. Comm'n* v. *Entergy Corp.*, et al., 173 FERC 61,152 (2020).

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 29, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29164 Filed 1–4–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–4–000]

Commission Information Collection Activities (FERC–549B); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection FERC–549B (Gas Pipeline Rates: Annual Capacity Reports and Index of Customers), and is submitting the information collection to the Office of Management and Budget (OMB) for review. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below.

DATES: Comments on the collection of information are due February 4, 2021.

ADDRESSES: You may submit written comments on FERC–549B to OMB through *www.reginfo.gov/public/do/PRAMain,* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB control number (1902–0169) in the subject line. Your comments should be sent within 30 days of publication of this notice in the **Federal Register**.

Please submit copies of your comments to the Commission (identified by Docket No. IC21–4–000) by any of the following methods:

- *eFiling at Commission's Website: http://www.ferc.gov/docs-filing/efiling.asp.*
- *U.S. Postal Service Mail:* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.
- Effective July 1, 2020, delivery of filings other than by eFiling or the U.S. Postal Service should be delivered to Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Instructions:

OMB submissions must be formatted and filed in accordance with submission guidelines at *www.reginfo.gov/public/do/PRAMain;* Using the search function under the ''Currently Under Review field,'' select Federal Energy Regulatory Commission; click ''submit'' and select ''comment'' to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov* and telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION: On October 26, 2020, the Commission published a notice in the **Federal Register** inviting public comments for 60 days on this information collection (85 FR 67732). The public comment period expired on December 28, 2020. The Commission received no public comments in response. As described above, the Commission now invites public comments for a period of 30 days.

Title: FERC–549B (Gas Pipeline Rates: Capacity Reports and Index of Customers).

OMB Control No.: 1902–0169.

Type of Request: Three-year extension of the FERC–549B information collection requirements with no program changes.

Abstract: The requirements of FERC–549B consist of an Index of Customers (IOC) report and two capacity reports. This information collection is authorized by 15 U.S.C. 717, 717c, and 717d, and by 18 CFR 284.13.

Reports on Firm and Interruptible Services and on Capacity and Flow Information Under 284.13(b) and 284.13(d)(1)

On April 4, 1992, in Order No. 636 (RM91–11–000), the Commission established a capacity release mechanism under which shippers could release firm transportation and storage capacity on either a short- or long-term basis to other shippers wanting to obtain capacity. Pipelines posted available firm and interruptible capacity information on their electronic bulletin boards (EBBs) to inform potential shippers.

On August 3, 1992, in Order No. 636–A (RM91–11–002), the Commission determined through staff audits, that the efficiency of the capacity release mechanism could be enhanced by standardizing the content and format of capacity release information and the methods by which shippers accessed this information, which pipelines posted to their EBBs.

On March 29, 1995, through Order 577 (RM95–5–000), the Commission amended § 284.243(h) of its regulations to allow shippers the ability to release capacity without having to comply with the Commission's advance posting and bidding requirements.

On February 9, 2000, in Order No. 637 (RM98–10–000), to create greater substitution between different forms of capacity and to enhance competition across the pipeline grid, the Commission revised its capacity release regulations regarding scheduling, segmentation and flexible point rights, penalties, and reporting requirements. This resulted in more reliable capacity information availability and price data that shippers needed to make informed decisions in a competitive market as well as to improve shipper's and the Commission's ability to monitor the market for potential abuses.

Peak Day Annual Capacity Report Under 284.13(d)(2)

The regulation at 18 CFR 284.13(d)(2) requires an annual peak day capacity report of all interstate pipelines, including natural gas storage only companies. This report is generally a short report showing the peak day design capacity or the actual peak day capacity achieved, with a short explanation, if needed. The regulation provides that an interstate pipeline must make an annual filing by March 1 of each year showing the estimated peak day capacity of the pipeline's system, and the estimated storage capacity and maximum daily delivery capability of

storage facilities under reasonably representative operating assumptions and the respective assignments of that capacity to the various firm services provided by the pipeline.

This annual report is publicly available, while other more specific interstate pipeline and storage capacity details are filed as Critical Energy Infrastructure Information, such as the Annual System Flow Diagram (FERC–567), which is not publicly available.

Index of Customers Under 284.13(c)

In Order 581, issued September 28, 1995 (Docket No. RM95–4–000), the Commission established the IOC quarterly information requirement. This order required the reporting of five data elements in the IOC filing: The customer name, the rate schedule under which service is rendered, the contract effective date, the contract termination date, and the maximum daily contract quantity, for either transportation or storage service, as appropriate.

In a notice issued separately from Order 581 in Docket No. RM95–4–000, issued February 29, 1996, the Commission, through technical conferences with industry, determined that the IOC data reported should be in tab delimited format on diskette and in a format prescribed in Appendix A of the rulemaking. In a departure from past practice, a three-digit code, instead of a six-digit code, was established to identify the respondent.

In Order 637, issued February 9, 2000 (Docket Nos. RM98–10–000 and RM98–12–000), the Commission required the filing of: The receipt and delivery points held under contract and the zones or segments in which the capacity is held, the common transaction point codes, the contract number, the shipper identification number, an indication of whether the contract includes negotiated rates, the names of any agents or asset managers that control capacity in a pipeline rate zone, and any affiliate relationship between the pipeline and the holder of capacity. It was stated in the order that the changes to the Commission's reporting requirements would enhance the reliability of information about capacity availability and price that shippers need to make informed decisions in a competitive market as well as improve shippers' and the Commission's ability to monitor marketplace behavior to detect and remedy anti-competitive behavior. Order 637 required a pipeline to post the IOC data quarterly on its website instead of on the outdated EBBs.

Types of Respondents: Interstate pipelines subject to FERC regulation under the Natural Gas Act, and those entities defined as Hinshaw Pipelines under the Natural Gas Policy Act.

Estimate of Annual Burden: The Commission estimates the annual public reporting burden [1] for the information collection as shown in the following table:

FERC–54B9B (GAS PIPELINE RATES: CAPACITY REPORTS AND INDEX OF CUSTOMERS)

Types of responses	Average annual number of respondents	Average annual number of responses per respondent	Average annual total number of responses	Average burden & cost per response [2]	Total annual burden hours & total annual cost	Cost per respondent ($)
A.	B	C	D (Col. B × Col. C)	E	F (Col. D × Col. E)	G (Col. E ÷ Col.)
Capacity Reports under 284.13(b) & 284.13(d)(1).	168	6	1,008	145 hrs.; $83,664	146,160 hrs.; $12,131,280.	$83,664
Index of Customers under 18 CFR 284.13(c).	168	4	672	3 hrs.; $249	2,016 hrs.; $167,328	996
Peak Day Annual Capacity Report under 18 CFR 284.13(d)(2).	168	1	168	10 hrs.; $830	1,680 hrs.; $139,440	830
Totals			1,848		149,856 hrs.; $12,433,048.	74,036

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) 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.

Dated: December 29, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29167 Filed 1–4–21; 8:45 am]

BILLING CODE 6717–01–P

[1] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 CFR 1320.3.

[2] The current average cost for one FERC full-time equivalent ($83.00 per hour for wages plus benefits) is used as a proxy for industry's hourly cost.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Notice

AGENCY: Equal Employment Opportunity Commission.

TIME AND DATE: Thursday, January 7, 2021, 1:00 p.m. Eastern Time.

STATUS: The meeting will be open to the public. Note: Because of the COVID–19 pandemic, the meeting will be held as an audio-only conference. The public may listen to the audio-only conference by following the instructions that will be posted on *www.eeoc.gov* 24 hours before the meeting. Closed captioning services will be available. The following items will be considered at the meeting:

Final Rule Updating the Commission's Conciliation Procedures

Formal Opinion Letter Concerning Individual Coverage Health Reimbursement Arrangements Under the ADEA

Final Rule Amending the Commission's Official Time Regulation for the Federal Sector

Note: In accordance with the Sunshine Act, the public will be able to listen to the Commission's deliberations

and voting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides information about Commission meetings on its website, *www.eeoc.gov.* and provides a recorded announcement a week in advance on future Commission meetings.)

Please telephone (202) 663–7100 (voice) or (202) 921–2750, or email *commissionmeetingcomments@eeoc.gov* at any time for information on this meeting.

CONTACT PERSON FOR MORE INFORMATION: Rachel V. See, Acting Executive Officer, (202) 921–2545.

Dated: December 31, 2020.

Rachel V. See,

Acting Executive Officer, Executive Secretariat.

[FR Doc. 2020–29286 Filed 12–31–20; 4:15 pm]

BILLING CODE 6570–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

RIN 3064–ZA22

Notice of Inflation Adjustments for Civil Money Penalties

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of Monetary Penalties 2021.

SUMMARY: The Federal Deposit Insurance Corporation is providing notice of its maximum civil money penalties as adjusted for inflation.

DATES: The adjusted maximum amounts of civil money penalties in this notice are applicable to penalties assessed after January 15, 2021, for conduct occurring on or after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Graham N. Rehrig, Senior Attorney, Legal Division, (202) 898–3829, *grehrig@fdic.gov;* Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: This notice announces changes to the maximum amount of each civil money penalty (CMP) within the Federal Deposit Insurance Corporation's (FDIC) jurisdiction to administer to account for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990 (1990 Adjustment Act),[1] as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Adjustment Act).[2] Under the 1990 Adjustment Act, as amended, federal agencies must make annual adjustments to the maximum amount of each CMP the agency administers. The Office of Management and Budget (OMB) is required to issue guidance to federal agencies no later than December 15 of each year providing an inflation-adjustment multiplier (*i.e.,* the inflation-adjustment factor agencies must use) applicable to CMPs assessed in the following year.

Agencies are required to publish their CMPs, adjusted under the multiplier provided by the OMB, by January 15 of the applicable year. Agencies, like the FDIC, that have codified the statutory formula for making the CMP adjustments may make annual inflation adjustments by providing notice in the **Federal Register**.[3]

On December 23, 2020, the OMB issued guidance to affected agencies on implementing the required annual adjustment, which guidance included the relevant inflation multiplier.[4] The FDIC has applied that multiplier to the maximum CMPs allowable in 2020 for FDIC-supervised institutions to calculate the maximum amount of CMPs that may be assessed by the FDIC in 2021.[5] There were no new statutory CMPs administered by the FDIC during 2020.

The following charts provide the inflation-adjusted maximum CMP amounts for use after January 15, 2021—the effective date of the 2021 annual adjustments—under 12 CFR part 308, for conduct occurring on or after November 2, 2015:

MAXIMUM CIVIL MONEY PENALTY AMOUNTS

U.S. code citation	Current maximum CMP (through January 14, 2021)	Adjusted maximum CMP[6] (beginning January 15, 2021)
12 U.S.C. 1464(v):		
Tier One CMP[7]	$4,098	$4,146
Tier Two CMP	40,979	2,048,915
Tier Three CMP[8]	41,463	2,073,133
12 U.S.C. 1467(d)	10,245	10,366
12 U.S.C. 1817(a):		
Tier One CMP[9]	4,098	4,146
Tier Two CMP	40,979	41,463
Tier Three CMP[10]	2,048,915	2,073,133
12 U.S.C. 1817(c):		
Tier One CMP	3,747	3,791
Tier Two CMP	37,458	37,901
Tier Three CMP[11]	1,872,957	1,895,095
12 U.S.C. 1817(j)(16):		
Tier One CMP	10,245	10,366
Tier Two CMP	51,222	51,827
Tier Three CMP[12]	2,048,915	2,073,133
12 U.S.C. 1818(i)(2):[13]		
Tier One CMP	10,245	10,366
Tier Two CMP	51,222	51,827
Tier Three CMP[14]	2,048,915	2,073,133

[1] Public Law 101–410, 104 Stat. 890, codified at 28 U.S.C. 2461 note.

[2] Public Law 114–74, 701(b), 129 Stat. 599, codified at 28 U.S.C. 2461 note.

[3] *See* Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum No. M–21–10, *Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* 4 (2020), *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf* (''OMB Guidance''); *see also* 12 CFR 308.132(d) (FDIC regulation that guides readers to the **Federal Register** to see the annual notice of CMP inflation adjustments).

[4] *See* OMB Guidance at 1 (providing an inflation multiplier of 1.01182).

[5] Penalties assessed for violations occurring prior to November 2, 2015, will be subject to the maximum amounts set forth in the FDIC's regulations in effect prior to the enactment of the 2015 Adjustment Act.

MAXIMUM CIVIL MONEY PENALTY AMOUNTS—Continued

U.S. code citation	Current maximum CMP (through January 14, 2021)	Adjusted maximum CMP [6] (beginning January 15, 2021)
12 U.S.C. 1820(e)(4)	9,365	9,476
12 U.S.C. 1820(k)(6)	337,016	341,000
12 U.S.C. 1828(a)(3)	127	129
12 U.S.C. 1828(h): [15]		
For assessments <$10,000	127	129
12 U.S.C. 1829b(j)	21,410	21,663
12 U.S.C. 1832(c)	2,976	3,011
12 U.S.C. 1884	297	301
12 U.S.C. 1972(2)(F):		
Tier One CMP	10,245	10,366
Tier Two CMP	51,222	51,827
Tier Three CMP [16]	2,048,915	2,073,133
12 U.S.C. 3909(d)	2,549	2,579
15 U.S.C. 78u–2:		
Tier One CMP (individuals)	9,639	9,753
Tier One CMP (others)	96,384	97,523
Tier Two CMP (individuals)	96,384	97,523
Tier Two CMP (others)	481,920	487,616
Tier Three CMP (individuals)	192,768	195,047
Tier Three CMP (others)	963,837	975,230
15 U.S.C. 1639e(k):		
First violation	11,767	11,906
Subsequent violations	23,533	23,811
31 U.S.C. 3802	11,665	11,803
42 U.S.C. 4012a(f)	2,226	2,252

CFR citation	Current presumptive CMP (through January 14, 2021)	Adjusted presumptive CMP (beginning January 15, 2021)
12 CFR 308.132(e)(1)(i):		
Institutions with $25 million or more in assets:		
1 to 15 days late	$562	$569.
16 or more days late	$1,124	$1,137.
Institutions with less than $25 million in assets:		
1 to 15 days late [17]	$188	$190.
16 or more days late [18]	$374	$378.
12 CFR 308.132(e)(1)(ii):		
Institutions with $25 million or more in assets:		
1 to 15 days late	$936	$947.
16 or more days late	$1,872	$1,894.
Institutions with less than $25 million in assets:		
1 to 15 days late	1/50,000th of the institution's total assets	1/50,000th of the institution's total assets.
16 or more days late	1/25,000th of the institution's total assets	1/25,000th of the institution's total assets.
12 CFR 308.132(e)(2)	$40,979	$41,463.
12 CFR 308.132(e)(3):		

[6] The maximum penalty amount is per day, unless otherwise indicated.

[7] 12 U.S.C. 1464(v) provides the maximum CMP amounts for the late filing of certain Call Reports. In 2012, however, the FDIC issued regulations that further subdivided these amounts based upon the size of the institution and the lateness of the filing. *See* 77 FR 74573, 74576–78 (Dec. 17, 2012), codified at 12 CFR 308.132(e)(1). These adjusted subdivided amounts are found at the end of this chart.

[8] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[9] 12 U.S.C. 1817(a) provides the maximum CMP amounts for the late filing of certain Call Reports. In 1991, however, the FDIC issued regulations that further subdivided these amounts based upon the size of the institution and the lateness of the filing. *See* 56 FR 37968, 37992–93 (Aug. 9, 1991), codified at 12 CFR 308.132(e)(1). These adjusted subdivided amounts are found at the end of this chart.

[10] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[11] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[12] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[13] These amounts also apply to CMPs in statutes that cross-reference 12 U.S.C. 1818, such as 12 U.S.C. 2601, 2804(b), 3108(b), 3349(b), 4009(a), 4309(a), 4717(b); 15 U.S.C. 1607(a), 1681s(b), 1691(b), 1691c(a), 1693*o*(a); and 42 U.S.C. 3601.

[14] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

[15] The $129-per-day maximum CMP under 12 U.S.C. 1828(h), for failure or refusal to pay any assessment, applies only when the assessment is less than $10,000. When the amount of the assessment is $10,000 or more, the maximum CMP under section 1828(h) is 1 percent of the amount of the assessment for each day that the failure or refusal continues.

[16] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

CFR citation	Current presumptive CMP (through January 14, 2021)	Adjusted presumptive CMP (beginning January 15, 2021)
Tier One CMP	$4,098	$4,146.
Tier Two CMP	$40,979	$41,463.
Tier Three CMP [19]	$2,048,915	$2,073,133.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on December 30, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–29175 Filed 1–4–21; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL TRADE COMMISSION

[File No. 191 0110]

E. & J. Gallo Winery and Constellation Brands; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 4, 2021.

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''E. & J. Gallo Winery and Constellation Brands; File No. 191 0110'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Elizabeth Arens (202–326–3552), Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 5, 2021. Write ''E. & J. Gallo Winery and Constellation Brands; File No. 191 0110'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective actions in response to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''E. & J. Gallo Winery and Constellation Brands; File No. 191 0110'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC website—as legally required by FTC Rule 4.9(b)—we cannot redact or

[17] The maximum penalty amount for an institution is the greater of this amount or 1/100,000th of the institution's total assets.

[18] The maximum penalty amount for an institution is the greater of this amount or 1/50,000th of the institution's total assets.

[19] The maximum penalty amount for an institution is the lesser of this amount or 1 percent of total assets.

remove your comment from the FTC website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing this matter. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 5, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction and Background

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Respondent E. & J. Gallo Winery (''Gallo''), a wholly owned subsidiary of Respondent Dry Creek Corporation (''Dry Creek''), and Respondent Constellation Brands, Inc. (''Constellation'') (collectively, ''Respondents''). The purpose of the Consent Agreement is to remedy the anticompetitive effects that would likely result from Gallo's acquisition of certain Constellation assets (''the Acquisition'').

To resolve the Commission's concerns, Gallo and Constellation elected to remove J Roget, Cook's, Paul Masson brandy, high color concentrates (''HCCs''), and the Mission Bell winery from the asset purchase agreement. Under the terms of the proposed Decision and Order (''Order'') contained in the Consent Agreement, Constellation is required to maintain the viability of the J Roget and Cook's assets. The Order also requires that (1) Constellation divest its Paul Masson brandy to the Sazerac Company, Inc. (''Sazerac''); (2) Gallo divest its Sheffield Cellars and Fairbanks low-priced port and sherry brands to Precept Brands LLC (''Precept''); and (3) Constellation divest its HCCs business to the Vie-Del Company (''Vie-Del'').

The Commission and the Respondents have also agreed to an Order to Maintain Assets. This order requires Gallo and Constellation to retain and maintain the assets that the Consent Agreement requires them to divest, pending their divestiture. The Commission's Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition in the United States in the product markets for: (1) Entry-level on-premise sparkling wine, (2) low-priced sparkling wine, (3) low-priced brandy, (4) low-priced port, (5) low-priced sherry, and (6) HCCs.

The proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the comments received and decide whether it should withdraw, modify, or finalize the Consent Agreement.

II. The Parties

Gallo is a privately owned company headquartered in Modesto, California. Founded in 1933, Gallo is the largest family-owned winery in the world, with over 100 wine and spirit brands, and a portfolio that includes white wines, red wines, sparkling wines, dessert or fortified wines, brandy, and vodka. Gallo owns 15 wineries situated throughout California and Washington, over 23,000 acres of vineyards across California, glass and bottling facilities, storage facilities, and distribution channels in states where legally permitted.

Headquartered in Victor, New York, Constellation is a publically traded alcoholic beverage company. Founded in 1945, Constellation is the third-largest producer of beer and one of the world's leading premium wine companies. Constellation is one of the three largest wine suppliers in the United States; in fiscal year 2018, it generated approximately $8.3 billion in gross revenue.

On April 3, 2019, Gallo entered into an Asset Purchase Agreement with Constellation. Pursuant to the agreement, Gallo would acquire more than 30 mostly low-priced wine, brandy, concentrate and additive brands along with several wine-making facilities from Constellation in a transaction originally valued at approximately $1.7 billion.

III. The Relevant Markets

Gallo's proposed acquisition of certain Constellation assets would likely result in substantial competitive harm in the following product markets: Entry-level on-premise sparkling wine, low-priced sparkling wine, low-priced brandy, low-priced port and low-priced sherry fortified wines, and HCCs. The United States is the relevant geographic market in which to assess the competitive effects of the proposed Acquisition.

A. Entry-Level On-Premise Sparkling Wine

Entry-level sparkling wine is often sold to on-premise retailers, such as restaurants, casinos, and hotels, for specific uses (*e.g.,* brunch mimosas, complimentary or ''floor'' pours, banquets, and catering). Sparkling wine outside of the entry-level tier is generally priced significantly higher than entry-level on-premise sparkling wine.

Gallo and Constellation are the two largest suppliers, by volume, of entry-level on-premise sparkling wine in the United States. Absent relief, Gallo would have acquired Constellation's J Roget brand, resulting in significant increases in concentration in a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. Further, Gallo's Wycliff brand and Constellation's J Roget brand are close and vigorous competitors in the United States. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely have increased Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the specialized equipment and massive scale needed to produce sparkling wine at a low cost. In addition, the need for a nationwide distribution network and sales team to work with retailers present further obstacles to entry and expansion.

B. Low-Priced Sparkling Wine

Low-priced sparkling wine (generally described in the industry as ''popular'' sparkling wine) is predominately sold to off-premise retailers such as grocery stores, liquor stores, and convenience stores. Low-priced sparkling wine does not significantly compete with more expensive ''premium'' brands.

Gallo's André and Constellation's Cook's brands are the two largest low-priced sparkling wine brands in the United States, with other competitors being significantly smaller. Absent relief, Gallo would have acquired Constellation's Cook's brand, resulting in significant increases in concentration and a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. André and Cook's directly compete for shelf

space and sales in the off-premise retail channel. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between André and Cook's and would likely have increased Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the specialized equipment and massive scale needed to produce low-priced sparkling wine. The need for a national distribution network and sales force, and retail relationships sufficient to compete with established brands for retail shelf space, present additional hurdles to entry and expansion.

C. Low-Priced Brandy

Brandy is a distilled spirit made from fruit, typically wine grapes. After distillation, it must be aged for at least two years in order to be labeled and sold as ''brandy'' in the United States. There is a large price and quality difference between low-priced brandies, which are typically produced domestically, and high-end imported brandies (primarily cognacs). Further, low-priced brandies do not compete closely with other types of spirits such as whiskeys, rums, vodkas, tequilas, and gins, since brandy has a unique taste profile and is often consumed straight rather than as a mixer.

Gallo's E & J Brandy and Constellation's Paul Masson brandy are the two largest low-priced brandies. Absent relief, Gallo would have acquired Constellation's Paul Masson brand, resulting in significant increases in concentration and a highly concentrated market, and giving rise to a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation consider each other's pricing when determining the price of their own low-priced brandy brands and compete to develop new products for these brands. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between E & J Brandy and Paul Masson, would likely result in lower quality, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry is unlikely to deter or counteract the anticompetitive effects of the Acquisition due to the significant capital investment and distribution network required for large-scale brandy production. Further, the need for certain state and local environmental permits makes entry or expansion difficult.

D. Low-Priced Port and Low-Priced Sherry

Port and sherry are types of fortified wines (wines to which a distilled spirit has been added, giving them a higher alcohol by volume) that are used for both cooking and consumption. Due to their flavor profile, alcohol level, and use, port and sherry brands are distinct from table wines and generic cooking wines. Further, there is a significant price gap between low-priced, domestic brands of port and sherry and high-end imports.

Gallo, which owns both the Sheffield Cellars and Fairbanks brands, and Constellation, which owns the Taylor brand, are the two largest suppliers, by volume, of low-priced port and low-priced sherry fortified wines in the United States. Absent relief, Gallo would have owned three of the top four low-priced port and sherry brands. The Acquisition would have resulted in significant increases in concentration and lead to highly concentrated markets, resulting in a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation are each other's closest competitors. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry into these markets is unlikely to occur due to the low level of interest in low-priced port and sherry from retailers, distributors, and third-party producers. In addition, producers of high-end imports have cost structures that render them unable to introduce a product at a price similar to domestic brands'.

E. High Color Concentrates

HCCs are grape-based additives that have been concentrated using sophisticated filtration technologies into a thick, shelf-stable syrup. HCCs are made from a specific grape varietal, Rubired, and are used by winemakers to deepen the color and enhance the taste and texture of red wines. HCCs are also used by food and beverage manufacturers in jellies, juices, and other products. HCCs have unique qualities that are not replicable through the use of lower-level concentrates or other winemaking techniques.

Gallo and Constellation are the two largest HCC producers in the United States, and there is only one other domestic producer. Absent relief, the Acquisition would have resulted in significant increases in concentration and lead to a highly concentrated market, resulting in a presumption of increased market power under the Horizontal Merger Guidelines. Gallo and Constellation are each other's closest competitors. Absent relief, the Acquisition would have substantially lessened the significant head-to-head competition between Gallo and Constellation, and would likely increase Gallo's ability and incentive to raise prices post-Acquisition. Entry into this market is difficult due to the need for technical expertise and significant capital investments in production equipment. In addition to potentially needing certain regulatory permits, firms making attempts at HCC production can only do so annually during a narrow harvest window, which results in a lengthy development process.

IV. The Proposed Consent Agreement

The proposed Consent Agreement remedies the likely anticompetitive effects in the aforementioned product markets. The proposed Order requires that Constellation retain and maintain the assets of the J Roget and Cook's brands. The Order also requires the following divestitures: Constellation will divest its Paul Masson brandy to Sazerac; Gallo will divest its Sheffield Cellars and Fairbanks low-priced port and sherry brands to Precept; and Constellation will divest its HCCs business to Vie-Del, no later than 10 days after the closing of the Acquisition. The Order further prohibits Constellation from selling or leasing, and Gallo from buying, the Mission Bell production facility without prior Commission approval. Constellation produces Cook's brand low-priced sparkling wine and HCCs at the Mission Bell facility, and will provide an interim supply of HCCs to the purchaser of that business.

The proposed Order and Order to Maintain Assets also appoint William Berlin as Monitor. The Monitor will ensure that the parties comply with their obligations under the proposed Orders and keep the Commission informed about the status of the transfer of the assets and rights to the approved acquirers.

Finally, the proposed Consent Agreement contains standard terms regarding each acquirer's access to employees, protection of material confidential information, and compliance reporting requirements, among other things, to ensure the viability of the divested businesses.

A. Entry-Level On-Premise Sparkling Wine

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the entry-level on-premise sparkling wine market by requiring that Constellation take all actions necessary to retain and maintain the full economic viability, marketability, and competitiveness of its J Roget brand until four years after entry of the Consent Agreement. This remedy will preserve the status quo in the entry-level on-premise sparkling wine market, resulting in no change in market concentration.

B. Low-Priced Sparkling Wine

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced sparkling wine market by requiring that Constellation take all actions necessary to retain and maintain the full economic viability, marketability, and competitiveness of its Cook's brand until four years after entry of the Consent Agreement. This remedy will preserve the status quo in the low-priced sparkling wine market, resulting in no change in market concentration.

C. Low-Priced Brandy

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced brandy market by requiring Constellation to divest the Paul Masson brandy to Sazerac, a spirits company based in New Orleans, Louisiana. This remedy would allow Sazerac to add a significant lower-priced brandy brand to its portfolio while otherwise preserving the status quo in the low-priced brandy market, resulting in no change in market concentration.

D. Low-Priced Port and Low-Priced Sherry

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the low-priced port and low-priced sherry markets by requiring Gallo to divest its Sheffield Cellars and Fairbanks brands to Precept, a winery based in Seattle, Washington. This remedy would launch Precept's entry into the dessert and cooking wine categories while otherwise preserving the status quo in the low-priced port and low-priced sherry markets, resulting in no change in market concentration.

E. High Color Concentrates

The proposed Consent Agreement remedies the likely anticompetitive effects of the proposed Acquisition in the HCCs market by requiring Constellation to divest its HCCs business to Vie-Del, a producer of wine, spirits, and non-high-color grape concentrate products based in Fresno, California. Based on the Commission's due diligence of Vie-Del as a divestiture buyer, the Commission deems it necessary to include the following provisions in the proposed Consent Agreement to help ensure Vie-Del's success in the HCC business. Paragraph IV.B. of the proposed Order requires Constellation to provide assistance to Vie-Del in establishing production capacity equivalent to that of Constellation, and Paragraph IV.D. requires Constellation to produce concentrates to Vie-Del until Vie-Del is able to produce HCCs in commercial quantities and until transferring Constellation customers have qualified Vie-Del's HCCs to meet their specifications. These provisions will help ensure Vie-Del is able to expand its customer base while otherwise preserving the status quo of three independent HCCs producers, resulting in no change in market concentration.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement to aid the Commission in determining whether it should make the proposed Consent Agreement final. This analysis is not an official interpretation of the proposed Consent Agreement and does not modify its terms in any way.

By direction of the Commission.

Joel Christie,

Acting Secretary.

[FR Doc. 2020–29149 Filed 1–4–21; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0144; Docket No. 2020–0053; Sequence No. 13]

Submission for OMB Review; Payment by Electronic Fund Transfer-Other Than System for Award Management

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision and renewal of a previously approved information collection requirement regarding payment by electronic fund transfer (other than System for Award Management).

DATES: Submit comments on or before February 4, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0144, Payment by Electronic Fund Transfer-Other than System for Award Management. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0144, Payment by Electronic Fund Transfer—Other than System for Award Management.

B. Need and Uses

This clearance covers the information that contractors must submit to comply with the following Federal Acquisition Regulation (FAR) requirement:

• *52.232–34, Payment by Electronic Funds Transfer—Other than System for Award Management.* This clause requires contractors to provide the following information to enable the Government to make payments under

the contract by electronic funds transfer (EFT):

(1) The contract number (or other procurement identification number).

(2) The Contractor's name and remittance address, as stated in the contract(s).

(3) The signature (manual or electronic, as appropriate), title, and telephone number of the Contractor official authorized to provide this information.

(4) The name, address, and 9-digit Routing Transit Number of the Contractor's financial agent.

(5) The Contractor's account number and the type of account (checking, saving, or lockbox).

(6) If applicable, the Fedwire Transfer System telegraphic abbreviation of the Contractor's financial agent.

(7) If applicable, the Contractor shall also provide the name, address, telegraphic abbreviation, and 9-digit Routing Transit Number of the correspondent financial institution receiving the wire transfer payment if the Contractor's financial agent is not directly on-line to the Fedwire Transfer System; and, therefore, not the receiver of the wire transfer payment.

The burden to provide the information required by the FAR clause at 52.232–33, Payment by Electronic Funds Transfer—System for Award Management, is covered by OMB Control Number 9000–0159, System for Award Management Registration (SAM). OMB Control Number 9000–0159 accounts for new registrations and renewals in SAM, which includes providing the EFT information.

The OMB Control number title was changed to ''Payment by Electronic Fund Transfer—Other than System for Award Management'' to be consistent with the accounted burden.

C. Annual Burden

Respondents: 3,196.

Total Annual Responses: 3,196.

Total Burden Hours: 1,598.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 85 FR 67742, on October 26, 2020. No comments were received.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0144, Payment by Electronic Fund Transfer-Other than System for Award Management.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2020–29172 Filed 1–4–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0037; Docket No. 2020–0053; Sequence No. 11]

Submission for OMB Review; Presolicitation Notice and Response

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division has submitted to the Office of Management and Budget (OMB) a request to review and approve a revision and renewal of a previously approved information collection requirement regarding presolicitation notice and response.

DATES: Submit comments on or before February 4, 2021.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

Additionally, submit a copy to GSA through *http://www.regulations.gov* and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments.

Instructions: All items submitted must cite OMB Control No. 9000–0037, Presolicitation Notice and Response. Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two-to-three days after submission to verify posting. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.*

FOR FURTHER INFORMATION CONTACT: Zenaida Delgado, Procurement Analyst, at telephone 202–969–7207, or *zenaida.delgado@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. OMB Control Number, Title, and Any Associated Form(s)

9000–0037, Presolicitation Notice and Response.

B. Need and Uses

Presolicitation notices are used by the Government to inform, and, where specified, solicit a response from potential offerors or bidders. The primary purposes of the notices are to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities. This clearance covers the information that offerors must submit to comply with the following Federal Acquisition Regulation (FAR) requirements:

- For sealed bidding (FAR 14.205), presolicitation notices briefly describe requirements and provide other essential information to enable potential bidders to determine whether they have an interest in the invitation and if appropriate, respond by communicating their interest in receiving the invitation for bid.
- For contracting by negotiation (FAR 15.201(c)), presolicitation notices provide a means of early exchanges of information about future acquisitions between Government and industry, to which potential offerors may respond with feedback concerning acquisition strategy, terms and conditions, and any other concerns or questions.
- For construction contracts (FAR 36.213–2), presolicitation notices are required for construction requirements in excess of the simplified acquisition threshold to communicate essential information on the requirements, to which potential bidders may respond communicating their interest in receiving the invitation for bid.

Contracting officers use the information as follows:

- For sealed bidding, to include interested bidders in the distribution of the invitations for bids; and
- For contracting by negotiation, to consider the industry feedback in shaping the acquisition strategy.

C. Annual Burden

Respondents: 59,420.

Total Annual Responses: 178,260.

Total Burden Hours: 14,261.

D. Public Comment

A 60-day notice was published in the **Federal Register** at 85 FR 66565, on October 20, 2020. One comment was received; however, it did not change the estimate of the burden.

Comment: The commenter requested the requirement for presolicitation notices be removed from the FAR. The commenter does not see their value; and stated that presolicitation notices lengthen the acquisition timelines unnecessarily.

Response: Presolicitation notices are required by statute; see FAR 5.201. The primary purposes of the notices are to improve small business access to acquisition information and enhance competition by identifying contracting and subcontracting opportunities. The commenter did not express an opinion on whether the estimated number of burden hours is accurate; or ways to minimize the burden of the collection of information.

Obtaining Copies: Requesters may obtain a copy of the information collection documents from the GSA Regulatory Secretariat Division, by calling 202–501–4755 or emailing *GSARegSec@gsa.gov.* Please cite OMB Control No. 9000–0037, Presolicitation Notice and Response.

William F. Clark,

Director, Federal Acquisition Policy Division, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

[FR Doc. 2020–29171 Filed 1–4–21; 8:45 am]

BILLING CODE 6820–EP–P

GOVERNMENT ACCOUNTABILITY OFFICE

Request for State All Payer Claims Databases Advisory Committee (SAPCDAC) Nominations

AGENCY: U.S. Government Accountability Office (GAO).

ACTION: Request for letters of nomination and resumes.

SUMMARY: The No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021 required the Secretary of Labor to convene an Advisory Committee of 15 members to advise on the standardized format for the voluntary reporting, by group health plans to State All Payer Claims Databases, of medical claims, pharmacy claims, dental claims, and eligibility and provider files collected from private and public payers. The Committee shall also advise the Secretary on the guidance provided to States on the process by which States may collect such data in the standardized reporting format. This Committee will be responsible for issuing a report to the Secretary of Labor and certain congressional committees within 180 days of the enactment of the Act, which shall include recommendations on the standardized format and guidance described above. The Act provides for members of this Committee to have distinguished themselves in fields of health services research, health economics, health informatics, data privacy and security, or the governance of State All Payer Claims Databases, or who represent organizations likely to submit data to or use the database, including patients, employers, employee organizations that sponsor group health plans, health care providers, health insurance issuers, or third-party administrators of group health plans. The Act gave the Secretary of Labor, in coordination with the Secretary of Health and Human Services, responsibility for appointing 9 of the 15 members to include eight representatives of various agencies within the Departments of Labor and Health and Human Services, as well as one representative of a State All Payer Claims Database. The Act gave the Comptroller General responsibility for appointing the remaining 6 of the committee's 15 members, including 1 representative of an employer that sponsors a group health plan; 1 representative of an employee organization that sponsors a group health plan; 1 academic researcher with expertise in health economics or health services research; 1 consumer advocate; and 2 additional members. GAO is accepting nominations of individuals for Committee appointments that will be effective in March 2021. Nominations should be sent to the email address listed below. Acknowledgement of submissions will be provided within a week of submission.

DATES: Letters of nomination and resumes should be submitted by January 27, 2021 to ensure adequate opportunity for review and consideration of nominees.

ADDRESSES: Submit letters of nomination and resumes to *SAPCDACappointments@gao.gov.*

FOR FURTHER INFORMATION CONTACT: Shannon Legeer at (202) 512–3197 or *LegeerS@gao.gov* if you do not receive an acknowledgement or need additional information. For general information, contact GAO's Office of Public Affairs, (202) 512–4800.

Authority: Section 115(b) of the No Surprises Act, enacted as part of the Consolidated Appropriations Act, 2021, div. BB, tit. I (2020).

Gene L. Dodaro,

Comptroller General of the United States.

[FR Doc. 2020–29055 Filed 1–4–21; 8:45 am]

BILLING CODE 1610–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Development of Computed Tomography (CT) Image Quality and Safety Hospital Measures

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: Through this notice of funding opportunity (NOFO), the Centers for Medicare & Medicaid Services (CMS), Center for Clinical Standards and Quality, seeks an application for a single source, cooperative agreement, to develop a radiology electronic clinical quality measure(s) (eCQM) for the following CMS hospital programs: Hospital Inpatient Quality Reporting Program (IQR); Hospital Outpatient Quality Reporting Program (OQR); and Promoting Interoperability Program for Eligible Hospitals and Critical Access Hospitals—formerly Meaningful Use (PI). CMS will provide support to the awardee in their planning, technical assistance, and reporting needs related to submission of a fully developed and tested radiology measures to the 2021 Measures Under Consideration (MUC) List in May 2021.

DATES: This notice of funding opportunity took effect on December 24, 2020.

FOR FURTHER INFORMATION CONTACT: Janis Grady, (410) 786 –7217, for programmatic questions or concerns.

Monica Anderson, (410) 786–2988, for administrative and compliance concerns.

SUPPLEMENTARY INFORMATION:

I. Background

Within the broader context of quality measure use and development, CMS engages in extensive ongoing measure development, quality reporting, and other measure-related activities. In particular, CMS works with measure developers to produce measures for use in CMS quality reporting and value-based payment programs. However, CMS recognizes the benefits of measure

development by external stakeholders with quality measure development expertise such as clinical specialty societies, clinical professional organizations, patient advocacy organizations, educational institutions, independent research organizations, health systems, and other entities engaged in quality measure development, and is therefore providing this Notice of Funding Opportunity. The CMS Meaningful Measurement framework *https://www.cms.gov/meaningful-measures-20-moving-measure-reduction-modernization* guides CMS's quality measures work.

II. Provisions of the Notice

For this NOFO, CMS will accept an application specifically and only for development of radiology electronic clinical quality measures (eCQM) that fill an existing gap or need and are high impact. Pending an acceptable application and budget, the CCSQ/Quality Measurement & Value-Based Incentives Group (QMVIG)/Division of Quality Measurement (DQM) Program Team recommends awarding a single source award to Alara Imaging who is uniquely qualified to complete the work requested. Alara Imaging has specific expertise with CMS in development of radiology measure(s) requested, can provide the proprietary software needed to capture imaging data, and has the ability to transfer those data to CMS. In addition, Alara would serve as the measure steward responsible for guiding the measure through NQF endorsement and the CMS regulatory process.

III. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Authority: Programmatic Authority of the Social Security Act, Titles XI, XVIII, XIX, XXI.

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 30, 2020.

Lynette Wilson,

Federal Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2020–29169 Filed 1–4–21; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Interstate Administrative Subpoena and Notice of Interstate Lien (OMB #0970–0152)

AGENCY: Office of Child Support Enforcement, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Administration for Children and Families (ACF) is requesting a 3-year extension of the Interstate Administrative Subpoena and Notice of Interstate Lien forms (OMB #0970–0152, expiration 7/31/2021). There is no change requested to these forms.

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, AFC is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The Administrative Subpoena is used by State IV–D agencies to obtain income and other financial information regarding noncustodial parents for purposes of establishing, enforcing, and modifying child support orders. The Notice of Interstate Lien imposes liens in cases with overdue support and allows a State IV–D agency to file liens across state lines, when it is more efficient than involving the other state's IV–D agency. Section 452(a)(11) of the Social Security Act requires the Secretary of the Department of Health and Human Services to promulgate forms for administrative subpoenas and imposition of liens used by state child support enforcement (Title IV–D) agencies in interstate cases. Section 454(9)(E) of the Social Security Act requires each state to cooperate with any other state in using the federal forms for issuance of administrative subpoenas and imposition of liens in interstate child support cases.

Respondents: State, local, or tribal agencies administering a child support enforcement program under title IV–D of the Social Security Act.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual burden hours
Administrative Subpoena	27,763	1	.50	13,882
Notice of Lien	1,786,988	1	.50	893,494

Estimated Total Annual Burden Hours: 907,376.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

(Authority: 42 U.S.C. 652; 42 U.S.C. 654)

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–29182 Filed 1–4–21; 8:45 am]

BILLING CODE 4184–41–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Pre-Testing of Evaluation Data Collection Activities (OMB #0970–0355)

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) proposes to extend the existing overarching generic clearance for Pre-testing of Evaluation Data Collection Activities (Office of Management and Budget (OMB) #0970–0355) with no changes.

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 ACF Office of Planning, Research, and Evaluation (OPRE), at the U.S. Department of Health and Human Services (HHS) intends to request approval from OMB to renew a generic clearance to pre-test data collection instruments with more than nine participants to identify and resolve any question or procedural problems in survey administration.

OPRE studies ACF programs, and the populations they serve, through rigorous research and evaluation projects. These include evaluations of existing programs, evaluations of innovative approaches to helping low-income children and families, research syntheses, and descriptive and exploratory studies. To improve the development of its research and evaluation surveys, OPRE uses the pre-testing of evaluation surveys generic clearance to employ a variety of techniques including cognitive and usability laboratory and field techniques, behavior coding, exploratory interviews, respondent debriefing questionnaires, split sample experiments, focus groups, and pilot studies/pre-tests. These activities allow OPRE to identify if and when a survey may be simplified for respondents, respondent burden may be reduced, and other possible improvements. Following standard OMB requirements, OPRE will submit a change request for each individual data collection activity under this generic clearance. Each request will include the individual instrument(s), a justification specific to the individual information collection, and any supplementary documents. OMB should review within 10 days of receiving each change request.

The information collected in this effort will not be the primary subject of any published ACF reports; however, information may be made public through methodological appendices or footnotes, reports on instrument development, instrument user guides, descriptions of respondent behavior, and other publications or presentations describing findings of methodological interest. When necessary, results will be labeled as exploratory in nature. The results of this pre-testing research may be prepared for presentation at professional meetings or publication in professional journals.

Respondents: Participants in ACF programs being evaluated; participants in ACF demonstrations; recipients of ACF grants and individuals served by ACF grantees; comparison group members; and other relevant populations, such as individuals at risk of needing ACF services.

ANNUAL BURDEN ESTIMATES

Instrument	Estimated total number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
Survey development field tests, respondent debriefing questionnaires, cognitive interviews, split sample experiments, focus groups	3,825	1	1	3,825

Estimated Total Annual Burden Hours: 3,825.

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: Social Security Act, Sec. 1110 [42 U.S.C. 1310].

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–29183 Filed 1–4–21; 8:45 am]

BILLING CODE 4184–79–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Sponsor Review Procedures for Unaccompanied Alien Children (OMB #0970–0278)

AGENCY: Office of Refugee Resettlement; Administration for Children and Families; Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: This information collection consists of several instruments that allow the Unaccompanied Alien Children (UAC) Program to assess the ability of potential sponsors to provide for the physical and mental well-being of the UAC and whether the UAC will be safe in the custody of the potential sponsor. The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on proposed revisions to the Sponsor Verification Application (formerly the Family Reunification Application); and the Sponsor Care Agreement. Revisions to the Sponsor Care Agreement change the categorization from supplementary material to an information collection and associated burden has been included in this update.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description

1. Sponsor Verification Application (Form SVP–3/3s): ORR is proposing several major revisions to the Sponsor Verification Application in order to collect more detailed information that will allow for a more robust assessment of sponsor suitability. ORR also removed the section that collected information on the individual identified to care for the UAC should the potential sponsor need to leave the country. This section was removed because it will be obtained as part of the sponsor care plan and not as part of the application process. Additionally, the application establishes a deadline of 45 calendar days for potential sponsors to submit the instruments in this collection, as well as supporting documents, imposed at the case manager's discretion. Allowing the case manager to set a firm deadline not only assists ORR in meeting its statutory requirement to release UAC from its custody without unnecessary delay, but also provides the sponsor and ORR with an official date of denial as opposed to leaving cases on an open ended ''pending'' status. Finally, ORR added an option for potential sponsors to voluntarily submit to a DNA test to prove that they are biologically related to the child in support of their application. DNA results can be used to prove a biological relationship exists in lieu of supporting paperwork (such as birth certificates) or where such paperwork is difficult or impossible to obtain and/or authenticate in a timely manner. ORR will pay for the cost of the DNA test. In some instances where ORR has serious concerns about fraud regarding the biological relationship of the child and the proposed sponsor or other individual in the sponsor's household, the agency may require an ORR-paid DNA test, before making a release decision.

2. Sponsor Care Agreement (Form SVP–4/4s): ORR is proposing to add an additional provision to the Sponsor Care Agreement requiring sponsors to enroll in post-release services (PRS) as a condition of release. PRS caseworkers will make initial phone contact with the released child within two days of release and an in-person home visit within 30 days of release. Subsequently, PRS caseworkers will contact both the released child and sponsor via phone at least once a month; and make additional in-home visits at least every 90 days. The PRS caseworker has discretion to decide how long phone contact and in-home check-ins need to continue. This additional provision will assist in ensuring that released UACs are thriving and will provide an opportunity for the UAC to express any safety or well-being concerns. It also assists in ensuring that sponsors are acutely aware of the responsibilities of sponsorship including ensuring that UACs attend immigration proceedings as well as continuing to meet educational and medical requirements as appropriate.

Respondents: Potential sponsors for UAC.

Annual Burden Estimates:

ANNUAL BURDEN FOR RESPONDENTS

Information collection title	Annual number of respondents	Annual number of responses per respondent	Average burden hours per response	Annual total burden hours
Authorization for Release of Information (Form SVP–2/2s)	38,310	1	1.00	38,310
Sponsor Verification Application (Form SVP–3/3s)	57,200	1	10.00	588,779
Sponsor Verification Application (Form SVP–3/3s)—Applicants choosing to submit to an ORR-paid DNA test	16,779	1	1.00	
Sponsor Care Agreement (SVP–4/4s) All UAC check-in	57,200	1	3.75	214,500
Fingerprinting Instructions (SVP–7/7s)	38,310	1	3.00	114,930
Letter of Designation for Care of a Minor (Form SVP–9/9s)	17,160	1	1.50	25,740
Estimated Annual Burden Hours Total				999,038

ANNUAL BURDEN FOR RECORD KEEPERS

Information collection title	Annual number of record keepers	Annual number of responses per record keeper	Average burden hours per response	Annual total burden hours
Authorization for Release of Information (Form SVP–2/2s)	216	177	1.00	38,232
Sponsor Verification Application (Form SVP–3/3s)	216	265	6.00	379,080

ANNUAL BURDEN FOR RECORD KEEPERS—Continued

Information collection title	Annual number of record keepers	Annual number of responses per record keeper	Average burden hours per response	Annual total burden hours
Sponsor Verification Application (Form SVP–3/3s)—Cases requiring a Financial Care Plan	216	87	1.00	
Sponsor Verification Application (Form SVP–3/3s)—Applicants choosing to submit to an ORR-paid DNA test	216	78	1.00	
Sponsor Care Agreement (SVP–4/4s) All UAC check-in	216	265	0.75	42,930
Sponsor Care Agreement (SVP–4/4s) All UAC check-in	11	5,200	3.00	171,600
Fingerprinting Instructions (SVP–7/7s)	216	177	1.00	38,232
Letter of Designation for Care of a Minor (Form SVP–9/9s)	216	79	0.50	8,532
Estimated Annual Burden Hours Total				714,246

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: 6 U.S.C. 279; 8 U.S.C. 1232; *Flores* v. *Reno Settlement Agreement,* No. CV85–4544–RJK (C.D. Cal. 1996).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–29117 Filed 1–4–21; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Community Living

Agency Information Collection Activities; Submission for OMB Review; Public Comment Request; Information Collection Request for the State Grants for Assistive Technology Program Annual Progress Report; OMB #0985–0042

AGENCY: Administration for Community Living, HHS.

ACTION: Notice.

SUMMARY: The Administration for Community Living is announcing that the proposed collection of information listed above has been submitted to the Office of Management and Budget (OMB) for review and clearance as required under section 506(c)(2)(A) of the Paperwork Reduction Act of 1995. This 30-day notice collects comments on the information collection requirements related to the reinstatement with change for the information collection requirements related to State Grants for Assistive Technology Program Annual Progress Report [OMB #0985–0042].

DATES: Submit written comments on the collection of information by February 4, 2021.

ADDRESSES: Submit written comments and recommendations for the proposed information collection within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. By mail to the Office of Information and Regulatory Affairs, OMB, New Executive Office Bldg., 725 17th St. NW, Rm. 10235, Washington, DC 20503, Attn: OMB Desk Officer for ACL.

FOR FURTHER INFORMATION CONTACT: Robert Groenendaal, Assistive Technology Program Manager, Center for Innovation and Partnership in the Office of Interagency Innovation Administration for Community Living; Email: *Robert.Groenendaal@acl.hhs.gov;* Phone: 202–795–7356.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, ACL has submitted the following proposed collection of information to OMB for review and clearance.

The Administration for Community Living (ACL) is requesting approval for a reinstatement with change for the information collection associated with the State Grants for Assistive Technology Program Annual Progress Report (AT APR) 0985–0042.

The information collected through this data collection instrument is necessary for ACL and states to comply with Sections 4 and 7 of the Assistive Technology Act of 1998, as amended (AT Act). ACL is requesting a reinstatement with change of a previously approved information collection under OMB No. 0985–0042.

Section 4 of the AT Act authorizes grants to public agencies in the 50 states and the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas (states and outlying areas). With these funds, the 56 states and outlying areas operate ''Statewide AT Programs'' that conduct activities to increase access to and acquisition of assistive technology (AT) for individuals with disabilities and older Americans. Divided into two comprehensive activity categories: ''State-level Activities'' and ''State Leadership Activities.'' According to Section 4 of the AT Act, as a condition of receiving a grant to support their Statewide AT Programs, the 56 states and outlying areas must provide to ACL: (1) Applications and (2) annual progress reports on their activities.

Applications: The application required of states and outlying areas is a three-year State Plan for Assistive Technology (State Plan for AT or State Plan) (OMB No. 0985–0048). The content of the State Plan for AT is based on the requirements in Section 4(d) of the AT Act. As a part of this State Plan, Section 4(d)(3) of the AT Act requires that states and outlying areas set measurable goals for addressing the assistive technology needs of individuals with disabilities in education, employment, community living and information technology/telecommunications.

Every state and outlying area is required to include a minimum of seven prescribed measurable goals in its State Plan. These seven goals apply to all

states and outlying areas in order to aggregate information on performance of the program at the national level. National aggregation of data related to these goals is necessary for the Government Performance and Results Modernization Act of 2010 (GPRAMA) (Pub. L. 111–352), as well as an Annual Report to Congress (see ''Section 7 Requirements Necessitating Collection'' below).

Therefore, this data collection instrument provides a way for all 56 grantees—50 U.S. states, DC, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands to collect and report data on their performance in a consistent manner, including a uniform survey to be given to consumers. This uniform survey is included as part of the data collection package.

Annual Reports: In addition to submitting a State Plan every three years, states and outlying areas are required to submit annual progress reports on their activities. The data required in that progress report is specified in Section 4(f) of the AT Act.

Section 7(d) of the AT Act requires that ACL submit to Congress an annual report on the activities conducted under the Act and an analysis of the progress of the states and outlying areas in meeting their measurable goals.

This report must include a compilation and summary of the data collected under Section 4(f). In order to make this possible, states and outlying areas must provide their data uniformly. This data collection instrument was developed to ensure that all 56 states and outlying areas report data in a consistent manner in alignment with the requirements of Section 4(f).

As stated above, ACL will use the information collected via this instrument to:

(1) Complete the annual report to Congress required by the AT Act;

(2) Comply with reporting requirements under the Government Performance and Results Modernization Act of 2010 (GPRAMA) (Pub. L. 111–352); and

(3) Assess the progress of states and outlying areas regarding measurable goals in their State Plans for AT.

Data collected from the grantees will provide a national description of activities funded under the AT Act to increase the access to and acquisition of AT devices and services through statewide AT programs for individuals with disabilities. Data collected from grantees will also provide information for usage by Congress, the Department, and the public. In addition, ACL will use this data to inform program management, monitoring, and technical assistance efforts. While States will be able to use the data for internal management and program improvement.

Comments in Response to the 60-Day Federal Register Notice

A notice published in the **Federal Register** on September 28, 2020 in 85 FR 60803. There were 32 public comments received during the 60-day FRN comment period.

Proposed change in State Financing Activities: Financial Loan—partnership loans reported with no guarantee or interest buy-down have narrative description added to document subsidy/investment.

Comment Summary: Two State AT Act Program grantees commented in support. One organization representing the State AT Act Programs requested clarification.

ACL Response: Sentence identified as confusing has been deleted in the AT APR—IC document.

Proposed change in Reuse: Exchange—option for automatic exclusion of exchange recipients from performance measure data collection eliminated.

Comment Summary: Two AT grantees commented in support. One AT organization requested clarification.

ACL Response: Clarification text has been added into the AT APR—IC document.

Proposed change in Device Loan—separate type of borrower and type of device data reporting tables by purposed of loan.

Comment Summary: Three AT grantees commented in support. One requested clarification of timeline for implementation.

ACL Response: No changes made. ACL will clarify the timeline for implementation to begin with federal fiscal year 2022, with first data collection October 1, 2021 to provide time for data system revision.

Proposed change in Device Demonstration—separate decision-making participant from other participants reported in participant type table.

Comment Summary: Three AT grantees commented in support. One grantee and one organization commented in opposition with one saying this is duplicative data reporting and one saying it is understood that an individual with a disability is the decision-maker unless unable to be and then it is the caregiver/provider role. One grantee requested clarification of the timeline for implementation.

ACL Response: The proposed change is designed to support data fidelity by ensuring the decision-maker is identified by type within what can be a larger number of participants reported for each demonstration event. Currently all participants are reported by type. As a result, this change does not duplicate or increase data reporting burden. It only separates the decision-maker participant type reported from the type or types reported for all other participants. No change is made. ACL will clarify the timeline for implementation to begin with federal fiscal year 2022, with first data collection October 1, 2021 to provide time for data system revision.

Updated Outcome Measures—Overall acquisition and access performance measure tables and consumer satisfaction tables updated to align with outcome/output data and targets used by ACL for program evaluation and budget justification since FY18.

Comment Summary: One AT organization requested clarification.

ACL Response: Clarification has been added to the AT APR—IC document.

Proposed new data elements in Public Awareness and Information & Assistance—New question added for description of partnerships as part of public awareness, new data table added to report how individuals learned about the AT Program, new information request in Notes for description of partnerships that increase referrals.

Comment Summary: Five AT grantees and one AT organization commented in opposition to these changes and the new data element. All commenters expressed concern about lack of clarity and significant new data burden (both for AT Programs and consumers) associated with the proposed new data collection requirements.

Commenters suggested these new data elements be removed and requested ACL work with AT Act grantees to determine the most efficient and effective way to report referral source data in a future information collection.

ACL Response: ACL is appreciative of the participation of AT stakeholders in the **Federal Register** Notice comment process and values the submission of comments on the proposed updates to the Public Awareness and Information and Assistance sections of the AT APR data collection instrument. Once approved, ACL intends to address and work through these changes with AT stakeholders to identify the most efficient and effective way to collect referral source data in the Information Collection.

State Improvement Outcomes—new optional section added to collect data on

coordination and collaboration with two new required narratives and associated drop-down menu data.

Comment Summary: Two AT grantees commented in support.

ACL Response: No changes made.

Leveraged Funding—eliminated Section B and folded data into Section A to simplify.

Comment Summary: Two AT grantees commented in support.

ACL Response: No changes made.

Instruction Manual—deleted redundant text and updated AT Taxonomy.

Comment Summary: Two AT grantees commented in support.

ACL Response: No changes made.

Estimated Program Burden

ACL estimates the burden associated with this collection of information as follows:

(A) A web-based system that collects data from states.

(B) A performance measurement survey that states collect from individuals

(C) A customer satisfaction survey that states collect from individuals.

(A) Fifty-six grantees report to ACL using the *web-based data collection system.* A workgroup of grantees estimated that the average amount of time required to complete all responses to the data collection instrument is 80 hours annually. The estimated response burden includes time to review the instructions, gather existing data, and complete and review the data entries. These estimates are based on the experience of staff who implement these programs at the state level. In addition, we project that clean-up and clarification of data elements will require no change in data burden estimates.

(B) The fifty-six grantees ask consumers to complete surveys that provide information on their performance related to the state's *measurable goals.* Historical data from states indicates that the average state will ask for this information from 3,242 consumers at 1 minute per consumer to complete the question survey, for a total of 54 hours annually.

(C) The fifty-six grantees also ask consumers to complete *customer satisfaction surveys.* Historical data from states indicated that the average state asks for this information from 3,242 consumers at 1 minute per consumer, for a total of 54 hours annually.

	Number of responses	Hours per response	Annual burden per grantee	Total annual burden hours
Work-Based System	56	1.428	80	4,480
Performance Measurement	3,242	0.01666	54	3.024
Customer Satisfaction	3,242	0.01666	54	3,024
Subtotal			188	10,528
Program Support	56	4	208	11,648
Record Keeping Burden	56	0.14286	8	448
Subtotal			216	12,096
Total			404	22,624

Dated: December 29, 2020.

Lance Robertson,

Administrator and Assistant Secretary for Aging.

[FR Doc. 2020–29150 Filed 1–4–21; 8:45 am]

BILLING CODE 4154–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–2105]

Mouse Embryo Assay for Assisted Reproduction Technology Devices; 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 ''Mouse Embryo Assay for Assisted Reproduction Technology Devices.'' This guidance document provides recommendations on conducting the mouse embryo assay to support premarket submissions and lot release of assisted reproduction technology devices.

DATES: The announcement of the guidance is published in the **Federal Register** on January 5, 2021.

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–2019–D–2105 for ''Mouse Embryo Assay for Assisted Reproduction Technology Devices.'' 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 ''Mouse Embryo Assay for Assisted Reproduction Technology Devices'' 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: Pei-Hsuan (Chris) Hung, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2647, Silver Spring, MD 20993–0002, 240–402–5928.

SUPPLEMENTARY INFORMATION:

I. Background

The majority of assisted reproduction technology (ART) devices directly or indirectly contact gametes and/or embryos during use. The mouse embryo assay (MEA) is used to assess the potential for embryotoxicity of devices that contact gametes and/or embryos. Several classification regulations under part 884 (21 CFR part 884) include special controls that require MEA testing or information. MEA may also be used by sponsors to support premarket submissions for other devices that are intended to contact gametes and/or embryos during their use. However, there are no voluntary consensus standards that describe how to conduct the MEA. This guidance provides recommendations for conducting the MEA to support premarket submissions and lot release for ART devices that are intended to contact gametes and/or embryos and to comply with the special controls for those devices classified under part 884 that require MEA testing or information.

A notice of availability of the draft guidance appeared in the **Federal Register** of June 13, 2019 (84 FR 27637). FDA considered comments received and revised the guidance as appropriate in response to the comments, including minor technical edits and clarifications. Specifically, the final guidance includes revisions to recommend that liquid-based test articles should be prepared per the instructions for use; clarify FDA's recommended exposure time for test articles depending on their clinical use duration; include additional specificity on the number of embryos that should be used; discuss how accelerated aging can also be used to develop test articles at the end of the proposed shelf-life; and when procedural modifications or options should be justified in the test report. In addition, FDA made editorial changes to the guidance for clarity.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Mouse Embryo Assay for Assisted Reproduction Technology Devices.'' 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 ''Mouse Embryo Assay for Assisted Reproduction Technology Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 16015 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

Dated: December 28, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–29081 Filed 1–4–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–2199]

Investigational New Drug Submissions for Individualized Antisense Oligonucleotide Drug Products: Administrative and Procedural Recommendations; Draft Guidance for Sponsor-Investigators; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry entitled ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products: Administrative and Procedural Recommendations.'' FDA is publishing this draft guidance to help sponsor-investigators (hereafter referred to as sponsors) developing individualized antisense oligonucleotide (ASO) drug products for a severely debilitating or life-threatening genetic disease. Most often, individuals with such diseases will not have adequate alternative therapy available for treating their disease. This draft guidance is intended to help sponsors of such development programs, who may be relatively unfamiliar with FDA regulations, processes, and practices, with the administrative and procedural aspects of interacting with FDA, including seeking feedback from FDA on their development programs and making regulatory submissions related to these development programs.

DATES: Submit either electronic or written comments on the draft guidance by March 8, 2021 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

ADDRESSES: You may submit comments on any guidance at any time as follows:

Electronic Submission

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–2199 for ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products: Administrative and Procedural Recommendations.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Colleen Locicero, Office of New Drugs, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Avenue, Silver Spring, MD 20903, 301–796–1114.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products: Administrative and Procedural Recommendations.'' This draft guidance is intended to help sponsors developing individualized ASO drug products for a severely debilitating or life-threatening genetic disease.

The draft guidance addresses the approach for obtaining feedback from FDA, the expectations and process for making regulatory submissions to FDA, and high-level recommendations related to the requirement for institutional review board review of protocols for trials of individualized ASO drug products and the informed consent of participants. The draft guidance discusses the importance of early interaction with FDA, submission expectations for pre-investigational new drug (IND) meeting packages and IND applications, and ethical and human subject protection considerations.

The draft guidance is intended to help sponsors of such development programs, who may be relatively unfamiliar with FDA regulations, processes, and practices, seek feedback from FDA on their development programs and make regulatory submissions related to these development programs. The draft guidance is expected to facilitate the preparation of adequate pre-IND and IND submissions for review by the Agency, which may help enable prompt initiation of the investigation.

This draft guidance represents the first of several guidances FDA intends to publish to advise and help sponsors developing individualized ASO drug products for patients who have severely debilitating or life-threatening diseases or conditions and no adequate alternative therapy available to them to treat their disease or condition.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on ''IND Submissions for Individualized Antisense Oligonucleotide Drug Products: Administrative and Procedural Recommendations.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 312 for the submission of IND applications, amendments, and safety reports; for investigator brochures; and for requesting a pre-IND meeting have been approved under OMB control number 0910–0014; the collections of information for paper submissions of Form FDA 3500A have been approved under OMB control number 0910–0291; the collections of information for electronic submissions of Form FDA 3500 have been approved under OMB control number 0910–0645; the collections of information in 21 CFR parts 50 and 56 for obtaining informed consent for prospective patients have been approved under OMB control number 0910–0755.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs* or *https://www.regulations.gov.*

Dated: December 23, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–29119 Filed 1–4–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Advisory Council on Alzheimer's Research, Care, and Services; Meeting

AGENCY: Assistant Secretary for Planning and Evaluation, HHS.

ACTION: Notice of meeting.

SUMMARY: This notice announces the public meeting of the Advisory Council on Alzheimer's Research, Care, and Services (Advisory Council). The Advisory Council provides advice on how to prevent or reduce the burden of Alzheimer's disease and related dementias on people with the disease and their caregivers. During the January 25, 2021 meeting the Advisory Council will hear presentations on the impact of COVID–19 on people with dementia, health disparities in dementia research, and the implications of new technologies to identify Alzheimer's disease through a blood tests.

DATES: The meeting will be held on January 25, 2021 from 1:00 p.m. to 4:30 p.m. EST.

ADDRESSES: The meeting will be virtual, streaming at *http://www.hhs.gov/live.*

Comments: Time is allocated on the agenda to hear public comments from 4:00 p.m. to 4:30 p.m. The time for oral comments will be limited to two (2) minutes per individual. In order to provide a public comment, please register by emailing your name to *napa@hhs.gov* by Thursday, January 21. Registered commenters will receive both a dial-in number and a link to join the meeting virtually; individuals will have the choice to either join virtually via the link, or to call in only by using the dial-in number. *Note:* There may be a 30–45 second delay in the livestream video presentation of the conference. For this reason, if you have pre-registered to submit a public comment, it is important to connect to the meeting by 3:45 p.m. to ensure that you do not miss your name and allotted time when called. If you miss your name and allotted time to speak, you may not be able to make your public comment. All participant audio lines will be muted for the duration of the meeting and only unmuted by the Host at the time of the participant's public comment. Should you have questions during the session email *napa@hhs.gov* and someone will respond to your message as quickly as possible.

In order to ensure accuracy, please submit a written copy of oral comments for the record by emailing *napa@hhs.gov* by Tuesday, January 26. These comments will be shared on the website and reflected in the meeting minutes.

In lieu of oral comments, formal written comments may be submitted for the record by Tuesday, January 26 to Helen Lamont, Ph.D., OASPE, 200 Independence Avenue SW, Room 424E, Washington, DC 20201. Comments may also be sent to *napa@hhs.gov.* Those submitting written comments should identify themselves and any relevant organizational affiliations.

FOR FURTHER INFORMATION CONTACT: Helen Lamont, 202–260–6075, *helen.lamont@hhs.gov. Note:* The meeting will be available to the public live at *www.hhs.gov/live.*

SUPPLEMENTARY INFORMATION: Notice of these meetings is given under the Federal Advisory Committee Act (5 U.S.C. App. 2, section 10(a)(1) and (a)(2)). Topics of the Meeting: Impact of COVID–19 on people with dementia, health disparities in dementia research, and the implications of new technologies to identify Alzheimer's disease through a blood tests.

Procedure and Agenda: The meeting will be webcast at *www.hhs.gov/live* and video recordings will be added to the National Alzheimer's Project Act website when available, after the meeting.

Authority: 42 U.S.C. 11225; Section 2(e)(3) of the National Alzheimer's Project Act. The panel is governed by provisions of Public Law 92–463, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: December 21, 2020.

Brenda Destro,

Deputy Assistant Secretary for Planning and Evaluation, Office of Human Services Policy.

[FR Doc. 2020–29141 Filed 1–4–21; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; 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 as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Heart, Lung, and Blood Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NHLBI.

Date: February 1, 2021.

Time: 8:45 a.m. to 6:00 p.m.

Agenda: To review and evaluate personnel qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 10, 10 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Robert S. Balaban, Ph.D., Scientific Director, Division of Intramural Research, National Institutes of Health, NHLBI Building 10, CRC, 4th Floor, Room 1581, 10 Center Drive, Bethesda, MD 20892, (301) 496–2116, *balabanr@nhlbi.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: December 29, 2020.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29124 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Initial Review Group; Diabetes, Endocrinology and Metabolic Diseases DDK–B Subcommittee.

Date: March 10–12, 2021.

Time: 10:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Video Meeting).

Contact Person: Charlene J. Repique, Ph.D., Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 7347, 6707 Democracy Boulevard, Bethesda, MD 20892–5452, (301) 594–7791, *charlene.repique@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 29, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29148 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Preclinical Development of Aging Therapeutics.

Date: February 18, 2021.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Gateway Building, Suite 2W200, Bethesda, MD 20892, (301) 480–1266, *neuhuber@ninds.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 29, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29145 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Gut Microbiomes in Brain Diseases.

Date: March 5, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Joshua Jin-Hyouk Park, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6208, *joshua.park4@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 29, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29146 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiological Basis of Mental Disorders and Addictions Study Section.

Date: February 3–4, 2021.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Boris P. Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry A Study Section.

Date: February 3–4, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anita Szajek, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–827–6276, *anita.szajek@nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Membrane Biology and Protein Processing Study Section.

Date: February 3–4, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kevin Czaplinski, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–435–0000, *czaplinskik2@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Community Influences on Health Behavior Study Section.

Date: February 3–4, 2021.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Tasmeen Weik, DRPH, MPH, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3141, Bethesda, MD 20892, 301–827–6480, *weikts@mail.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Neurogenesis and Cell Fate Study Section.

Date: February 3–4, 2021.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joanne T. Fujii, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4184, MSC 7850, Bethesda, MD 20892, (301) 435–1178, *fujiij@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 29, 2020.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29120 Filed 1–4–21; 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; Biobehavioral and Behavioral Sciences Subcommittee.

Date: February 25, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH/NACHHD 6710B, 6710B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Clay Mash, Ph.D., Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, Rm. 2131A, Bethesda, MD 20892, (301) 496–6866, *mashc@mail.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 29, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29118 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Pediatric and Obstetric Pharmacology and Therapeutics.

Date: January 15, 2021.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Dianne Hardy, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6175, MSC 7892, Bethesda, MD 20892, (301) 435–1154, *dianne.hardy@nih.gov.*

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. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 29, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29147 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting. The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Using the Science of Science to Document and Accelerate Progress in Treating Alzheimer's Disease.

Date: February 12, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Joshua Jin-Hyouk Park, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6208, *joshua.park4@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: December 29, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29144 Filed 1–4–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–31320; 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 19, 2020, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by January 21, 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 19, 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:

ARIZONA

Pima County

Viewpoint, 2840 North Sunrock Ln., Tucson, SG100006082

CALIFORNIA

Alameda County

Oakland Auditorium, 10 10th St., Oakland, SG100006085

Los Angeles County

King Edward Hotel, 117–131 East 5th St., 455 South Los Angeles St., Los Angeles, SG100006086

San Francisco County

Buon Gusto Sausage Factory, 535 Green St., San Francisco, SG100006073

Solano County

Benicia City Cemetery, Bounded by Riverhill Dr., Riverview Terr., Shirley Dr., and Incline Pl., Benicia City, SG100006087

DELAWARE

New Castle County

St. Nicholas Ukrainian Catholic Church, 610 South Heald St., Wilmington, SG100006071

KANSAS

Rawlins County

Sappa Creek Massacre Site, Address Restricted, Atwood vicinity, SG100006060

MASSACHUSETTS

Suffolk County

Elm Hill Park Historic District, 2–38 Elm Hill Park, 538–570 Warren St., Boston, SG100006078

Worcester County

Leominster High School, 261 West St., Leominster, SG100006083

MISSOURI

Cole County

Giesecke-D'Oench-Hays Shoe Factory, 1101 East Capitol Ave., Jefferson City, SG100006079

Jackson County

Archbishop O'Hara High School, 9001 James A. Reed Rd., Kansas City, SG100006074
Hazelle, Inc. Building, 1224 Admiral Blvd., Kansas City, SG100006075
Oakwood Country Club, 9800 Grandview Rd., Kansas City, SG100006076

Jefferson County

Waggener Dairy Barn, 1700 Boyce Ln., Festus vicinity, SG100006081

Moniteau County

Harrison School, 235 East Howard St., Tipton, SG100006080

OHIO

Cuyahoga County

Erieview Historic District, Roughly bounded by Lakeside Ave., Chester Ave., East 9th St., and East 12th St., Cleveland, SG100006084

SOUTH DAKOTA

Codington County

Watertown Commercial Historic District (Boundary Decrease), Roughly bounded by 1st St. West, 3rd St. East, 1st Ave. North, 2nd Ave. South, Watertown, BC100006064

Roberts County

Nigg, Louis, Barn, 46356 125th St., Sisseton, SG100006065

TEXAS

Tarrant County

Pioneers Rest Cemetery, 600 Samuels Ave., Fort Worth, SG100006072

UTAH

San Juan County

Navajo Mountain Day School and Community Center Historic District, 300 yds. west of jct. of Cty. Rds. 434 and 488, Navajo Mountain, SG100006063

WASHINGTON

Jefferson County

Christian Congregation Church of Port Ludlow, 11 Werner Rd., Port Ludlow, SG100006061

King County

Millionaire's Row Historic District, 626–1021 14th Ave. East, 1409 East Aloha St., and 1409 East Prospect St., Seattle, SG100006062
Ballast Island, At the foot of South Washington and South Main Sts., along the waterfront. Seattle, SG100006067
Fir Lodge, 2717 61st Ave. SW, Seattle, SG100006070

Spokane County

Dodson Building, 218–220 North Bernard St., Spokane, SG100006068

Additional documentation has been received for the following resources:

ARIZONA

Pima County

Catalina Vista Historic District (Additional Documentation), Bounded by Grant Rd., Tucson Blvd., Elm St., and Campbell Ave., Tucson, AD03000317

SOUTH DAKOTA

Brookings County

Brookings Commercial Historic District (Additional Documentation), Roughly along Main Ave. between the C&NW RR and the alley North Fifth St., Brookings, AD88000029

(Authority: Section 60.13 of 36 CFR part 60)

Dated: December 23, 2020.

Julie H. Ernstein,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2020–29142 Filed 1–4–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Affirmative Decisions on Petitions for Modification Granted in Whole or in Part

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice.

SUMMARY: The Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations govern the application, processing, and disposition of petitions for modification of mandatory safety standards. Any mine operator or representative of miners may petition for an alternative method of complying with an existing safety standard. MSHA reviews the content of each submitted petition, assesses the mine in question, and ultimately issues a decision on the petition. This notice includes a list of petitions for modification that were granted after MSHA's review and investigation, between April 20, 2019 and December 14, 2020.

ADDRESSES: Copies of the final decisions are posted on MSHA's website at *https://www.msha.gov/regulations/rulemaking/petitions-modification*. The public may inspect the petitions and final decisions during normal business hours in MSHA's Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202. All visitors are required to check in at the receptionist's desk in Suite 4E401.

FOR FURTHER INFORMATION CONTACT: Roslyn B. Fontaine, 202–693–9440 (voice), *Fontaine.roslyn@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 101 of the Federal Mine Safety and Health Act of 1977, any mine operator or representative of miners may petition to use an alternative approach to comply with a safety standard. In response, the Secretary of Labor (Secretary) or his or her designee may modify the application of a mandatory safety standard to that mine if the Secretary determines that: (1) An alternative method exists that will guarantee no less protection for the miners affected than that provided by the standard; or (2) the application of the standard will result in a diminution of safety to the affected miners.

MSHA bases the final decision on the petitioner's statements, any comments and information submitted by interested

persons, and a field investigation of the conditions at the mine. In some instances, MSHA may approve a petition for modification on the condition that the mine operator complies with other requirements noted in the decision. In other instances, MSHA may deny, dismiss, or revoke a petition for modification. In accordance with 30 CFR 44.5, MSHA publishes every final action granting a petition for modification.

II. Granted Petitions for Modification

On the basis of the findings of MSHA's investigation, and as designee of the Secretary, MSHA has granted or partially granted the petitions for modification below. Since the previous **Federal Register** notice (84 FR 34950) included petitions granted through April 19, 2019, listed below are petitions granted between April 20, 2019 and December 20, 2020. The granted petitions are shown in the order that MSHA received them.

• *Docket Number:* M–2016–012–C.
FR Notice: 81 FR 42737 (6/30/2016).
Petitioner: ICG Illinois, LLC, 5945 Lester Road, Williamsville, Illinois 62693.
Mine: Viper Mine, MSHA I.D. No. 11–02664, located in Sangamon County, Illinois.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2016–013–C.
FR Notice: 81 FR 42737 (6/30/2016).
Petitioner: ICG Illinois, LLC, 5945 Lester Road, Williamsville, Illinois 62693.
Mine: Viper Mine, MSHA I.D. No. 11–02664, located in Sangamon County, Illinois.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2016–014–C.
FR Notice: 81 FR 42737 (6/30/2016).
Petitioner: ICG Illinois, LLC, 5945 Lester Road, Williamsville, Illinois 62693.
Mine: Viper Mine, MSHA I.D. No. 11–02664, located in Sangamon County, Illinois.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2016–034–C.
FR Notice: 81 FR 81810 (11/18/2016).
Petitioner: Warrior Coal, LLC, 57 J.E. Ellis Rd., Madisonville, Kentucky 42431.
Mine: Warrior's Cardinal Mine, MSHA I.D. No. 15–14335, located in Hopkins County, Kentucky.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2016–035–C.
FR Notice: 81 FR 81810 (11/18/2016).
Petitioner: Warrior Coal, LLC, 57 J.E. Ellis Rd., Madisonville, Kentucky 42431.
Mine: Warrior's Cardinal Mine, MSHA I.D. No. 15–14335, located in Hopkins County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2017–004–C.
FR Notice: 82 FR 16071 (3/31/2017).
Petitioner: Tunnel Ridge, LLC, 2596 Battle Run Road, Triadelphia, West Virginia 26059.
Mine: Tunnel Ridge Mine, MSHA I.D. No. 46–08864, located in Ohio County, West Virginia.
Regulation Affected: Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2017–005–C.
FR Notice: 82 FR 16071 (3/31/2017).
Petitioner: Tunnel Ridge, LLC, 2596 Battle Run Road, Triadelphia, West Virginia 26059.
Mine: Tunnel Ridge Mine, MSHA I.D. No. 46–08864, located in Ohio County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2017–006–C.
FR Notice: 82 FR 16071 (3/31/2017).
Petitioner: Tunnel Ridge, LLC, 2596 Battle Run Road, Triadelphia, West Virginia 26059.
Mine: Tunnel Ridge Mine, MSHA I.D. No. 46–08864, located in Ohio County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2017–010–C.
FR Notice: 82 FR 34701 (7/26/2017).
Petitioner: Peabody Gateway North Mining, LLC, 12968 Illinois State Route 13, Coulterville, IL 62237.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2017–011–C.
FR Notice: 82 FR 34701 (7/26/2017).
Petitioner: Peabody Gateway North Mining, LLC, 12968 Illinois State Route 13, Coulterville, IL 62237.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2017–015–C.
FR Notice: 82 FR 37239 (8/9/2017).
Petitioner: Prairie State Generating Company, 4274 County Highway 12, Marissa, Illinois 62257.
Mine: Lively Grove Mine, MSHA I.D. No. 11–03193, located in Washington County, Illinois.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2017–016–C.
FR Notice: 82 FR 37239 (8/9/2017).
Petitioner: Prairie State Generating Company, 4274 County Highway 12, Marissa, Illinois 62257.
Mine: Lively Grove Mine, MSHA I.D. No. 11–03193, located in Washington County, Illinois.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2017–041–C.
FR Notice: 83 FR 4927 (2/2/2018).
Petitioner: Rosebud Mining Company, 301 Market Street, Kittanning, Pennsylvania 16201.
Mines: Cresson Mine, MSHA I.D. No. 36–09308 and Madison Mine, MSHA I.D. No. 36–09127, located in Cambria County, Pennsylvania; Barret Mine, MSHA I.D. No. 36–09342, Knob Creek Mine, MSHA I.D. No. 36–09394, Heilwood Mine, MSHA I.D. No. 36–09407, Brush Valley Mine, MSHA I.D. No. 36–09437, Lowry Mine, MSHA I.D. No. 36–09287, Coral-Graceton Mine, MSHA I.D. No. 36–09595 and Crooked Creek Mine, MSHA I.D. No. 36–09972, located in Indiana County, Pennsylvania; Tusky Mine, MSHA I.D. No. 33–04509, located in Tuscarawas County, Ohio; Penfield Mine, MSHA I.D. No. 36–09355 and Harmony Mine, MSHA I.D. No. 36–09477, located in Clearfield County, Pennsylvania; Bergholz 7 Mine, MSHA I.D. No. 33–04565, located in Jefferson County, Ohio; Mine 78, MSHA ID No. 36–09371, located in Somerset County, Pennsylvania; Vail Mine, MSHA I.D. No. 33–04645, located in Harrison County, Ohio; Darmac Mine, MSHA I.D. No. 36–08135, Dutch Run Mine, MSHA I.D. No. 36–08701, Parkwood Mine, MSHA I.D. No. 36–08785, Logansport Mine, MSHA I.D. No. 36–08841 and Long Run Mine, MSHA I.D. No. 36–09468, located in Armstrong County, Pennsylvania; Kocjancic Mine, MSHA I.D. No. 36–09436, located in Jefferson County, Pennsylvania;

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2017–042–C.
FR Notice: 83 FR 4927 (2/2/2018).
Petitioner: Cumberland Contura, LLC, Three Gateway Center, 401 Liberty Avenue, Suite 1500, Pittsburgh, Pennsylvania 15222–1000.
Mine: Cumberland Mine, MSHA I.D. No. 36–05018, located in Greene County, Pennsylvania.
Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance), 18.35(a)(5)(i) (Portable (trailing) cables and cords).

• *Docket Number:* M–2018–003–M.
FR Notice: 83 FR 15876 (4/12/2018).
Petitioner: Ciner Wyoming LLC, P.O. Box 513, 254 County Road 4–6, Green River, Wyoming 82935.
Mine: Big Island Mine, MSHA I.D. No. 48–00154, located in Sweetwater County, Wyoming.
Regulation Affected: 30 CFR 57.22305 (Approved equipment (III mines)).

• *Docket Number:* M–2018–005–C.
FR Notice: 83 FR 15876 (4/12/2018).
Petitioner: Hamilton County Coal, LLC, 18033 County Road 500E, Dahlgren, Illinois 62828–4294.
Mine: Hamilton Mine No. 1, MSHA I.D. No. 11–03203, located in Hamilton County, Illinois.
Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35 (Portable (trailing) cables and cords).

• *Docket Number:* M–2018–019–C.
FR Notice: 83 FR 57508 (11/15/2018).
Petitioner: Knight Hawk Coal, LLC, 1710 State Route 154, Pinckneyville, Illinois 62274.
Mine: Prairie Eagle Underground Mine, MSHA I.D. No. 11–03147, located in Perry County, Illinois.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2018–020–C.
FR Notice: 83 FR 66758 (12/27/2018).
Petitioner: Signal Peak Energy, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Bull Mountains Mine No. 1, MSHA I.D. No. 24–01950, located in Musselshell County, Montana.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2018–021–C.
FR Notice: 83 FR 66758 (12/27/2018).
Petitioner: Signal Peak Energy, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Bull Mountains Mine No. 1, MSHA I.D. No. 24–01950, located in Musselshell County, Montana.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2018–022–C.
FR Notice: 83 FR 66758 (12/27/2018).
Petitioner: Signal Peak Energy, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Bull Mountains Mine No. 1, MSHA I.D. No. 24–01950, located in Musselshell County, Montana.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2018–023–C.
FR Notice: 84 FR 5111 (2/20/2019).
Petitioner: Little Buck Coal Company, 21 Pine Lane, Pine Grove, Pennsylvania 17963.
Mine: Broad Mountain Slope, MSHA I.D. No. 36–10233, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1200(d), (h) and (i) (Mine map).

• *Docket Number:* M–2018–024–C.
FR Notice: 84 FR 5111 (2/20/2019).
Petitioner: Little Buck Coal Company, 21 Pine Lane, Pine Grove, Pennsylvania 17963.
Mine: Broad Mountain Slope, MSHA I.D. No. 36–10233, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1202–1(a) (Temporary notations, revisions, and supplements).

• *Docket Number:* M–2018–025–C.
FR Notice: 84 FR 5111 (2/20/2019).
Petitioner: Little Buck Coal Company, 21 Pine Lane, Pine Grove, Pennsylvania 17963.
Mine: Broad Mountain Slope, MSHA I.D. No. 36–10233, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1400 (Hoisting equipment; general).

• *Docket Number:* M–2018–026–C.
FR Notice: 84 FR 5108 (2/20/2019).
Petitioner: Castle Valley Mining, LLC, P.O. Box 475, Huntington, Utah 84528.
Mine: Castle Valley Mine No. 3, MSHA I.D. No. 42–02263 and Castle Valley Mine No. 4, MSHA I.D. No. 42–02335, located in Emery County, Utah.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–002–C.
FR Notice: 84 FR 28077 (6/17/2019).
Petitioner: Cumberland Contura, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Cumberland Mine, MSHA I.D. No. 36–05018, located in Greene County, Pennsylvania.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–003–C.
FR Notice: 84 FR 28077 (6/17/2019).
Petitioner: Cumberland Contura, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Cumberland Mine, MSHA I.D. No. 36–05018, located in Greene County, Pennsylvania.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; out by the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–004–C.
FR Notice: 84 FR 28077 (6/17/2019).
Petitioner: Cumberland Contura, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Cumberland Mine, MSHA I.D. No. 36–05018, located in Greene County, Pennsylvania.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–004–M.
FR Notice: 84 FR 38646 (8/7/2019).
Petitioner: Solvay Chemicals, Inc., P.O. Box 1167, 400 County Road 85, Green River, WY 82935.
Mine: Solvay Chemicals, Inc. Mine, MSHA I.D. 48–01295, located in Sweetwater County, WY.
Regulation Affected: 30 CFR 57.22305 (Approved equipment (III mines)).

• *Docket Number:* M–2019–005–C.
FR Notice: 84 FR 20430 (5/9/2019).
Petitioner: Castle Valley Mining LLC, P.O. Box 475, 5550 W Bear Canton Rd., Huntington, Utah 84528.
Mine: Castle Valley Mine No. 3, MSHA I.D. No. 42–02263, located in Emery County, Utah.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–006–C.
FR Notice: 84 FR 20430 (5/9/2019).
Petitioner: Castle Valley Mining LLC, P.O. Box 475, 5550 W Bear Canyon Rd., Huntington, Utah 84528.
Mine: Castle Valley Mine No. 3, MSHA I.D. No. 42–02263, located in Emery County, Utah.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–006–M.
FR Notice: 84 FR 49561 (9/20/2019).
Petitioner: Hecla Limited, Lucky Friday Unit, 397 Friday Ave., Mullan, ID 83846.

Mine: Lucky Friday, MSHA I.D. No. 10–00088, located in Shoshone County, Idaho.

Regulation Affected: 30 CFR 57.11052(d) (Refuge areas).

• *Docket No.* M–2019–007–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Eagle 3 Mine, MSHA I.D. No. 46–09427, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–007–M.
FR Notice: 84 FR 64107 (11/20/2019).
Petitioner: Genesis Alkali, LLC, P.O. Box 872, 580 Westvaco Rd., Green River, WY 82935.
Mine: Genesis Alkali @WESTVACO, MSHA I.D. No. 48–00152, located in Sweetwater County, WY.
Regulation Affected: 30 CFR 57.22305 (Approved equipment (III mines)).

• *Docket Number:* M–2019–008–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Eagle 3 Mine, MSHA I.D. No. 46–09427, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–009–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Eagle 3 Mine, MSHA I.D. No. 46–09427, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–010–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Flying Eagle Mine, MSHA I.D. No. 46–09471, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–011–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Flying Eagle Mine, MSHA I.D. No. 46–09471, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–012–C.
FR Notice: 84 FR 28083 (6/17/2019).
Petitioner: Rockwell Mining, LLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, Pennsylvania 15222–1000.
Mine: Flying Eagle Mine, MSHA I.D. No. 46–09471, located in Wyoming County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–018–C.
FR Notice: 84 FR 29881 (6/25/2019).
Petitioner: Hartshorne Mining Group, LLC, P.O. Box 449, Calhoun, Kentucky 42327.
Mine: Poplar Grove Mine, MSHA I.D. No. 15–19806, located in McLean County, Kentucky.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–019–C.
FR Notice: 84 FR 29881 (6/25/2019).
Petitioner: Hartshorne Mining, LLC, P.O. Box 449, Calhoun, Kentucky 42327.
Mine: Poplar Grove Mine, MSHA I.D. No. 15–19806, located in McLean County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number* M–2019–021–C.
FR Notice: 84 FR 43820 8/22/2019.
Petitioner: Monongalia County Coal Company, P.O. Box 72, Brave, Pennsylvania 15316.
Mine: Monongalia County Mine, MSHA I.D. No. 46–01968, located in Monongalia County, West Virginia.
Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 18.35(a)(5)(i) (Portable (trailing) cables and cords).

• *Docket Number:* M–2019–022–C.
FR Notice: 84 FR 43820 (8/22/2019).
Petitioner: Sunrise Coal, LLC, 12661 N Agricare Road, Oaktown, Indiana 47561.
Mine: Oaktown Fuels No. 1, MSHA I.D. No. 12–02394, located in Knox County, Indiana.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–023–C.
FR Notice: 84 FR 43820 (8/22/2019).
Petitioner: Sunrise Coal, LLC, 12661 N Agricare Road, Oaktown, Indiana 47561.
Mine: Oaktown Fuels No. 2, MSHA I.D. No. 12–02418, located in Knox County, Indiana.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–028–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 77 Mine, MSHA I.D. No. 15–09636, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–029–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 77 Mine, MSHA I.D. No. 15–09636, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–030–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 77 Mine, MSHA I.D. No. 15–09636, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–031–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Calvary No. 81 Mine, MSHA I.D. No. 15–12753, located in Leslie County, Kentucky.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–032–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Calvary No. 81 Mine, MSHA I.D. No. 15–12753, located in Leslie County, Kentucky.

Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–033–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Calvary No. 81 Mine, MSHA I.D. No. 15–12753, located in Leslie County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–034–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Orchard Branch Mine No. 89, MSHA I.D. No. 15–19405, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–035–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Orchard Branch Mine No. 89, MSHA I.D. No. 15–19405, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–036–C.
FR Notice: 84 FR 38649 (8/7/2019).
Petitioner: Blue Diamond Coal Company, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Orchard Branch Mine No. 89, MSHA I.D. No. 15–19405, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–037–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Buffalo Mine, MSHA I.D. No. 46–09528, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–038–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Buffalo Mine, MSHA I.D. No. 46–09528, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–039–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Buffalo Mine, MSHA I.D. No. 46–09528, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–040–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Washington Mine, MSHA I.D. No. 46–09294, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–041–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Washington Mine, MSHA I.D. No. 46–09294, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–042–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Washington Mine, MSHA I.D. No. 46–09294, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–043–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Muddy Bridge Mine, MSHA I.D. No. 46–09514, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–044–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Muddy Bridge Mine, MSHA I.D. No. 46–09514, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–045–C.
FR Notice: 84 FR 43165 (8/20/2019).
Petitioner: Hampden Coal, LLC, One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: Muddy Bridge Mine, MSHA I.D. No. 46–09514, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–046–C.
FR Notice: 84 FR 44925 (8/27/2019).
Petitioner: Jet Coal Co., Inc., One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 8 Mine, MSHA I.D. No. 46–09018, located in Mingo County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–047–C.
FR Notice: 84 FR 44925 (8/27/2019).
Petitioner: Jet Coal Co., Inc., One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 8 Mine, MSHA I.D. No. 46–09018, located in Mingo County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–048–C.
FR Notice: 84 FR 44925 (8/27/2019).
Petitioner: Jet Coal Co., Inc., One Oxford Centre, 301 Grant Street, Suite 4300, Pittsburgh, Pennsylvania 15219.
Mine: No. 8 Mine, MSHA I.D. No. 46–09018, located in Mingo County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–049–C.
FR Notice: 84 FR 48178 (9/12/2019).
Petitioner: Rock N Roll Coal Company, Inc., 4641 Greenbrier Mountain Road, Panther, WV 24872.
Mine: Mine No. 7, MSHA I.D. No. 46–09093, located in McDowell County, West Virginia.

Regulation Affected: 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

• *Docket Number:* M–2019–050–C.
FR Notice: 84 FR 55175 (10/15/2019).
Petitioner: Peabody Gateway North Mining LLC, Six PPG Place, Suite 830, Pittsburgh, PA 15222.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–051–C.
FR Notice: 84 FR 55175 (10/15/2019).
Petitioner: Peabody Gateway North Mining LLC, Six PPG Place, Suite 830, Pittsburgh, PA 15222.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–052–C.
FR Notice: 84 FR 55175 (10/15/2019).
Petitioner: Peabody Gateway North Mining LLC, Six PPG Place, Suite 830, Pittsburgh, PA 15222.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, Illinois.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2019–054–C.
FR Notice: 84 FR 64107 (11/20/2019).
Petitioner: Castle Valley Mining LLC, P.O. Box 475, Huntington, UT 84528.
Mines: Castle Valley Mine #3, MSHA I.D. No. 42–02263 and Castle Valley Mine #4, MSHA I.D. No. 42–02335, located in Emery County, UT.
Regulation Affected: 75.1909(b)(6) (Nonpermissible diesel-powered equipment; design and performance requirements).

• *Docket Number* M–2019–055–C.
FR Notice: 84 FR 64107 11/20/2019.
Petitioner: INMET Mining, LLC, 144 E Market Place Blvd., Knoxville, TN 37922.
Mine: D–31 Cut Through, MSHA I.D. No. 44–06782, located in Lee County, Virginia.
Regulation Affected: 30 CFR 75.1108(c) (Approved conveyor belts).

• *Docket Number:* M–2019–056–C.
FR Notice: 84 FR 64107 11/20/2019.
Petitioner: Marfork Coal Company, LLC, P.O. Box 457, Whitesville, WV 25209.
Mine: Markfork Processing, MSHA I.D. No. 46–08374, located in Raleigh County, West Virginia.
Regulation Affected: 30 CFR 77.214(a) (Refuse piles; general).

• *Docket Number:* M–2019–061–C.
FR Notice: 85 FR 4709 1/27/2020.
Petitioner: Peabody Gateway North Mining, LLC, 7100 Eagle Crest Boulevard, Suite 100, Evansville, IN 47715–8152.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, IL.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2019–062–C.
FR Notice: 85 FR 4709 1/27/2020.
Petitioner: Peabody Gateway North Mining, LLC, 7100 Eagle Crest Boulevard, Suite 100, Evansville, IN 47715–8152.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, IL.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2019–063–C.
FR Notice: 85 FR 4709 1/27/2020.
Petitioner: Peabody Gateway North Mining, LLC, 7100 Eagle Crest Boulevard, Suite 100, Evansville, IN 47715–8152.
Mine: Gateway North Mine, MSHA I.D. No. 11–03235, located in Randolph County, IL.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2020–002–C.
FR Notice: 85 FR 19162 (4/6/2020).
Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.
Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2020–002–M.
FR Notice: 85 FR 47417 (8/5/2020).
Petitioner: U.S. Silica Company, 5263 Edmund Highway, West Columbia, South Carolina 29170.
Mine: Columbia Plant, MSHA I.D. No. 38–00138, located in Lexington County, South Carolina.
Regulation Affected: 30 CFR 56.13020 (Use of compressed air).

• *Docket Number:* M–2020–003–C.
FR Notice: 85 FR 19162 (4/6/2020).
Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.
Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2020–004–C.
FR Notice: 85 FR 19162 (4/6/2020).
Petitioner: Ramaco Resources, LLC, P.O. Box 219, Verner, WV 25650.
Mines: Eagle Seam Deep Mine, MSHA I.D. No. 46–09495, Stonecoal Branch Mine No. 2, MSHA I.D. No. 46–08663, No. 2 Gas, MSHA I.D. No. 46–09541, located in Logan County, West Virginia.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

• *Docket Number:* M–2020–006–C.
FR Notice: 85 FR 20528 (4/13/2020).
Petitioner: Nelson Brothers, LLC, P.O. Box 8276, South Charleston, WV 25303.
Mines: Workman Creek Surface Mine, MSHA I.D. No. 46–09475, located in Raleigh County, West Virginia; No. 1 Surface Mine, MSHA I.D. No. 46–06870, located in Nicholas County, West Virginia; Twilight Mtr. Surface Mine, MSHA I.D. No. 46–08645, located in Boone County, West Virginia.
Regulation Affected: 30 CFR 77.1302(k) (Vehicles used to transport explosives).

• *Docket Number:* M–2020–007–C.
FR Notice: 85 FR 36422 (6/16/2020).
Petitioner: Rockwell Mining, LLC, 300 Kanawha Boulevard, East (ZIP 25301), P.O. Box 273, Charleston, West Virginia 25321–0273.
Mine: Matewan Tunnel, MSHA I.D. No. 46–08610, located in Boone County, West Virginia.
Regulation Affected: 30 CFR 75.1108(c) (Approved conveyor belts).

• *Docket Number:* M–2020–011–C.
FR Notice: 85 FR 47404 (8/5/2020).
Petitioner: Jarisa, Inc., 935 State Hwy 317, Neon, KY 41840.
Mine: E4–1 Mine, MSHA I.D. No. 15–18565, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.500(d) (Permissible electric equipment).

• *Docket Number:* M–2020–012–C.
FR Notice: 85 FR 47404 (8/5/2020).
Petitioner: Jarisa, Inc., 935 State Hwy. 317, Neon, KY 41840.
Mine: E4–1 Mine, MSHA I.D. No. 15–18565, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.507–1(a) (Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements).

• *Docket Number:* M–2020–013–C.
FR Notice: 85 FR 47404 (8/5/2020).
Petitioner: Jarisa, Inc., 935 State Hwy. 317, Neon, KY 41840.
Mine: E4–1 Mine, MSHA I.D. No. 15–18565, located in Perry County, Kentucky.
Regulation Affected: 30 CFR 75.1002(a) (Installation of electric equipment and conductors; permissibility).

Roslyn B. Fontaine,
Deputy Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2020–29191 Filed 1–4–21; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 21–CRB–0001–PR (2023–2027)]

Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice announcing commencement of proceeding with request for petitions to participate.

SUMMARY: The Copyright Royalty Judges announce commencement of a proceeding to determine reasonable rates and terms for making and distributing phonorecords for the period beginning January 1, 2023, and ending December 31, 2027. The Copyright Royalty Judges also announce the date by which a party wishing to participate in the rate determination proceeding must file its Petition to Participate and the accompanying $150 filing fee.

DATES: Petitions to Participate and the filing fee are due no later than February 4, 2021.

ADDRESSES: The petition to participate form is available online in eCRB, the Copyright Royalty Board's online electronic filing application, at *https://app.crb.gov/.*

Instructions: The petition to participate process has been simplified. Interested parties file a petition to participate by completing and filing the petition to participate form in eCRB and paying the fee in eCRB. Do not upload a petition to participate document.

Docket: For access to the docket to read submitted documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/,* and search for docket number 21–CRB–0001–PR (2023–2027).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act provides for the Copyright Royalty Judges (Judges) to commence a proceeding every fifth year to determine rates and terms for making and distributing phonorecords pursuant to the statutory license in 17 U.S.C. 115, 803(b)(1)(A)(i)(V); 804(b)(4).[1] This notice commences the rate determination proceeding for the license period 2023–2027, inclusive.

Petitions To Participate

Parties with a significant interest in the outcome of the phonorecords royalty rate proceeding must provide the information required by § 351.1(b) of the Judges' regulations by completing and filing the Petition to Participate form in eCRB. Parties must pay the $150 filing fee when filing each Petition to Participate form. Parties must use the form in eCRB instead of uploading a document and must comply with the requirements of § 351.1(b)(1) of the Copyright Royalty Board's regulations. 37 CFR 351.1(b)(1). Only attorneys admitted to the bar in one or more states or the District of Columbia and members in good standing will be allowed to represent parties before the Judges. Only an individual may represent herself or himself and appear without legal counsel. 37 CFR 303.2.

Dated: December 28, 2020.

Jesse M. Feder,
Chief Copyright Royalty Judge.

[FR Doc. 2020–29017 Filed 1–4–21; 8:45 am]

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LIBRARY OF CONGRESS

Copyright Royalty Board

[Docket No. 21–CRB–0002–PBR (2023–2027)]

Determination of Rates and Terms for Public Broadcasting (PB IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Notice announcing commencement of proceeding with request for petitions to participate.

SUMMARY: The Copyright Royalty Judges announce commencement of a proceeding to determine reasonable rates and terms for the use of certain copyrighted works by public broadcasting entities for the period beginning January 1, 2023, and ending December 31, 2027. The Copyright Royalty Judges also announce the date by which a party wishing to participate in the rate determination proceeding must file its Petition to Participate and the accompanying $150 filing fee.

DATES: Petitions to Participate and the filing fee are due no later than February 4, 2021.

ADDRESSES: The petition to participate form is available online in eCRB, the Copyright Royalty Board's online electronic filing application, at *https://app.crb.gov/.*

Instructions: The petition to participate process has been simplified. Interested parties file a petition to participate by completing and filing the petition to participate form in eCRB and paying the fee in eCRB. Do not upload a petition to participate document.

Docket: For access to the docket to read submitted documents, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at *https://app.crb.gov/,* and search for docket number 21–CRB–0002–PBR (2023–2027).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707–7658 or by email at *crb@loc.gov.*

SUPPLEMENTARY INFORMATION: The Copyright Act provides that the Copyright Royalty Judges (Judges) will commence a proceeding every fifth year to determine rates and terms for the reproduction, distribution, performance or display of certain works by public broadcasting entities (as defined in 17 U.S.C. 118(f)) in the course of the activities described in 17 U.S.C. 118(c). 17 U.S.C. 803(b)(1)(A)(i)(V); *see also* 804(b)(6). This notice commences the rate determination proceeding for the license period 2023–2027, inclusive.

Petitions To Participate

Parties with a significant interest in the outcome of the proceeding to determine the royalty rate for public broadcasting entities must provide the information required by § 351.1(b) of the Judges' regulations by completing and filing the Petition to Participate form in eCRB. Parties must pay the $150 filing fee when filing each Petition to Participate form. Parties must use the form in eCRB instead of uploading a document and must comply with the requirements of § 351.1(b)(1) of the

[1] In accordance with section 804(b)(4), a party may file a petition to initiate a proceeding to determine rates and terms for making and distributing phonorecords pursuant to the statutory license in 17 U.S.C. 115. However, no petition has been filed; consequently, section 803(b)(1)(A)(i)(V) requires the Judges to publish in the **Federal Register** by no later than January 5, 2021, a notice commencing this proceeding.

Copyright Royalty Board's regulations. 37 CFR 351.1(b)(1). Only attorneys admitted to the bar in one or more states or the District of Columbia and members in good standing will be allowed to represent parties before the Judges. Only an individual may represent herself or himself and appear without legal counsel.

Authority: 37 CFR 303.2.

Dated: December 28, 2020.

Jesse M. Feder,

Chief Copyright Royalty Judge.

[FR Doc. 2020–29018 Filed 1–4–21; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2020–0278]

Measuring, Evaluating, and Reporting Radioactive Material in Liquid and Gaseous Effluents and Solid Waste

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–1377, ''Measuring, Evaluating, and Reporting Radioactive Material in Liquid and Gaseous Effluents and Solid Waste.'' This DG is proposed revision 3 of Regulatory Guide (RG) 1.21 of the same name. The proposed revision describes an approach that is acceptable to the staff of the NRC to meet regulatory requirements for; (1) measuring, evaluating, and reporting plant related radioactivity in effluents and solid radioactive waste shipments from NRC licensed facilities, and (2) assessing and reporting the public dose to demonstrate compliance with NRC regulations.

DATES: Submit comments by February 19, 2021. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal Rulemaking Website:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0278. Address questions about Docket IDs to Jennifer Borges; telephone: 301–287–9221; email: *Jennifer.BorgesRoman@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail comments to:* Office of Administration, Mail Stop: TWFN–7A06, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Steven Garry, Office of Nuclear Reactor Regulation, telephone: 301–415–2766, email: *Steven.Garry@nrc.gov,* and Kyle Song, Office of Nuclear Regulatory Research, telephone: 301–415–3637, email: *Kyle.Song@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0278 when contacting the NRC about the availability of information regarding this action. You may obtain publicly available information related to this action by any of the following methods:

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0278.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* DG–1377 is available in ADAMS under Accession No. ML20287A423 and the regulatory analysis for DG–1377 is available in ADAMS under Accession No. ML20287A434.

• *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking Website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0278 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC posts all comment submissions at *https://www.regulations.gov* as well as enters the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Additional Information

The NRC is issuing for public comment a DG in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The DG, titled, ''Measuring, Evaluating, and Reporting Radioactive Material in Liquid and Gaseous Effluents and Solid Waste,'' is a proposed revision temporarily identified by its task number, DG–1377 (ADAMS Accession No. ML20287A423). The draft guide is proposed revision 3 of RG 1.21 of the same name (ADAMS Accession No. ML091170109). The guide proposes revised guidance for measuring, evaluating, and reporting plant-related radioactivity in effluents and solid radioactive waste shipments from NRC licensed facilities. This guidance provides clarity and consistency regarding the assessing and

reporting the public dose to demonstrate compliance with part 20 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Standards For Protection Against Radiation'' and 40 CFR part 190, ''Environmental Radiation Protection Standards for Nuclear Power Operations.''

Substantial changes are integrated in this revision. This revision provides (1) guidance on acceptable methods for calibration of accident-range radiation monitors and accident-range effluent monitors, (2) updated guidance on reviewing and updating long-term, annual average χ/Q and D/Q values used for determining dose to individual members of the public, (3) clarification on reporting requirements for low-level waste shipments from the site that waste classification does not need to be reported, and (4) clarification that drinking water sampling would only be performed under the guidance when the calculated dose from I–131 is greater than 1 mrem/yr. This guide also incorporates the risk-informed principles of the Reactor Oversight Process. A risk-informed, performance-based approach to regulatory decision making combines the ''risk informed'' and ''performance based'' elements discussed in the staff requirements memorandum to SECY 98–144, ''Staff Requirements—SECY–98–144—White Paper on Risk-Informed and Performance-Based Regulation,'' dated February 24, 1999 (ADAMS Accession No. ML003753593). In particular, the guidance in this RG gives licensees the option of deciding on what effluents to monitor based on a risk-significance basis.

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML20287A434). The staff develops a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

III. Backfitting, Forward Fitting and Issue Finality

The draft regulatory guide (DG–1377), if finalized, would not constitute backfitting as defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests.'' It also would not constitute forward fitting as that term is defined and described in MD 8.4; or affect the issue finality of any approval issued under 10 CFR part 52. As explained in DG–1377, applicants and licensees would not be required to comply with the positions set forth in DG–1377.

Dated: December 30, 2020.

For the Nuclear Regulatory Commission.

Mekonen M. Bayssie,

Acting Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2020–29154 Filed 1–4–21; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Licensing Support Network Advisory Review Panel

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of renewal of the charter of the licensing support network advisory review panel.

SUMMARY: The Licensing Support System Advisory Review Panel was established by the Nuclear Regulatory Commission (NRC) as a Federal Advisory Committee in 1989. Its purpose was to provide advice on the fundamental issues of design and development of an electronic information management system to be used to store and retrieve documents relating to the licensing of a geologic repository for the disposal of high-level radioactive waste, and on the operation and maintenance of the system. This electronic information management system was known as the Licensing Support System.

FOR FURTHER INFORMATION CONTACT: Russell E. Chazell, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–7469 or at *Russell.Chazell@nrc.gov.*

SUPPLEMENTARY INFORMATION: In November 1998, the Commission approved amendments to title 10 *Code of Federal Regulations* Part 2 that renamed the Licensing Support System Advisory Review Panel as the Licensing Support Network Advisory Review Panel (LSNARP). The Licensing Support Network (LSN) was shut down in 2011 and the document collection was submitted to the Office of the Secretary. The document collection was made publicly available in the NRC's Agencywide Documents Access and Management System in August 2016 and contains over 3.69 million documents associated the proposed high-level waste facility at Yucca Mountain. Membership on the Panel will continue to be drawn from those whose interests could be affected by the use of the LSN document collection, including the Department of Energy, the NRC, the State of Nevada, the National Congress of American Indians, affected units of local governments in Nevada, the Nevada Nuclear Waste Task Force, and nuclear industry groups. Federal agencies with expertise and experience in electronic information management systems may also participate on the Panel.

The NRC has determined that renewal of the charter for the LSNARP until December 30, 2022, is in the public interest in connection with duties imposed on the Commission by law. This action is being taken in accordance with the Federal Advisory Committee Act after consultation with the Committee Management Secretariat, General Services Administration.

Dated: December 30, 2020.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2020–29170 Filed 1–4–21; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90814; File No. SR–MIAX–2020–39]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

December 29, 2020.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2020, Miami International Securities Exchange LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'') to extend the waiver period for certain non-transaction fees applicable to Market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Makers[3] that trade solely in Proprietary Products[4] until March 31, 2021.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to extend the waiver period for certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products until March 31, 2021.

On October 12, 2018, the Exchange received approval from the Commission to list and trade on the Exchange, options on the SPIKES® Index, a new index that measures expected 30-day volatility of the SPDR S&P 500 ETF Trust (commonly known and referred to by its ticker symbol, ''SPY'').[5] The Exchange adopted its initial SPIKES transaction fees on February 15, 2019 and adopted a new section of the Fee Schedule—Section 1)a)xi), SPIKES—for those fees.[6] Options on the SPIKES Index began trading on the Exchange on February 19, 2019.

On May 31, 2019, the Exchange filed a proposal with the Commission to amend the Fee Schedule to waive certain non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on the SPIKES Index) until September 30, 2019.[7] In particular, the Exchange adopted waivers for Membership Application fees, monthly Market Maker Trading Permit fees, Application Programming Interface (''API'') Testing and Certification fees for Members, and monthly MEI Port fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until September 30, 2019.

On October 1, 2019, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2019.[8] On December 30, 2019, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until June 30, 2020.[9] On June 30, 2020, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until September 30, 2020.[10] On September 30, 2020, the Exchange filed a proposal with the Commission to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until December 31, 2020.[11]

The Exchange now proposes to extend the waiver period for the same non-transaction fees applicable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until March 31, 2021. In particular, the Exchange proposes to waive Membership Application fees, monthly Market Maker Trading Permit fees, Member API Testing and Certification fees, and monthly MEI Port fees assessed to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until March 31, 2021.

Membership Application Fees

The Exchange currently assesses Membership fees for applications of potential Members. The Exchange assesses a one-time Membership Application fee on the earlier of (i) the date the applicant is certified in the membership system, or (ii) once an application for MIAX membership is finally denied. The one-time application fee is based upon the applicant's status as either a Market Maker or an Electronic Exchange Member (''EEM'').[12] A Market Maker is assessed a one-time Membership Application fee of $3,000.

The Exchange proposes that the waiver for the one-time Membership Application fee of $3,000 for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from December 31, 2020 until March 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to submit membership applications, which should result in increasing potential liquidity in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers who will trade solely in Proprietary Products from December 31, 2020 until March 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after March 31, 2021.

Trading Permit Fees

The Exchange issues Trading Permits that confer the ability to transact on the Exchange. MIAX Trading Permits are issued to Market Makers and EEMs. Members receiving Trading Permits during a particular calendar month are assessed monthly Trading Permit fees as set forth in the Fee Schedule. As it relates to Market Makers, MIAX currently assesses a monthly Trading

[3] The term ''Market Makers'' refers to ''Lead Market Makers'', ''Primary Lead Market Makers'' and ''Registered Market Makers'' collectively. *See* Exchange Rule 100.

[4] The term ''Proprietary Product'' means a class of options that is listed exclusively on the Exchange. *See* Exchange Rule 100.

[5] *See* Securities Exchange Act Release No. 84417 (October 12, 2018), 83 FR 52865 (October 18, 2018) (SR–MIAX–2018–14) (Order Granting Approval of a Proposed Rule Change by Miami International Securities Exchange, LLC to List and Trade on the Exchange Options on the SPIKES® Index).

[6] *See* Securities Exchange Release No. 85283 (March 11, 2019), 84 FR 9567 (March 15, 2019) (SR–MIAX–2019–11). The Exchange initially filed the proposal on February 15, 2019 (SR–MIAX–2019–04). That filing was withdrawn and replaced with SR–MIAX–2019–11. On September 30, 2020, the Exchange filed its proposal to, among other things, reorganize the Fee Schedule to adopt new Section 1)b), Proprietary Products Exchange Fees, and moved the fees and rebates for SPIKES options into new Section 1)b)i). *See* Securities Exchange Act Release No. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32).

[7] *See* Securities Exchange Act Release No. 86109 (June 14, 2019), 84 FR 28860 (June 20, 2019) (SR–MIAX–2019–28).

[8] *See* Securities Exchange Act Release No. 87282 (October 10, 2019), 84 FR 55658 (October 17, 2019) (SR–MIAX–2019–43).

[9] *See* Securities Exchange Act Release No. 87897 (January 6, 2020), 85 FR 1346 (January 10, 2020) (SR–MIAX–2019–53).

[10] *See* Securities Exchange Act Release No. 89289 (July 10, 2020), 85 FR 43279 (July 16, 2020) (SR–MIAX–2020–22).

[11] *See* Securities Exchange Act Release No. 90146 (October 9, 2020), 85 FR 65443 (October 15, 2020) (SR–MIAX–2020–32).

[12] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

Permit fee in any month the Market Maker is certified in the membership system, is credentialed to use one or more MIAX Express Interface Ports (''MEI Ports'')[13] in the production environment and is assigned to quote in one or more classes. MIAX assesses its Market Makers the monthly Market Maker Trading Permit fee based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate is the lesser of either the per class basis or percentage of total national average daily volume measurements. A MIAX Market Maker is assessed a monthly Trading Permit Fee according to the following table:

Type of trading permit	Monthly MIAX trading permit fee	Market Maker assignments (the lesser of the applicable measurements below) Ω	
		Per class	% of National average daily volume
Market Maker (includes RMM, LMM, PLMM)	$7,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
	12,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
	* 17,000.00	Up to 100 Classes	Up to 50% of Classes by volume.
	* 22,000.00	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.
* For these Monthly MIAX Trading Permit Fee levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $15,500 instead of the fee otherwise applicable to such level.

MIAX proposes that the waiver for the monthly Trading Permit fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) will be extended from December 31, 2020 to March 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for Market Makers to provide liquidity in Proprietary Products on the Exchange, which should result in increasing potential order flow and volume in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers trading solely in Proprietary Products from December 31, 2020 until March 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness by potential Members seeking a Trading Permit on the Exchange that the Exchange intends to assess such a fee after March 31, 2021.

The Exchange also proposes that Market Makers who trade Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted with the symbol ''Ω'' following the table that shows the monthly Trading Permit Fees currently assessed for Market Makers in Section 3)b) of the Fee Schedule.

API Testing and Certification Fee

The Exchange assesses an API Testing and Certification fee to all Members depending upon the type of Member. An API makes it possible for Members' software to communicate with MIAX software applications, and is subject to Members testing with, and certification by, MIAX. The Exchange offers four types of interfaces: (i) The Financial Information Exchange Port (''FIX Port''),[14] which enables the FIX Port user (typically an EEM or a Market Maker) to submit simple and complex orders electronically to MIAX; (ii) the MEI Port, which enables Market Makers to submit simple and complex electronic quotes to MIAX; (iii) the Clearing Trade Drop Port (''CTD Port''),[15] which provides real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms; and (iv) the FIX Drop Copy Port (''FXD Port''),[16] which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an EEM to receive such messages.

API Testing and Certification fees for Market Makers are assessed (i) initially per API for CTD and MEI in the month the Market Maker has been credentialed to use one or more ports in the production environment for the tested API and the Market Maker has been assigned to quote in one or more classes, and (ii) each time a Market Maker initiates a change to its system that requires testing and certification. API Testing and Certification fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. The Exchange currently assesses a Market Maker an API Testing and Certification fee of $2,500. The API Testing and Certification fees represent costs incurred by the Exchange as it works with each Member for testing and certifying that the Member's software systems communicate properly with MIAX's interfaces.

MIAX proposes to extend the waiver of the API Testing and Certification fee for Market Makers that trade solely in

[13] Full Service MEI Ports provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, note 27.

[14] A FIX Port is an interface with MIAX systems that enables the Port user (typically an Electronic Exchange Member or a Market Maker) to submit simple and complex orders electronically to MIAX. *See* Fee Schedule, note 24.

[15] Clearing Trade Drop (''CTD'') provides Exchange members with real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); (v) Exchange Member Participant Identifier (''MPID'') for each side of the transaction, including Clearing Member MPID; and (vi) strategy specific information for complex transactions. CTD Port Fees will be assessed in any month the Member is credentialed to use the CTD Port in the production environment. *See* Fee Schedule, Section 5)d)iii.

[16] The FIX Drop Copy Port (''FXD'') is a messaging interface that will provide a copy of real-time trade execution, trade correction and trade cancellation information for simple and complex orders to FIX Drop Copy Port users who subscribe to the service. FIX Drop Copy Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM only. FXD Port Fees will be assessed in any month the Member is credentialed to use the FXD Port in the production environment. *See* Fee Schedule, Section 5)d)iv.

Proprietary Products (including options on SPIKES) from December 31, 2020 until March 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposed change is to continue to provide an incentive for potential Market Makers to develop software applications to trade in Proprietary Products, including options on SPIKES. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers who trade solely in Proprietary Products from December 31, 2020 until March 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after March 31, 2021.

MEI Port Fees

MIAX provides four (4) Port types, including (i) the FIX Port, which enables the FIX Port user (typically an EEM or a Market Maker) to submit simple and complex orders electronically to MIAX; (ii) the MEI Port, which enables Market Makers to submit simple and complex electronic quotes to MIAX; (iii) the CTD Port, which provides real-time trade clearing information to the participants to a trade on MIAX and to the participants' respective clearing firms; and (iv) the FXD Port, which provides a copy of real-time trade execution, correction and cancellation information through a FIX Port to any number of FIX Ports designated by an EEM to receive such messages.

MIAX assesses monthly MEI Port Fees to Market Makers in each month the Member has been credentialed to use the MEI Port in the production environment and has been assigned to quote in at least one class. The amount of the monthly MEI Port Fee is based upon the number of classes in which the Market Maker was assigned to quote on any given day within the calendar month, and upon the class volume percentages set forth in the table below. The class volume percentage is based on the total national average daily volume in classes listed on MIAX in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly MEI Port Fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average daily volume. The Exchange assesses MIAX Market Makers the monthly MEI Port Fee based on the greatest number of classes listed on MIAX that the MIAX Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national average daily volume measurement. MIAX assesses MEI Port Fees on Market Makers according to the following table:

Monthly MIAX MEI fees	Market Maker assignments (the lesser of the applicable measurements below) Ω	
	Per class	% of National average daily volume
$5,000.00	Up to 5 Classes	Up to 10% of Classes by volume.
$10,000.00	Up to 10 Classes	Up to 20% of Classes by volume.
$14,000.00	Up to 40 Classes	Up to 35% of Classes by volume.
$17,500.00 *	Up to 100 Classes	Up to 50% of Classes by volume.
$20,500.00 *	Over 100 Classes	Over 50% of Classes by volume up to all Classes listed on MIAX.

Ω Excludes Proprietary Products.

* For these Monthly MIAX MEI Fees levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.060% of the total monthly executed volume reported by OCC in the market maker account type for MIAX-listed option classes for that month, then the fee will be $14,500 instead of the fee otherwise applicable to such level.

MIAX proposes to extend the waiver of the monthly MEI Port Fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) from December 31, 2020 until March 31, 2021, which the Exchange proposes to state in the Fee Schedule. The purpose of this proposal is to continue to provide an incentive to Market Makers to connect to MIAX through the MEI Port such that they will be able to trade in MIAX Proprietary Products. Even though the Exchange is proposing to extend the waiver of this particular fee for Market Makers trading solely in Proprietary Products until March 31, 2021, the overall structure of the fee is outlined in the Fee Schedule so that there is general awareness that the Exchange intends to assess such a fee after March 31, 2021.

The Exchange notes that for the purposes of this proposed change, other Market Makers who trade MIAX Proprietary Products (including options on SPIKES) along with multi-listed classes will continue to not have Proprietary Products (including SPIKES) counted toward those Market Makers' class assignment count or percentage of total national average daily volume. This exclusion is noted by the symbol ''Ω'' following the table that shows the monthly MEI Port Fees currently assessed for Market Makers in Section 5)d)ii) of the Fee Schedule.

The proposed extension of the fee waivers are targeted at market participants, particularly market makers, who are not currently members of MIAX, who may be interested in being a Market Maker in Proprietary Products on the Exchange. The Exchange estimates that there are fewer than ten (10) such market participants that could benefit from the extension of these fee waivers. The proposed extension of the fee waivers does not apply differently to different sizes of market participants, however the fee waivers do only apply to Market Makers (and not EEMs).

Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing. Accordingly, the Exchange believes it is reasonable and not unfairly discriminatory to continue to offer the fee waivers to Market Makers because the Exchange is seeking additional liquidity providers for Proprietary Products, in order to enhance liquidity and spreads in Proprietary Products, which is traditionally provided by Market Makers, as opposed to EEMs.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is

consistent with Section 6(b) of the Act [17] in general, and furthers the objectives of Section 6(b)(4) of the Act [18] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and dealers.

The Exchange believes that the proposal to extend the fee waiver period for certain non-transaction fees for Market Makers in Proprietary Products is an equitable allocation of reasonable fees because the proposal continues to waive non-transaction fees for a limited period of time in order to enable the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants in MIAX's Proprietary Products, including options on SPIKES. The Exchange believe the proposed extension of the fee waivers is fair and equitable and not unreasonably discriminatory because it applies to all market participants not currently registered as Market Makers at the Exchange. Any market participant may choose to satisfy the additional requirements and obligations of being a Market Maker and trade solely in Proprietary Products in order to qualify for the fee waivers.

The Exchange believes that the proposed extension of the fee waivers is equitable and not unfairly discriminatory for Market Makers as compared to EEMs because Market Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing.

The Exchange believes it is reasonable and equitable to continue to waive the one-time Membership Application Fee, monthly Trading Permit Fee, API Testing and Certification Fee, and monthly MEI Port Fee for Market Makers that trade solely in Proprietary Products (including options on SPIKES) until March 31, 2021, since the waiver of such fees provides incentives to interested market participants to trade in Proprietary Products. This should result in increasing potential order flow and liquidity in MIAX Proprietary Products, including options on SPIKES.

The Exchange believes it is reasonable and equitable to continue to waive the API Testing and Certification fee assessable to Market Makers that trade solely in Proprietary Products (including options on SPIKES) until March 31, 2021, since the waiver of such fees provides incentives to interested Members to develop and test their APIs sooner. Determining system operability with the Exchange's system will in turn provide MIAX with potential order flow and liquidity providers in Proprietary Products.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory that Market Makers who trade in Proprietary Products along with multi-listed classes will continue to not have Proprietary Products counted toward those Market Makers' class assignment count or percentage of total national average daily volume for monthly Trading Permit Fees and monthly MEI Port Fees in order to incentivize existing Market Makers who currently trade in multi-listed classes to also trade in Proprietary Products, without incurring certain additional fees.

The Exchange believes that the proposed extension of the fee waivers constitutes an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The proposed extension of the fee waivers means that all prospective market makers that wish to become Market Maker Members of the Exchange and quote solely in Proprietary Products may do so and have the above-mentioned fees waived until March 31, 2021. The proposed extension of the fee waivers will continue to not apply to potential EEMs because the Exchange is seeking to enhance the quality of its markets in Proprietary Products through introducing more competition among Market Makers in Proprietary Products. In order to increase the competition, the Exchange believes that it must continue to waive entry type fees for such Market Makers. EEMs do not provide the benefit of enhanced liquidity which is provided by Market Makers, therefore the Exchange believes it is reasonable and not unfairly discriminatory to continue to only offer the proposed fee waivers to Market Makers (and not EEMs). Further, the Exchange believes it is reasonable and not unfairly discriminatory to continue to exclude Proprietary Products from an existing Market Maker's permit fees and port fees, in order to incentive such Market Makers to quote in Proprietary Products. The amount of a Market Maker's permit and port fee is determined by the number of classes quoted and volume of the Market Maker. By excluding Proprietary Products from such fees, the Exchange is able to incentivize Market Makers to quote in Proprietary Products. EEMs do not pay permit and port fees based on the classes traded or volume, so the Exchange believes it is reasonable, equitable, and not unfairly discriminatory to only offer the exclusion to Market Makers (and not EEMs).

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.

Intra-Market Competition

The Exchange believes that the proposal to reorganize certain sections of the Fee Schedule does not impose any burden on intra-market competition that is not necessary or appropriate because this proposal is not competitive in nature, but rather is designed to remedy minor non-substantive issues and provide added clarity to the Fee Schedule in order to avoid potential confusion on the part of market participants. [sic]

The Exchange believes that the proposal to extend certain of the non-transaction fee waivers until March 31, 2021 for Market Makers that trade solely in Proprietary Products would increase intra-market competition by incentivizing new potential Market Makers to quote in Proprietary Products, which will enhance the quality of quoting and increase the volume of contracts in Proprietary Products traded on MIAX, including options on SPIKES. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity for the Exchange's Proprietary Products. Enhanced market quality and increased transaction volume in Proprietary Products that results from the

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4) and (5).

anticipated increase in Market Maker activity on the Exchange will benefit all market participants and improve competition on the Exchange.

The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes for each separate type of market participant (new Market Makers and existing Market Makers) will be assessed equally to all such market participants. While different fees are assessed to different market participants in some circumstances, these different market participants have different obligations and different circumstances as discussed above. For example, Market Makers have quoting obligations that other market participants (such as EEMs) do not have.

Inter-Market Competition

The Exchange does not believe the proposal to reorganize certain sections of the Fee Schedule will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule. [sic]

The Exchange does not believe that the proposed rule change to extend the fee waiver for certain non-transaction fees will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed extension of the fee waivers apply only to the Exchange's Proprietary Products (including options on SPIKES), which are traded exclusively on the Exchange.

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) of the Act,[19] and Rule 19b–4(f)(2)[20] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2020–39 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–MIAX–2020–39. 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–MIAX–2020–39, and should be submitted on or before January 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29134 Filed 1–4–21; 8:45 am]

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[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90819; File No. SR–CboeBZX–2020–036]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change Relating to Rule 14.11, Other Securities, To Modify a Continued Listing Criterion for Certain Exchange-Traded Products

December 29, 2020.

I. Introduction

On April 29, 2020, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend one of the continued listing requirements relating to certain exchange-traded products (''ETPs'') under BZX Rule 14.11. The proposed rule change was published for comment in the **Federal Register** on May 7, 2020.[3]

On June 16, 2020, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On August 4, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.[6] On October 28, 2020, the Commission designated a longer period

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 88795 (May 1, 2020), 85 FR 27254 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89076 (June 16, 2020), 85 FR 37488 (June 22, 2020). The Commission designated August 5, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] *See* Securities Exchange Act Release No. 89472 (Aug. 4, 2020), 85 FR 48318 (Aug. 20, 2020) (''OIP'').

for Commission action on the proposed rule change.[7] The Commission has received two comment letters on the proposed rule change.[8]

This order disapproves the proposed rule change because, as discussed below, BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirement that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [9]

II. Description of the Proposal

As described in detail in the Notice and OIP, a continued listing requirement under BZX Rule 14.11 for certain ETPs [10] currently provides that, following the initial 12-month period after commencement of trading on the Exchange, the Exchange will consider the suspension of trading in, and will commence delisting proceedings for, shares of such ETPs for which there are fewer than 50 beneficial holders for 30 or more consecutive trading days (''Beneficial Holders Rule''). The Exchange is proposing to change the date after which an ETP must have at least 50 beneficial holders or be subject to delisting proceedings under the Beneficial Holders Rule (''Non-Compliance Period''). Specifically, the Exchange seeks to extend the Non-Compliance Period in the Beneficial Holders Rule from 12 months after commencement of trading on the Exchange to 36 months after commencement of trading on the Exchange.

The Exchange asserts that it would be appropriate to increase the Non-Compliance Period from 12 months to 36 months because: (1) It would bring the rule more in line with the life cycle of an ETP; (2) the economic and competitive structures in place in the ETP ecosystem naturally incentivize issuers to de-list products rather than continuing to list products that do not garner investor interest; and (3) extending the period from 12 to 36 months will not meaningfully impact the manipulation concerns that the Beneficial Holders Rule is intended to address.

According to the Exchange, the ETP space is more competitive than it has ever been, with more than 2000 ETPs listed on exchanges. As a result, distribution platforms have become more restrictive about the ETPs they will allow on their systems, often requiring a minimum track record (*e.g.,* twelve months) and a minimum level of assets under management (*e.g.,* $100 million). Many larger entities also require a one-year track record before they will invest in an ETP. In the Exchange's view, this has slowed the growth cycle of the average ETP, with the result that the Exchange has seen a significant number of deficiencies with respect to the Beneficial Holders Rule over the last several years. Specifically, the Exchange states that it has issued deficiency notifications to 34 ETPs for non-compliance with the Beneficial Holders Rule in the last five years, 27 of which ultimately were able to achieve compliance while going through the delisting process.

In addition, the Exchange believes that the economic and competitive structures in place in the ETP ecosystem naturally incentivize issuers to de-list products with insufficient investor interest, and that the Beneficial Holders Rule has resulted in the forced termination of ETPs that issuers believed were still economically viable. The Exchange states that there are significant costs associated with the launch and continued operation of an ETP, and notes that the Exchange has had 69 products voluntarily delist in the last two years. The Exchange also questions whether the number of beneficial holders is a meaningful measure of market interest in an ETP, and believes that an ETP issuer is incentivized to have as many beneficial holders as possible.

The Exchange states that the proposal ''does not create any significant change in the risk of manipulation for ETPs listed on the Exchange.'' The Exchange ''does not believe there is anything particularly important about the 50th Beneficial Holder that reduces the manipulation risk associated with an ETP as compared to the 49th, nor is there any manipulation concern that arises on the 366th day after an ETP began trading on the Exchange that didn't otherwise exist on the 1st, 2nd, or 365th day.'' [11] The Exchange also states that it has in place a robust surveillance program for ETPs that it believes is sufficient to deter and detect manipulation and other violative activity, and that the Exchange (or the Financial Industry Regulatory Authority on its behalf) communicates as needed with other members of the Intermarket Surveillance Group. The Exchange believes that ''these robust surveillance procedures will further act to mitigate concerns that arise from extending the compliance period for the Beneficial Holders [Rule] from 12 months to 36 months.'' [12] Lastly, the Exchange takes the position that other continued listing standards (*e.g.,* with respect to the diversity, liquidity and size of an ETP's holdings or reference assets) ''are generally sufficient to mitigate manipulation concerns associated with the applicable ETP.'' [13]

The Commission received two comments in support of the proposal.[14] One commenter states that the beneficial owner requirement disproportionately punishes smaller companies without the resources to pay for aggressive distribution, and disincentivizes issuers from launching funds that can prove themselves purely by investment merit over the long term,[15] although the commenter provides no data to support that assertion. This commenter believes that the purpose of the beneficial holder minimum likely is to enforce some sort of minimum liquidity, and accordingly suggests alternative liquidity measures such as the quality of secondary markets (*e.g.,* spreads and depth of book), the liquidity of the underlying basket, and the number of potential liquidity providers. In this commenter's view, increasing the time period to achieve the minimum number of beneficial holders is a positive step, but eliminating the requirement altogether ''would be far more purposeful.'' [16]

Another commenter states that the Beneficial Holders Rule ''does not appear to provide any meaningful investor-protection benefits.'' [17] Specifically, this commenter expresses the view that the liquidity of shares of an exchange-traded fund (''ETF'') is primarily a function of the liquidity of the ETF's underlying securities, that the marketplace taps into this liquidity

[7] *See* Securities Exchange Act Release No. 90277 (Oct. 28, 2020), 85 FR 69675 (Nov. 3, 2020).

[8] Comments on the proposed rule change can be found on the Commission's website at: *https://www.sec.gov/comments/sr-cboebzx-2020-036/srcboebzx2020036.htm.*

[9] 15 U.S.C. 78f(b)(5).

[10] For purposes of the proposal, the term ''ETP'' means securities listed pursuant to BZX Rule 14.11(c) (Index Fund Shares), BZX Rule 14.11(i) (Managed Fund Shares), and BZX Rule 14.11(l) (Exchange-Traded Fund Shares (''ETF Shares'')).

[11] *See* Notice, *supra* note 3, 85 FR at 27256.

[12] *See id.*

[13] *See id.*

[14] *See* Letter to Secretary, Commission, from S Phil Bak, Founder & CEO, SecLenX (May 13, 2020) (''SecLenX Letter''); and letter to Secretary, Commission, from Timothy W. Cameron, Asset Management Group—Head, and Lindsey Weber Keljo, Asset Management Group—Managing Director and Associate General Counsel, SIFMA AMG (Dec. 18, 2020) (''SIFMA Letter'').

[15] *See* SecLenX Letter, *supra* note 14, at 1.

[16] *Id.* at 2.

[17] SIFMA Letter, *supra* note 14, at 3.

through the creation and redemption and arbitrage processes, and that this mitigates potential price manipulation concerns.[18] In addition, the commenter believes that the enhanced disclosure requirements of Rule 6c–11 under the Investment Company Act of 1940,[19] including those relating to an ETF's portfolio holdings and when an ETF's premium or discount exceeds 2% for more than seven consecutive days, will help facilitate effective arbitrage. The commenter further states that it is appropriate to increase the period of time for an ETF to comply with the applicable beneficial holders requirement because it may take several years for an ETF to gain significant market acceptance and to gather assets.[20] This commenter believes that many investment platforms require a three-year track record before making investment products available to clients, and the proposal would better align the rule with the lifecycle of these ETFs.[21] This commenter concludes from a survey conducted of its members that ETF sponsors often make decisions about whether to delist and terminate funds with low levels of assets after approximately three years, and that the level of assets, number of shareholders, and average daily trading volume often improved after three years.[22]

III. Discussion and Commission Findings

The Commission must consider whether BZX's proposal is consistent with Section 6(b)(5) of the Exchange Act, which requires, in relevant part, that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.'' [23] Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [24]

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[25] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[26] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[27]

The Commission has consistently recognized the importance of the minimum number of holders and other similar requirements, stating that such listing standards help ensure that exchange listed securities have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.[28] As stated by the Exchange, the minimum number of holders requirement also helps to ensure that trading in exchange-listed securities is not susceptible to manipulation.[29]

As discussed above, the Exchange is proposing to increase the Non-Compliance Period from 12 months to 36 months, thereby extending by two years the length of time during which an ETP listed on the Exchange would have no requirement to have a minimum number of beneficial holders. In support of its proposal, the Exchange emphasizes that some ETPs have had difficulty complying with the Beneficial Holders Rule. The Exchange indicates that non-compliance with the Beneficial Holders Rule is increasing because the ETP market has become so competitive, and there are so many of them, that it can be difficult to acquire the requisite number of beneficial holders within the existing Non-Compliance Period. The Exchange also believes that the existing Beneficial Holders Rule forces the delisting of ETPs that may still be economically viable. The Exchange takes the position that the manipulation risk would not be materially greater if an ETP had 49 beneficial holders as opposed to 50, and that no new manipulation concerns would arise with a longer Non-Compliance Period than a shorter one. The Exchange also asserts that existing surveillances and other listing standards are sufficient to mitigate manipulation concerns.[30]

The Exchange takes the position that the highly-competitive ETP market has made compliance with the Beneficial Holders Rule difficult and has led to the delisting of ETPs that may be economically viable. However, the Exchange does not sufficiently support its assertion that compliance with the Beneficial Holders Rule is especially difficult for ETPs or that any such compliance difficulties have led to the delisting of economically viable ETPs. For example, while the Exchange states that 22 ETP issues voluntarily delisted within 12 months of commencing trading on the Exchange, the Exchange acknowledges that it cannot attribute any of those voluntary delistings to non-compliance with the Beneficial Holders Rule.[31]

In addition, the Exchange does not sufficiently explain why any such

[18] *See id.*

[19] *See id.* at 3–4.

[20] *See id.* at 4.

[21] *See id.* The commenter also states that the proposal could put newer and smaller sponsors at an unnecessary disadvantage to larger sponsors having the enterprise-wide scale and distribution reach to gather assets in the months after launch. *See id.*

[22] *See id.* The commenter also states that data from one large ETF sponsor revealed that liquidity tends to build between 12 and 36 months after launch, and that: (a) The median shareholder count increased over ten-fold between 12 and 36 months after launch; (b) secondary market liquidity saw a similar growth trajectory between 12 and 36 months after launch; and (c) median spreads tightened by 3 basis points between 12 and 36 months after launch. *See id.,* n.10.

[23] 15 U.S.C. 78f(b)(5). Pursuant to Section 19(b)(2) of the Exchange Act, 15 U.S.C. 78s(b)(2), the Commission must disapprove a proposed rule change filed by a national securities exchange if it does not find that the proposed rule change is consistent with the applicable requirements of the Exchange Act. Exchange Act Section 6(b)(5) states that an exchange shall not be registered as a national securities exchange unless the Commission determines that ''[t]he rules of the exchange 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.'' 15 U.S.C. 78(f)(b)(5).

[24] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[25] *See id.*

[26] *See id.*

[27] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 447 (D.C. Cir. 2017).

[28] *See, e.g.,* Securities Exchange Act Release No. 57785 (May 6, 2008), 73 FR 27597 (May 13, 2008)(SR–NYSE–2008–17) (stating that the distribution standards, which includes exchange holder requirements ''. . . should help to ensure that the [Special Purpose Acquisition Company's] securities have sufficient public float, investor base, and liquidity to promote fair and orderly markets''); Securities Exchange Act Release No. 86117 (June 14, 2019), 84 FR 28879 (June 20, 2018) (SR–NYSE–2018–46) (disapproving a proposal to reduce the minimum number of public holders continued listing requirement applicable to Special Purpose Acquisition Companies from 300 to 100).

[29] *See* Notice, *supra* note 3, 85 FR at 27255.

[30] The commenter suggests eliminating the requirement altogether, but does not address how increasing the time period to achieve the minimum number of beneficial holders is consistent with any provision of the Exchange Act.

[31] *See id.* at 27255, n.6.

compliance difficulties justify tripling the Non-Compliance Period for this core quantitative listing standard from one year to three years, and permitting ETPs to trade on the Exchange for an additional two years without the protections, described above, that the Beneficial Holders Rule was designed to provide. For example, the Exchange states that no new manipulation concerns would arise with a longer Non-Compliance Period than a shorter one, but does not address why tripling the period during which the same regulatory risks posed by a Non-Compliance Period would be present is consistent with the Exchange Act. As discussed above, the Beneficial Holders Rule and other minimum number of holders requirements are important to ensure that trading in exchange listed securities is fair and orderly and not susceptible to manipulation, and the Exchange does not explain why it is consistent with the Exchange Act to permit ETPs to trade for two additional years without any of the protections of the Beneficial Holders Rule. The Exchange also states that the manipulation risk is not materially greater with 49 beneficial holders than with 50, but there is no minimum number of beneficial holders during the Non-Compliance Period, and the Exchange does not sufficiently address why the manipulation and other regulatory risks to fair and orderly markets, investor protection and the public interest would not be materially greater with a number of beneficial holders that is substantially smaller than 49 (*e.g.,* 10 or 20).

Finally, while the Exchange asserts that existing surveillances and other listing standards are sufficient to mitigate manipulation concerns, it does not offer any explanation of the basis for that view or provide any supporting information or evidence to support its conclusion. Notably, although the Exchange acknowledges that the Beneficial Holders Rule helps to ensure that trading in exchange-listed securities is not susceptible to manipulation, the Exchange does not explain how any of its specific existing surveillances or other listing requirements effectively address, in the absence of the Beneficial Holders Rule, those manipulation concerns and other regulatory risks to fair and orderly markets, investor protection and the public interest.[32] Accordingly, the Commission is unable to assess whether the Exchange's assertion has merit.

The Commission identified all of these concerns in the OIP, but the Exchange has not responded or provided additional data addressing these concerns.[33] As stated above, under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [34] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.[35] The Commission concludes that, because BZX has not demonstrated that its proposal is designed to prevent fraudulent and manipulative acts and practices or to protect investors and the public interest, the Exchange has not met its burden to demonstrate that its proposal is consistent with Section 6(b)(5) of the Exchange Act.[36] For this reason, the Commission must disapprove the proposal.

IV. Conclusion

For the reasons set forth above, the Commission does not find, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with Section 6(b)(5) of the Exchange Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that proposed rule change SR–CboeBZX–2020–036 is disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29139 Filed 1–4–21; 8:45 am]

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[32] The Exchange states that its surveillances focus on detecting securities trading outside of their normal patterns, followed by surveillance analysis and investigations, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange also states that it or the Financial Industry Regulatory Authority, on behalf of the Exchange, or both, communicate as needed regarding ETP trading with other markets and the Intermarket Surveillance Group member entities, and may obtain trading information in ETPs from such markets and other entities.

[33] While one commenter suggests alternative liquidity standards (*see* SecLenX Letter, *supra* note 14), this commenter does not explain them with any specificity or explain how they would satisfy the requirements of the Exchange Act, and, in any event, the Exchange has not proposed them. The other commenter asserts that the creation and redemption processes, which tap into the liquidity of the underlying holdings, coupled with the enhanced disclosures mandated under Rule 6c–11 under the Investment Company Act of 1940, mitigate manipulation concerns. *See* SIFMA Letter, *supra* note 14, at 3. However, neither the Exchange nor that commenter explains why arbitrage opportunities would sufficiently mitigate manipulation concerns for the full range of ETPs, including ETPs overlying a portfolio of instruments that are themselves illiquid, or where market interest in the ETP is not sufficient to attract effective arbitrage activity. While this commenter asserts that certain disclosures under Rule 6c–11 under the Investment Company Act of 1940 provide investors with additional insight into the effectiveness of an ETF's arbitrage (*see* SIFMA Letter, *supra* note 14, at 3–4), neither the Exchange nor the commenter explains how such disclosures might prevent manipulation.

[34] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[35] *See id.*

[36] In disapproving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). Although one commenter (*see* SecLenX Letter, *supra* note 14) asserts that the current Beneficial Holders Rule disproportionately punishes smaller companies and disincentivizes issuers from launching funds that can prove their investment merit over the long term, no data is provided—by the commenter or the Exchange—to support these conclusions. Similarly, although the other commenter (*see* SIFMA Letter, *supra* note 14, at 4) asserts that the current Beneficial Holders Rule puts newer and smaller sponsors at an unnecessary disadvantage to larger sponsors having the enterprise-wide scale and distribution reach to gather assets in the months after launch, neither the commenter nor the Exchange has provided data to support this conclusion.

[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90810; File No. SR–NYSE–2020–109]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add Commentary .07 to Rule 7.35A To Provide That, for a Temporary Period, the Exchange Will Permit DMMs Limited-Entry to the Trading Floor or Remote Access to Floor-Based System for Certain Auctions

December 29, 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 28, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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

The Exchange proposes to add Commentary .07 to Rule 7.35A to provide that, for a temporary period that begins December 28, 2020, and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021, the Exchange would (1) permit a DMM limited entry to the Trading Floor or (2) provide a DMM remote access to Floor-based systems, for the purpose of effecting a manual Core Open Auction in connection with a corporate action that may result in a significant price discovery event or a manual Direct Listing Auction. 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 add Commentary .07 to Rule 7.35A to provide that, for a temporary period that begins December 28, 2020, and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021, the Exchange would (1) permit a DMM limited entry to the Trading Floor or (2) provide a DMM remote access to Floor-based systems, for the purpose of effecting a manual Core Open Auction in connection with a corporate action that may result in a significant price discovery event or a manual Direct Listing Auction.

Background

On December 23, 2020, in response to changes in the New York City-area public health conditions, the CEO of the Exchange made a determination under Rule 7.1(c)(3) that DMMs would temporarily return to remote operations beginning on Monday, December 28, 2020.[4] The Exchange previously moved to fully electronic trading on a temporary basis [5] and then partially reopened in two phases,[6] subject to safety measures designed to prevent the spread of COVID–19.

During the prior temporary period when DMMs operated remotely, the Exchange added Commentaries .02, .03, .04, and .05 to Rule 7.35A, which set forth limited circumstances when a DMM may be permitted limited entry to the Trading Floor or provided remote access to Floor-based systems for the purpose of effecting a manual IPO Auction, Core Open Auction in connection with a listed company's post-IPO public offering, or Trading Halt Auction for reopening a security following a regulatory halt issued under Section 2 of the Listed Company Manual.[7] Because these Commentaries remain operative,[8] beginning December 28, 2020, the relief described in these Commentaries will be available to DMMs.

Proposed Rule Change

The Exchange proposes to add Commentary .07 to Rule 7.35A to provide that, for a temporary period that begins December 28, 2020, and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021, the Exchange would (1) permit a DMM limited entry to the Trading Floor or (2) provide a DMM remote access to Floor-based systems, for the purpose of effecting a manual Core Open Auction in connection with a corporate action that may result in a significant price discovery event or a manual Direct Listing Auction.

As noted above, during the prior temporary period while the Trading Floor was closed to DMMs, the Exchange permitted limited reentry to the Trading Floor for the purposes of effecting an IPO Auction, Core Open Auction in connection with a post-IPO offering, and specified Trading Halt Auctions. The Exchange has also provided DMMs with remote access to NYSE trading systems that are located on the Trading Floor so that a DMM can manually effect such Auctions remotely. The Exchange now proposes to provide DMMs with limited entry to the Trading Floor or remote access to NYSE trading systems so that a DMM may manually effect a Core Open Auction in connection with a corporate action that may result in a significant price discovery event or a Direct Listing Auction.

To effect this change, the Exchange proposes to add Commentary .07 to Rule 7.35A to provide that:

> For a temporary period that begins on December 28, 2020 and ends on the earlier of a full reopening of the Trading Floor facilities to DMMs or after the Exchange closes on April 30, 2021, the Exchange will (1) permit a DMM limited entry to the Trading Floor or (2) provide a DMM remote access to Floor-based systems, for the purpose of effecting a manual Core Open Auction in connection with a corporate action that may result in a significant price discovery event or a manual Direct Listing Auction.

After a security is listed, an issuer may undergo a corporate action that results in a significant price discovery event for the Core Open Auction on the morning of such corporate action. For example, a new company may be listing in connection with a carve-out or spin-off transaction. In such cases, both the

[4] *See* Trader Update, dated December 23, 2020, available here: *https://www.nyse.com/publicdocs/nyse/notifications/trader-update/DMMs_moving_remote_December_2020.pdf.*

[5] Beginning March 23, 2020, the Trading Floor facilities located at 11 Wall Street in New York City temporarily closed. *See* Press Release, dated March 18, 2020, available here: *https://ir.theice.com/press/press-releases/all-categories/2020/03-18-2020-204202110.* The Exchange's current rules establish how the Exchange will function fully-electronically.

[6] On May 23, 2020, the Trading Floor was reopened on a limited basis to a subset of Floor brokers. *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). On June 17, 2020, the Trading Floor was reopened to a subset of DMMs. *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. 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); 88705 (April 21, 2020), 85 FR 23413 (April 27, 2020) (SR–NYSE–2020–35) (amending Rule 7.35A to add Commentary .04); and 88950 (May 26, 2020), 85 FR 33252 (June 1, 2020) (SR–NYSE–2020–48) (amending Rule 7.35A to add Commentary .05).

[8] *See* Securities Exchange Act Release No. 90795 (December 23, 2020) (SR–NYSE–2020–106) (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).

newly listed company and the existing issuer that is carving out or spinning off a new listed company may undergo significant price discovery events in their respective Core Open Auctions. Similarly, a company emerging from bankruptcy may have a significant price discovery event for its Core Open Auction. In addition, upon consumption of a business combination, the Core Open Auction for an issuer listed as a special purpose acquisition company (''SPAC'') may also result in a significant price discovery event.[9]

While a DMM is permitted under Exchange rules to effect Core Open Auctions electronically, even when a security is affected by a corporate action, DMMs generally manually facilitate Core Open Auctions for issuers undergoing corporate actions that may result in a significant price discovery event. When a DMM manually effects such Core Open Auctions, the DMM is able to publish pre-opening indications pursuant to Rule 7.35A(d), which would be in addition to the Auction Imbalance Information available for such Core Open Auctions, thus promoting transparency in advance of a significant pricing event. In addition, when manually effecting such Core Open Auctions, the DMM can assess the buy and sell interest and determine when and at what price to open the security. The Exchange believes that during the temporary period when DMMs are operating remotely, it would promote fair and orderly markets to provide DMMs with limited entry to the Trading Floor or remote access to Floor-based systems so that DMMs may continue to effect such Core Open Auctions manually.

Separately, because of the importance of the DMM to the Direct Listing Auction, the Exchange recently amended Rule 7.35C to provide that the Exchange would not facilitate Direct Listing Auctions.[10] In addition, DMMs are not permitted to facilitate a Direct Listing Auction electronically.[11] Accordingly, a DMM must facilitate a Direct Listing Auction manually. To enable the Exchange to provide issuers with the option to list on the Exchange via a Direct Listing during the temporary period when DMMs are operating remotely, the Exchange proposes that DMMs be permitted limited entry to the Trading Floor and be provided remote access to Floor-based systems for the purpose of manually effecting a Direct Listing Auction.

This proposed rule change could be implemented immediately.

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) of the Act,[13] 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.

On December 23, 2020, the CEO made a determination under Rule 7.1(c)(3) that, beginning December 28, 2020, as a precautionary measure, DMM units would return to working remotely.

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 it would promote fair and orderly Core Open Auctions in connection with an issuer undergoing a corporate action that may result in a significant price discovery event. The Exchange believes that it would promote fair and orderly markets to provide the DMM with mechanisms to facilitate such Core Open Auctions manually because it would provide flexibility for the DMM of when to facilitate such Auctions and at what price. DMMs would also be able to publish pre-opening indications in connection with such Core Open Auctions, which would promote transparency.

In addition, because a Direct Listing Auction must be effected manually, this proposed rule change would allow for Direct Listing Auctions to occur during the period when the Trading Floor is temporarily closed to DMMs. Accordingly, this proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Exchange would be able to provide issuers with the option to list on the Exchange via a Direct Listing during the temporary period when DMMs are operating remotely.

The Exchange believes that, by clearly stating that this relief will be in effect through the earlier of the reopening of the Trading Floor facilities or the close of the Exchange on April 30, 2021, market participants will have advance notice that a Core Open Auction in connection with an issuer undergoing a corporate action that may result in a significant price discovery event may be effected manually by the DMM during this period, and therefore may not be conducted at 9:30 a.m.

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 is designed to ensure fair and orderly Core Open Auctions in connection with a corporate action that may result in a significant pricing event and Direct Listing Auctions by providing a DMM with either limited access to the Trading Floor or remote access to Floor-based systems for the sole purpose of effecting such Auctions manually during a temporary period when the Exchange Trading Floor has been closed to DMMs in response to social-distancing measures designed to reduce the spread of the COVID–19 virus.

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[14] and Rule 19b–4(f)(6) thereunder.[15] 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

[9] Section 102.06 of the Listed Company Manual sets forth initial listing requirements applicable to a company whose business plan is to complete an initial public offering and engage in a merger or acquisition with one or more unidentified companies within a specified period of time.

[10] *See* Securities Exchange Act Release No. 90768 (December 22, 2020) (SR–NYSE–2019–67) (Order setting aside action by delegated authority and approving a proposed rule change).

[11] *See* Rule 7.35C(c)(1)(C).

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6).

19(b)(3)(A)(iii) of the Act [16] and Rule 19b–4(f)(6)(iii) thereunder.[17]

A proposed rule change filed under Rule 19b–4(f)(6) [18] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[19] 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 Exchange has stated that, because of the rapid changes to the New York City-area public health conditions, it made the determination to close the Trading Floor to DMMs with only two business days' notice before such closure would take effect. However, the Exchange represents that at least three SPACs listed on the Exchange are anticipated to complete their business combinations during the week of December 28, 2020, and the Core Open Auctions for such securities are expected to be significant pricing events. The Exchange has asked the Commission to waive the operative delay so that the DMM assigned to these securities would be able to effect the Core Open Auctions manually. 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 proposed rules to become effective in time for DMMs to manually effect Core Open Auctions for those securities that are anticipated to have significant price discovery events during the week of December 28, 2020. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[20]

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) [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–NYSE–2020–109 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–2020–109. 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–2020–109 and should be submitted on or before January 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29131 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(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 complied with this requirement.

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6)(iii).

[20] 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).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90812; File No. SR–PEARL–2020–35]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX PEARL Fee Schedule

December 29, 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 21, 2020, MIAX PEARL, LLC (''MIAX PEARL'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX PEARL Fee Schedule (the ''Fee Schedule'') to increase the number of additional Limited Service MIAX Express Order Interface (''MEO'') Ports available to Members.[3] The Exchange does not propose to amend the fees for additional Limited Service MEO Ports.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/pearl* at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization that is registered with the Exchange pursuant to Chapter II of these Rules for purposes of trading on the Exchange as an ''Electronic Exchange Member'' or ''Market Maker.'' Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to offer two (2) additional Limited Service MEO Ports to Members. The Exchange does not propose to amend the fees charged for the additional Limited Service MEO Ports.

The Exchange initially filed the proposal to increase the number of Limited Service MEO Ports available to Members on June 30, 2020, with no change to the actual fee amounts being charged.[4] The First Proposed Rule Change was published for comment in the **Federal Register** on July 20, 2020.[5] The Exchange notes that the First Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the First Proposed Rule Change on August 24, 2020.[6] On August 25, 2020, the Exchange refiled its proposal to increase the number of Limited Service MEO Ports available to Members (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's annual cost for providing additional Limited Service MEO Ports.[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on September 11, 2020.[8] Like the First Proposed Rule Change, the Second Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the Second Proposed Rule Change on October 23, 2020[9] and submitted SR–PEARL–2020–21 (''Third Proposed Rule Change''). On October 26, 2020, the Exchange withdrew the Third Proposed Rule Change and submitted SR–PEARL–2020–22 (''Fourth Proposed Rule Change''). The Fourth Proposed Rule Change to increase the number of additional Limited Service MEO Ports available to Members (without increasing the actual fee amounts) provides additional information regarding the Exchange's revenues, costs, and profitability for the two additional Limited Service MEO Ports. This additional analysis includes information regarding the Exchange's methodology for determining the costs and revenues for the two additional Limited Service MEO Ports.

On November 5, 2020, the Exchange withdrew the Fourth Proposed Rule Change and refiled its proposal to increase the number of Limited Service MEO Ports available to Members (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability for the two additional Limited Service MEO Ports (including information regarding the Exchange's methodology for determining the costs and revenues for the two additional Limited Service MEO Ports).[10] The Fifth Proposed Rule Change was published for comment in the **Federal Register** on November 24, 2020.[11] Like the First, Second, Third and Fourth Proposed Rule Changes, the Fifth Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the Fifth Proposed Rule Change on December 21, 2020.[12]

The Exchange now submits this filing to increase the number of additional Limited Service MEO Ports available to Members (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's cost analysis for the two additional Limited Service MEO Ports.

The Exchange currently offers different options of MEO Ports depending on the services required by an Exchange Member, including a Full Service MEO Port-Bulk,[13] a Full Service MEO Port-Single,[14] and a Limited Service MEO Port.[15] Currently, a Member may be allocated two (2) Full-Service MEO Ports of either type, Bulk and/or Single, per Matching Engine, and up to eight (8) Limited Service MEO Ports, per Matching Engine. The two (2) Full-Service MEO Ports that may be allocated per Matching Engine to a Member currently may consist of: (a) Two (2) Full Service MEO Ports—Bulk; or (b) two (2) Full Service MEO Ports—Single. The Exchange also has a third option, option (c), which permits a Member to have one (1) Full Service MEO Port—Bulk, and one (1) Full Service MEO Port—Single.

The Exchange currently provides Members the first two (2) requested Limited Service MEO Ports free of charge and charges $200 per month for Limited Service MEO Ports three (3) and four (4), $300 per month for Limited Service MEO Ports five (5) and six (6), and $400 per month for Limited Service MEO Ports seven (7) and eight (8). These fees have been unchanged since they were adopted in 2018.[16]

The Exchange originally added the Limited Service MEO Ports to enhance the MEO Port connectivity made available to Members. Limited Service MEO Ports have been well received by Members since their addition. The Exchange now proposes to offer to Members the ability to purchase an additional two (2) Limited Service MEO Ports per matching engine over and above the current six (6) additional Limited Service MEO Ports per matching engine that are available for purchase by Members. The Exchange proposes making a corresponding change to the text in the Port Fee table and to the text below the Port Fee table in Section 5(d) of the Fee Schedule to specify that Members will now be limited to purchasing eight (8)

[4] *See* Securities Exchange Act Release No. 89316 (July 14, 2020), 85 FR 43898 (July 20, 2020) (SR–PEARL–2020–09) (the ''First Proposed Rule Change'').

[5] *Id.*

[6] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated August 24, 2020, notifying the Commission that the Exchange will withdraw the First Proposed Rule Change.

[7] *See* Securities Exchange Act Release No. 89774 (September 4, 2020), 85 FR 56281 (September 11, 2020) (SR–PEARL–2020–12) (the ''Second Proposed Rule Change'').

[8] *Id.*

[9] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated October 19, 2020, notifying the Commission that the Exchange would withdraw the Second Proposed Rule Change.

[10] *See* Securities Exchange Act Release No. 90449 (November 18, 2020), 85 FR 75079 (November 24, 2020) (SR–PEARL–2020–25) (the ''Fifth Proposed Rule Change'').

[11] *Id.*

[12] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated December 18, 2020, notifying the Commission that the Exchange would withdraw the Fifth Proposed Rule Change.

[13] ''Full Service MEO Port—Bulk'' means an MEO port that supports all MEO input message types and binary bulk order entry. *See* the Definitions Section of the Fee Schedule.

[14] ''Full Service MEO Port—Single'' means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders. *See* the Definitions Section of the Fee Schedule.

[15] ''Limited Service MEO Port'' means an MEO port that supports all MEO input message types, but does not support bulk order entry and only supports limited order types, as specified by the Exchange via Regulatory Circular. *See* the Definitions Section of the Fee Schedule.

[16] *See* Securities Exchange Act Release No. 83867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

additional Limited Service MEO Ports per matching engine, for a total of ten (10) per matching engine. All fees related to MEO Ports shall remain unchanged and Members that voluntarily purchase the additional ninth or tenth Limited Service MEO Ports will be subject to the existing $400 monthly fee per port that is charged to Members that request a seventh or eighth Limited Service MEO Port.

The Exchange is increasing the number of additional Limited Service MEO Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer facing systems, is necessary in order to provide sufficient access to new and existing Members, to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment.

Currently, the Exchange has 8 network switches that support the entire customer base of MIAX PEARL. The Exchange plans to increase this to 10 switches, which will increase the number of available customer ports by 25%. This increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to the MIAX PEARL System to all Members. Absent the proposed increase in available MEO Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [17] in general, and furthers the objectives of Section 6(b)(5) of the Act [18] 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 and dealers.

The Exchange believes that its proposal is consistent with the objectives of Section 6(b)(5) of the Act [19] because the proposed additional Limited Service MEO Ports will be available to all Members and the current fees for the additional Limited Service MEO Ports apply equally to all Members regardless of type, and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange is proposing to increase the number of available Limited Service MEO Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer facing systems, is necessary in order to provide sufficient and equal access to new and existing Members, to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment.

Currently, the Exchange has 8 network switches that support the entire customer base of MIAX PEARL. The Exchange plans to increase this to 10 switches, which will increase the number of available customer ports by 25%. This increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to MIAX PEARL Systems for all Members. Absent the proposed increase in available MEO Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs. Further, the Exchange notes that decision of whether to purchase two additional Limited Service MEO Ports is completely optional and it is a business decision for each Member to determine whether the additional Limited Service MEO Ports are necessary to meet their business requirements.

The Exchange further believes that the availability of the additional Limited Service MEO Ports is equitable and not unfairly discriminatory because it will enable Members to maintain uninterrupted access to the MIAX PEARL System and consequently enhance the marketplace by helping Members to better manage risk, thus preserving the integrity of the MIAX markets, all to the benefit of and protection of investors and the public as a whole.

The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act because only Members that voluntarily purchase the two additional Limited Service MEO Ports will be charged the existing $400 monthly fee per port applicable to ports seven (7) and eight (8), which has been unchanged since adopted 2018.[20] The Exchange does not propose to amend the fees applicable to additional Limited Service MEO Ports which have been previously filed with the Commission and become effective after notice and public comment.[21] As stated above, the Exchange proposes to expand its network by making available two additional Limit Service MEO Ports due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. The cost to expand the network in this manner is greater than the revenue the Exchange anticipates the additional Limited Service MEO Ports will generate. Specifically, the Exchange estimates it will incur a one-time cost of approximately $175,000 in capital expenditures (''CapEx'') on hardware, software, and other items to expand the network to make available the two additional Limited Service MEO Ports. This estimated cost also includes expense associated with providing the necessary engineering and support personnel to transition those Members who wish to acquire the two additional Limited Service MEO Ports.

The Exchange projects that approximately six to seven Members will purchase the additional Limited Service MEO Ports, which will be subject to the existing monthly fee of $400 per port applicable to ports seven (7) and eight (8). Accordingly, the Exchange projects that the annualized revenue from the two additional Limited Service MEO Ports will be approximately $67,200 (assuming seven Members purchase the two additional Limited Service MEO Ports). Therefore, the Exchange's upfront cost in expanding its network to provide its Members with the two additional Limited Service MEO Ports—approximately $175,000—is significant relative to the anticipated annualized revenue the Exchange expects to bring in from the two additional Limited Service MEO Ports—approximately $67,200. Further, the Exchange anticipates it will incur approximately $77,712 in annualized ongoing operating expense in order to support the expanded network and the two

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] 15 U.S.C. 78f(b)(5).

[20] *See supra* note 16.

[21] *Id.*

additional Limited Service MEO Ports. Thus, even excluding the upfront CapEx expense of $175,000, the Exchange is not generating a supra-competitive profit from the provision of these two additional Limited Service MEO Ports. In fact, even excluding the one-time CapEx expense $175,000, the Exchange anticipates generating an annual loss from the provision of these two additional Limited Service MEO Ports of ($10,512)—that is, $67,200 in revenue minus $77,712 in expense equates to a loss of ($10,512) to support the additional ports annually.

The Exchange conducted an extensive cost review in which the Exchange analyzed every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the additional Limited Service MEO Ports, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the additional Limited Service MEO Ports, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide services associated with the two additional Limited Service MEO Ports. For the avoidance of doubt, none of the expenses included herein relating to the services associated with providing the two additional Limited Service MEO Ports also relate to the provision of any other services offered by the Exchange. Stated differently, no expense amount of the Exchange is allocated twice. The Exchange notes that it made certain representations in a previous filing [22] regarding its expense allocation for the provision of network connectivity services. The Exchange represents that none of the expenses allocated to the provision of network connectivity services are also allocated to the provision of ports—that is, there is no overlap of any such expenses that are included in the costs associated with services the Exchange provides for connectivity and for the services the Exchange provides for ports.

Specifically, utilizing 2019 expense figures,[23] total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the two additional Limited Service MEO Ports, was approximately $10,701. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, NJ and Miami, FL to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[24] which supports network feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, network services, and infrastructure services for critical components of options network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members and non-Members connect to the network to trade, receive market data, etc.).

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the services associated with providing the two additional Limited Service MEO Ports.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the services associated with the two additional Limited Service MEO Ports. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEO Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only that portion which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEO Ports, approximately 0.5% of the total Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEO Ports. The Exchange did not allocate all of the Zayo expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only the portion which the Exchange identified as being specifically mapped to providing the two additional Limited Service MEO Ports, approximately 0.4% of the total Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, network services, and

[22] *See* Securities Exchange Act Release No. 87876 (December 31, 2019), 85 FR 757 (January 7, 2020) (SR–PEARL–2019–36).

[23] The Exchange notes that the total 2019 expense figures for each of the external and internal expenses described herein relate only to the Exchange's options market. No expense relating to the Exchange's equities market is included in this filing.

[24] In fact, on October 22, 2019, the Exchange was notified by SFTI that it is again raising its fees charged to the Exchange by approximately 11%, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEO Ports, approximately 0.5% of the total SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEO Ports, approximately 0.3% of the total hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports.

For 2019, total internal expense, relating to the internal costs of the Exchange to provide the services associated with the two additional Limited Service MEO Ports was $67,011. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the services associated with providing the two additional Limited Service MEO Ports, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the services associated with the two additional Limited Service MEO Ports, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the services associated with the two additional Limited Service MEO Ports. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the services associated with providing the two additional Limited Service MEO Ports.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the services associated with the two additional Limited Service MEO Ports. In particular, the Exchange's employee compensation and benefits expense relating to providing the services associated with the two additional Limited Service MEO Ports was approximately $49,067, which is only a portion of the $8,177,821 total expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of services associated with the two additional Limited Service MEO Ports. Without these employees, the Exchange would not be able to provide the services associated with the two additional Limited Service MEO Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the services associated with providing the two additional Limited Service MEO Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEO Ports, approximately 0.6% of the total employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports, and not any other service, as supported by its cost review.

The Exchange's depreciation and amortization expense relating to providing the services associated with the two additional Limited Service MEO Ports was $15,584, which is only a portion of the $3,116,781 total expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the services associated with the two additional Limited Service MEO Ports. Without this equipment, the Exchange would not be able to operate the network and provide the services associated with the two additional Limited Service MEO Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only the portion which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEO Ports, approximately 0.5% of the total depreciation and amortization expense, as these services would not be possible without relying on such equipment. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEO Ports, and not any other service, as supported by its cost review.

The Exchange's occupancy expense relating to providing the services associated with providing the two additional Limited Service MEO Ports was approximately $2,360, which is only a portion of the $590,157 total expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the services associated with the two additional Limited Service MEO Ports. This amount consists primarily of rent for the Exchange's Princeton, NJ office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 160 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the services associated with providing the two additional Limited Service MEO Ports. Without this office space, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEO Ports to its Members and non-Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the services associated with the two additional Limited Service MEO Ports. The Exchange did not allocate all of the occupancy expense toward the cost of providing the services associated with the two additional Limited Service MEO Ports, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 0.4% of the total occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the services associated with the two additional Limited Service MEO Ports, and not any other service, as supported by its cost review.

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the services associated with the two additional Limited Service MEO Ports will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the services associated with the two additional Limited Service MEO Ports because the Exchange performed a line-by-line item analysis of all the expenses of the Exchange, and has determined the expenses that directly relate to operation and support of the network. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to operate and support the network, including providing the services associated with the two additional Limited Service MEO Ports to its Members and non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to the operation and support of the network. Providing the two additional Limited Service MEO Ports at the existing rates is intended to recover the Exchange's costs of operating and supporting the network.

Accordingly, the Exchange believes that providing the two additional Limited Service MEO Ports at the existing rate is fair and reasonable because it does not result in excessive pricing or supra-competitive profit, when comparing the actual network operation and support costs to the Exchange versus the projected annual revenue from providing the two additional Limited Service MEO Ports.

Further, subjecting the two additional Limited Service MEO Ports to the existing $400 monthly fee per port applicable to ports seven (7) and eight (8) is also designed to encourage Members to be efficient with their port usage, thereby resulting in a corresponding increase in the efficiency that the Exchange would be able to realize in managing its aggregate costs for providing the two additional ports. There is no requirement that any Member maintain a specific number of Limited Service MEO Ports and a Member may choose to maintain as many or as few of such ports as each Member deems appropriate.

Finally, subjecting the two additional Limited Service MEO Ports to the existing $400 monthly fee applicable to ports seven (7) and eight (8) will help to encourage Limited Service MEO Port usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg. SCI'').[25] Reg. SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg. SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[26] By encouraging Members to be efficient with their usage of Limited MEO Ports, the current fee that will continue to apply to the proposed two (2) additional Limited Service MEO Ports will support the Exchange's Reg. SCI obligations in this regard by ensuring that unused ports are available to be allocated based on individual Members needs and as the Exchange's overall order and trade volumes increase.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX PEARL 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, as amended. The proposed rule change will not impose a burden on competition but will benefit competition by enhancing the Exchange's ability to compete by providing additional services to market participants. It is not intended to address a competitive issue. Rather, the proposed increase in the number of additional Limited Service MEO Ports available per Member is intended to allow the Exchange to increase its inventory of MEO Ports to meet increased Member demand. The Exchange is increasing the number of available additional Limited Service MEO Ports in response to Member demand for increased connectivity to the MIAX PEARL System. The Exchange's current inventory may soon be insufficient to meet those needs. Again, the Exchange is not proposing to amend the fees for MEO Ports, just to increase the number of MEO Ports available per Member. The Exchange also does not believe that the proposed

[25] 17 CFR 242.1000–1007.

[26] 17 CFR 242.1001(a).

rule change will impose a burden on intramarket competition because the two additional Limited Service MEO Ports will be available to all Members on an equal basis. It is a business decision of each Member whether to pay for the additional Limited Service MEO Ports.

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) of the Act,[27] and Rule 19b–4(f)(2)[28] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–PEARL–2020–35 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–PEARL–2020–35. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–PEARL–2020–35 and should be submitted on or before January 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29133 Filed 1–4–21; 8:45 am]

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[27] 15 U.S.C. 78s(b)(3)(A)(ii).

[28] 17 CFR 240.19b–4(f)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90811; File No. SR–MIAX–2020–41]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Increase the Number of Additional Limited Service MIAX Express Interface Ports Available to Market Makers

December 29, 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 21, 2020, Miami International Securities Exchange, LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to increase the number of additional Limited Service MIAX Express Interface (''MEI'') Ports available to Market Makers.[3] The Exchange does not propose to amend the fees for additional Limited Service MEI Ports.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to offer two (2) additional Limited Service MEI Ports to Market Makers. The Exchange does not propose to amend the fees charged for the additional Limited Service MEI Ports.

The Exchange initially filed the proposal to increase the number of Limited Service MEI Ports available to Market Makers on June 30, 2020, with no change to the actual fee amounts being charged.[4] The First Proposed Rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100.

[4] *See* Securities Exchange Act Release No. 89317 (July 14, 2020), 85 FR 43918 (July 20, 2020) (SR–MIAX–2020–23) (the ''First Proposed Rule Change'').

Change was published for comment in the **Federal Register** on July 20, 2020.[5] The Exchange notes that the First Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the First Proposed Rule Change on August 24, 2020.[6] On August 25, 2020, the Exchange refiled its proposal to increase the number of Limited Service MEI Ports available to Market Makers (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's annual cost for providing additional Limited Service MEI Ports.[7] The Second Proposed Rule Change was published for comment in the **Federal Register** on September 11, 2020.[8] Like the First Proposed Rule Change, the Second Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the Second Proposed Rule Change on October 23, 2020.[9]

On October 23, 2020, the Exchange refiled its proposal to increase the number of Limited Service MEI Ports available to Market Makers (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability for the two additional Limited Service MEI Ports (including information regarding the Exchange's methodology for determining the costs and revenues for the two additional Limited Service MEI Ports).[10] The Third Proposed Rule Change was published for comment in the **Federal Register** on November 12, 2020.[11] Like the First and Second Proposed Rule Changes, the Third Proposed Rule Change did not receive any comment letters. Nonetheless, the Exchange withdrew the Third Proposed Rule Change on December 21, 2020.[12]

The Exchange now submits this proposed rule change to increase the number of additional Limited Service MEI Ports available to Market Makers (without increasing the actual fee amounts) to provide additional information regarding the Exchange's cost analysis for the two additional Limited Service MEI Ports.

Currently, MIAX assesses monthly MEI Port Fees on Market Makers based upon the number of MIAX matching engines[13] used by the Market Maker. Market Makers are allocated two (2) Full Service MEI Ports[14] and two (2) Limited Service MEI Ports[15] per matching engine to which they connect. The Full Service MEI Ports, Limited Service MEI Ports, and the additional Limited Service MEI Ports all include access to MIAX's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports for which they will be assessed the existing $100 monthly fee for each additional port they request. This fee has been unchanged since 2016.[16]

The Exchange originally added the Limited Service MEI Ports to enhance the MEI Port connectivity made available to Market Makers, and has subsequently made additional Limited Service MEI Ports available to Market Makers.[17] Limited Service MEI Ports have been well received by Market Makers since their addition. The Exchange now proposes to offer to Market Makers the ability to purchase an additional two (2) Limited Service MEI Ports per matching engine over and above the current six (6) additional Limited Service MEI Ports per matching engine that are available for purchase by Market Makers. The Exchange proposes making a corresponding change to footnote 30 of the Exchange's Fee Schedule to specify that Market Makers will now be limited to purchasing eight (8) additional Limited Service MEI Ports per matching engine, for a total of ten (10) per matching engine. All fees related to MEI Ports shall remain unchanged and Market Makers that voluntarily purchase the additional Limited Service MEI Ports will remain subject to the existing $100 monthly fee per port.

The Exchange is increasing the number of additional Limited Service MEI Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer facing systems, is necessary in order to provide sufficient access to new and existing Members,[18] to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment.

Currently, the Exchange has 8 network switches that support the entire customer base of MIAX. The Exchange plans to increase this to 10 switches, which will increase the number of available customer ports by 25%. This increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to MIAX Systems to all Members. Absent the proposed increase in available MEI Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is

[5] *Id.*

[6] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated August 24, 2020, notifying the Commission that the Exchange would withdraw the First Proposed Rule Change.

[7] *See* Securities Exchange Act Release No. 89769 (September 4, 2020), 85 FR 55905 (September 10, 2020) (SR–MIAX–2020–29) (the ''Second Proposed Rule Change'').

[8] *Id.*

[9] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated October 19, 2020, notifying the Commission that the Exchange would withdraw the Second Proposed Rule Change.

[10] *See* Securities Exchange Act Release No. 90354 (November 5, 2020), 85 FR 71958 (November 12, 2020) (SR–MIAX–2020–34) (the ''Third Proposed Rule Change'').

[11] *Id.*

[12] *See* Comment Letter from Christopher Solgan, VP, Senior Counsel, the Exchange, dated December 18, 2020, notifying the Commission that the Exchange would withdraw the Third Proposed Rule Change.

[13] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section 5(d)(ii), note 29.

[14] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, Section 5(d)(ii), note 27.

[15] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. *See* Fee Schedule, Section 5(d)(ii), note 28.

[16] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[17] *See* Securities Exchange Act Release Nos. 70137 (August 8, 2013), 78 FR 49586 (August 14, 2013) (SR–MIAX–2013–39); 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAX–2013–52); 78950 (September 27, 2016), 81 FR 68084 (October 3, 2016) (SR–MIAX–2016–33); and 79198 (October 31, 2016), 81 FR 76988 (November 4, 2016) (SR–MIAX–2016–37).

[18] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

consistent with Section 6(b) of the Act [19] in general, and furthers the objectives of Section 6(b)(5) of the Act [20] 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 and dealers.

The Exchange believes that its proposal is consistent with the objectives of Section 6(b)(5) of the Act [21] because the proposed additional Limited Service MEI Ports will be available to all Market Makers and the current fees for the additional Limited Service MEI Ports apply equally to all Market Makers regardless of type, and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange is proposing to increase the number of available Limited Service MEI Ports because the Exchange is expanding its network. This network expansion is necessary due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. Consequently, this network expansion, which increases the number of switches supporting customer facing systems, is necessary in order to provide sufficient and equal access to new and existing Members, to maintain a sufficient amount of network capacity head-room, and to continue to provide the same level of service across the Exchange's low-latency, high-throughput technology environment.

Currently, the Exchange has 8 network switches that support the entire customer base of MIAX. The Exchange plans to increase this to 10 switches, which will increase the number of available customer ports by 25%. This increase in the number of available customer ports will enable the Exchange to continue to provide sufficient and equal access to MIAX Systems for all Members. Absent the proposed increase in available MEI Ports, the Exchange projects that its current inventory will be depleted and it will lack sufficient capacity to continue to meet Members' access needs. Further, the Exchange notes the decision of whether to purchase two additional Limited Service MEI Ports is completely optional and it is a business decision for each Market Maker to determine whether the additional Limited Service MEI Ports are necessary to meet their business requirements.

The Exchange further believes that the availability of the additional Limited Service MEI Ports is equitable and not unfairly discriminatory because it will enable Market Makers to maintain uninterrupted access to the MIAX System and consequently enhance the marketplace by helping Market Makers to better manage risk, thus preserving the integrity of the MIAX markets, all to the benefit of and protection of investors and the public as a whole.

The Exchange also believes that its proposal is consistent with Section 6(b)(4) of the Act because only Market Makers that voluntarily purchase the two additional Limited Service MEI Ports will be charged the existing $100 monthly fee per port, which has been unchanged since 2016.[22] The Exchange does not propose to amend the fees applicable to additional Limited Service MEI Ports which have been previously filed with the Commission and become effective after notice and public comment.[23] As stated above, the Exchange proposes to expand its network by making available two additional Limit Service MEI Ports due to increased customer demand and increased volatility in the marketplace, both of which have translated into increased message traffic rates across the network. The cost to expand the network in this manner is greater than the revenue the Exchange anticipates the additional Limited Service MEI Ports will generate. Specifically, the Exchange estimates it will incur a one-time cost of approximately $175,000 in capital expenditures (''CapEx'') on hardware, software, and other items to expand the network to make available the two additional Limited Service MEI Ports. This estimated cost also includes expense associated with providing the necessary engineering and support personnel to transition those Market Makers who wish to acquire the two additional Limited Service MEI Ports.

The Exchange projects that approximately six to seven Market Makers will purchase the additional Limited Service MEI Ports, which will be subject to the existing monthly fee of $100 per port. Accordingly, the Exchange projects that the annualized revenue from the two additional Limited Service MEI Ports will be approximately $16,800 (assuming seven Market Makers purchase the two additional Limited Service MEI Ports). Therefore, the Exchange's upfront cost in expanding its network to provide its Members with the two additional Limited Service MEI Ports—approximately $175,000—is significant relative to the anticipated annualized revenue the Exchange expects to bring in from the two additional Limited Service MEI Ports—approximately $16,800. Further, the Exchange anticipates it will incur approximately $100,371 in annualized ongoing operating expense (''OpEx'') in order to support the expanded network and the two additional Limited Service MEI Ports. Thus, even excluding the upfront CapEx of $175,000, the Exchange is not generating a supra-competitive profit from the provision of these two additional Limited Service MEI Ports. In fact, even excluding the one-time CapEx cost of $175,000, the Exchange anticipates generating an annual loss from the provision of these two additional Limited Service MEI Ports of ($83,571)—that is, $16,800 in revenue minus $100,371 in expense equates to a loss of ($83,571) to support the additional ports annually.

The Exchange conducted an extensive cost review in which the Exchange analyzed every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the additional Limited Service MEI Ports, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the additional Limited Service MEI Ports, and thus bears a relationship that is, ''in nature and closeness,'' directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide services associated with the two additional Limited Service MEI Ports. For the avoidance of doubt, none of the expenses included herein relating to the services associated with providing the two additional Limited Service MEI Ports also relate to the provision of any other services offered by the Exchange. Stated differently, no expense amount of the Exchange is allocated twice. The Exchange notes that it made certain representations in a previous filing [24] regarding its expense allocation for the provision of network connectivity services. The Exchange represents that none of the expenses allocated to the provision of network connectivity services are also allocated to the provision of ports—that is, there is no overlap of any such expenses that are

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] 15 U.S.C. 78f(b)(5).

[22] *See supra* note 16.

[23] *See supra* notes 16 and 17.

[24] *See* Securities Exchange Act Release No. 87875 (December 31, 2019), 85 FR 770 (January 7, 2020) (SR–MIAX–2019–51).

included in the costs associated with services the Exchange provides for connectivity and for the services the Exchange provides for ports.

Specifically, utilizing 2019 expense figures, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the two additional Limited Service MEI Ports, was approximately $12,393. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. (''Zayo'') for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, NJ and Miami, FL to all data center locations; (3) Secure Financial Transaction Infrastructure (''SFTI''),[25] which supports network feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, network services, and infrastructure services for critical components of options network services; and (5) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members and non-Members connect to the network to trade, receive market data, etc.).

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the services associated with providing the two additional Limited Service MEI Ports.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the services associated with the two additional Limited Service MEI Ports. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEI Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only that portion which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEI Ports, approximately 0.5% of the total Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAX PEARL and MIAX Emerald, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEI Ports. The Exchange did not allocate all of the Zayo expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only the portion which the Exchange identified as being specifically mapped to providing the two additional Limited Service MEI Ports, approximately 0.4% of the total Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports, and not any other service, as supported by its cost review.

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, network services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEI Ports, approximately 0.5% of the total SFTI and other service providers' expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide access to its Members and non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEI Ports, approximately 0.3% of the total hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports.

For 2019, total internal expense, relating to the internal costs of the Exchange to provide the services associated with the two additional Limited Service MEI Ports was $87,978. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time

[25] In fact, on October 22, 2019, the Exchange was notified by SFTI that it is again raising its fees charged to the Exchange by approximately 11%, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b–4, respectively.

employees that support the services associated with providing the two additional Limited Service MEI Ports, including staff in network operations, trading operations, development, system operations, business, as well as staff in general corporate departments (such as legal, regulatory, and finance) that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the services associated with the two additional Limited Service MEI Ports, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the services associated with the two additional Limited Service MEI Ports. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the services associated with providing the two additional Limited Service MEI Ports.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the services associated with the two additional Limited Service MEI Ports. In particular, the Exchange's employee compensation and benefits expense relating to providing the services associated with the two additional Limited Service MEI Ports was approximately $58,870, which is only a portion of the $9,811,685 total expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features and enhancements), Trade Operations, Finance (who provide billing and accounting services relating to the network), and Legal (who provide legal services relating to the network, such as rule filings and various license agreements and other contracts). As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by each employee on matters relating to the provision of services associated with the two additional Limited Service MEI Ports. Without these employees, the Exchange would not be able to provide the services associated with the two additional Limited Service MEI Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the services associated with providing the two additional Limited Service MEI Ports, only the portions which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEI Ports, approximately 0.6% of the total employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports, and not any other service, as supported by its cost review.

The Exchange's depreciation and amortization expense relating to providing the services associated with the two additional Limited Service MEI Ports was $26,362, which is only a portion of the $5,272,469 total expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the services associated with the two additional Limited Service MEI Ports. Without this equipment, the Exchange would not be able to operate the network and provide the services associated with the two additional Limited Service MEI Ports to its Members and non-Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only the portion which the Exchange identified as being specifically mapped to providing the services associated with the two additional Limited Service MEI Ports, approximately 0.5% of the total depreciation and amortization expense, as these services would not be possible without relying on such equipment. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the services associated with the two additional Limited Service MEI Ports, and not any other service, as supported by its cost review.

The Exchange's occupancy expense relating to providing the services associated with providing the two additional Limited Service MEI Ports was approximately $2,746, which is only a portion of the $686,437 total expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the services associated with the two additional Limited Service MEI Ports. This amount consists primarily of rent for the Exchange's Princeton, NJ office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center (''NOC'') and Security Operations Center (''SOC'') from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network. The Exchange currently has approximately 160 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the services associated with providing the two additional Limited Service MEI Ports. Without this office space, the Exchange would not be able to operate and support the network and provide the services associated with the two additional Limited Service MEI Ports to its Members and non-Members and their customers. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the services associated with the two additional Limited Service MEI Ports. The Exchange did not allocate all of the occupancy expense toward the cost of providing the services associated with the two additional Limited Service MEI Ports, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 0.4% of the total occupancy expense. The Exchange believes this allocation is reasonable because it represents the

Exchange's cost to provide the services associated with the two additional Limited Service MEI Ports, and not any other service, as supported by its cost review.

Accordingly, based on the facts and circumstances presented, the Exchange believes that its provision of the services associated with the two additional Limited Service MEI Ports will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the services associated with the two additional Limited Service MEI Ports because the Exchange performed a line-by-line item analysis of all the expenses of the Exchange, and has determined the expenses that directly relate to operation and support of the network. Further, the Exchange notes that, without the specific third-party and internal items listed above, the Exchange would not be able to operate and support the network, including providing the services associated with the two additional Limited Service MEI Ports to its Members and non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to the operation and support of the network. Providing the two additional Limited Service MEI Ports at the existing rates is intended to recover the Exchange's costs of operating and supporting the network.

Accordingly, the Exchange believes that providing the two additional Limited Service MEI Ports at the existing rate is fair and reasonable because it does not result in excessive pricing or supra-competitive profit, when comparing the actual network operation and support costs to the Exchange versus the projected annual revenue from providing the two additional Limited Service MEI Ports.

Further, subjecting the two additional Limited Service MEI Ports to the existing $100 monthly fee per port is also designed to encourage Market Makers to be efficient with their port usage, thereby resulting in a corresponding increase in the efficiency that the Exchange would be able to realize in managing its aggregate costs for providing the two additional ports. There is no requirement that any Market Maker maintain a specific number of Limited Service MEI Ports and a Market Maker may choose to maintain as many or as few of such ports as each Market Maker deems appropriate.

Finally, subjecting the two additional Limited Service MEI Ports to the existing $100 monthly fee will help to encourage Limited Service MEI Port usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg. SCI'').[26] Reg. SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg. SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[27] By encouraging Members to be efficient with their usage of Limited MEI Ports, the current fee that will continue to apply to the proposed two (2) additional Limited Service MEI Ports will support the Exchange's Reg. SCI obligations in this regard by ensuring that unused ports are available to be allocated based on individual Members needs and as the Exchange's overall order and trade volumes increase.

B. Self-Regulatory Organization's Statement on Burden on Competition

MIAX 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, as amended. The proposed rule change will not impose a burden on competition but will benefit competition by enhancing the Exchange's ability to compete by providing additional services to market participants. It is not intended to address a competitive issue. Rather, the proposed increase in the number of additional Limited Service MEI Ports available per Market Maker is intended to allow the Exchange to increase its inventory of MEI Ports to meet increased Member demand. The Exchange is increasing the number of available additional Limited Service MEI Ports in response to Market Maker demand for increased connectivity to the MIAX System. The Exchange's current inventory may soon be insufficient to meet those needs. Again, the Exchange is not proposing to amend the fees for MEI Ports, just to increase the number of MEI Ports available per Market Maker. The Exchange also does not believe that the proposed rule change will impose a burden on intramarket competition because the two additional Limited Service MEI Ports will be available to all Market Makers on an equal basis. It is a business decision of each Market Maker whether to pay for the additional Limited Service MEI Ports.

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) of the Act,[28] and Rule 19b–4(f)(2)[29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2020–41 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–MIAX–2020–41. 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

[26] 17 CFR 242.1000–1007.

[27] 17 CFR 242.1001(a).

[28] 15 U.S.C. 78s(b)(3)(A)(ii).

[29] 17 CFR 240.19b–4(f)(2).

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–MIAX–2020–41, and should be submitted on or before January 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29132 Filed 1–4–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90818; File No. SR–MIAX–2020–40]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 29, 2020.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2020, Miami International Securities Exchange LLC (''MIAX Options'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the ''Fee Schedule'').

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to extend the cap waiver of 1,000 contracts per leg for complex PRIME (''cPRIME'')[3] Agency Order rebates for all tiers under the Priority Customer Rebate Program (''PCRP'')[4] until March 31, 2021.

Background

Exchange Rule 518(b)(7) defines a cPRIME Order as a type of complex order[5] that is submitted for participation in a cPRIME Auction and trading of cPRIME Orders is governed by Rule 515A, Interpretation and Policy .12.[6] cPRIME Orders are processed and executed in the Exchange's PRIME mechanism, the same mechanism that the Exchange uses to process and execute simple PRIME orders, pursuant to Exchange Rule 515A.[7] PRIME is a process by which a Member may electronically submit for execution an order it represents as agent (an ''Agency Order'') against principal interest and/or solicited interest. The Member that submits the Agency Order (''Initiating Member'') agrees to guarantee the execution of the Agency Order by submitting a contra-side order representing principal interest or solicited interest (''Contra-Side Order''). When the Exchange receives a properly designated Agency Order for Auction processing, a request for response (''RFR'') detailing the option, side, size and initiating price is broadcasted to MIAX participants up to an optional designated limit price. Members may submit responses to the RFR, which can be either an Auction or Cancel (''AOC'') order or an AOC eQuote. A cPRIME

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''cPRIME'' is the process by which a Member may electronically submit a ''cPRIME Order'' (as defined in Rule 518(b)(7)) it represents as agent (a ''cPRIME Agency Order'') against principal or solicited interest for execution (a ''cPRIME Auction''), subject to the restrictions set forth in Exchange Rule 515A, Interpretation and Policy .12. *See* Exchange Rule 515A.

[4] Under the PCRP, MIAX credits each Member the per contract amount resulting from each Priority Customer order transmitted by that Member which is executed electronically on the Exchange in all multiply-listed option classes (excluding, in simple or complex as applicable, QCC and cQCC Orders, mini-options, Priority Customer-to-Priority Customer Orders, C2C and cC2C Orders, PRIME and cPRIME AOC Responses, PRIME and cPRIME Contra-side Orders, PRIME and cPRIME Orders for which both the Agency and Contra-side Order are Priority Customers, and executions related to contracts that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Exchange Rule 1400), provided the Member meets certain percentage thresholds in a month as described in the PCRP table. *See* Fee Schedule, Section 1(a)(iii). ''Priority Customer'' means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). A ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Exchange Rule 100.

[5] A ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. A complex order can also be a ''stock-option'' order, which is an order to buy or sell a stated number of units of an underlying security coupled with the purchase or sale of options contract(s) on the opposite side of the market, subject to certain contingencies set forth in the proposed rules governing complex orders. For a complete definition of a ''complex order,'' *see* Exchange Rule 518(a)(5). *See also* Securities Exchange Act Release No. 78620 (August 18, 2016), 81 FR 58770 (August 25, 2016) (SR–MIAX–2016–26).

[6] *See* Securities Exchange Act Release No. 81131 (July 12, 2017), 82 FR 32900 (July 18, 2017) (SR–MIAX–2017–19) (Order Granting Approval of a Proposed Rule Change to Amend MIAX Options Rules 515, Execution of Orders and Quotes; 515A, MIAX Price Improvement Mechanism (''PRIME'') and PRIME Solicitation Mechanism; and 518, Complex Orders).

[7] *Id.*

Auction is the price-improvement mechanism of the Exchange's System pursuant to which an Initiating Member electronically submits a complex Agency Order into a cPRIME Auction. The Initiating Member, in submitting an Agency Order, must be willing to either (i) cross the Agency Order at a single price against principal or solicited interest, or (ii) automatically match against principal or solicited interest, the price and size of a RFR that is broadcast to MIAX participants up to an optional designated limit price. Such responses are defined as cPRIME AOC Responses or cPRIME eQuotes. The PRIME mechanism is used for orders on the Exchange's Simple Order Book.[8] The cPRIME mechanism is used for Complex Orders [9] on the Exchange's Strategy Book,[10] with the cPRIME mechanism operating in the same manner for processing and execution of cPRIME Orders that is used for PRIME Orders on the Simple Order Book.

The Exchange proposes to amend footnote ''*'' in Section 1(a)(iii) of the Fee Schedule to extend the waiver of the contracts cap per leg for cPRIME Agency Order rebates for all tiers under the PCRP until March 31, 2021. Prior to a rule filing by the Exchange (described below), the Exchange limited the cPRIME Agency Order Credit to be payable only to the first 1,000 contracts per leg for each cPRIME Agency Order in all tiers under the PCRP. On February 28, 2020, the Exchange filed, and the Commission approved, the Exchange's proposal to waive the 1,000 contracts cap per leg for cPRIME Agency Order rebates for all tiers under the PCRP from March 1, 2020 until May 31, 2020.[11]

On May 29, 2020, the Exchange filed, and the Commission approved, the Exchange's proposal to extend the waiver of the 1,000 contracts cap per leg for cPRIME Agency Order rebates for all tiers under the PCRP from June 1, 2020 until July 31, 2020.[12] On July 31, 2020, the Exchange filed, and the Commission approved, the Exchange's proposal to extend the waiver of the 1,000 contracts cap per leg for cPRIME Agency Order rebates for all tiers under the PCRP from August 1, 2020 until August 31, 2020.[13] On August 25, 2020, the Exchange filed, and the Commission approved, the Exchange's proposal to extend the waiver of the 1,000 contracts cap per leg for cPRIME Agency Order rebates for all tiers under the PCRP from August 31, 2020 until December 31, 2020.[14]

The Exchange now proposes to extend the cap waiver of 1,000 contracts per leg for cPRIME Agency Order rebates for all tiers under the PCRP until March 31, 2021. The purpose of this proposed change is for business and competitive reasons and to continue to entice market participants to submit larger-sized cPRIME Agency Orders.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and self-regulatory organization (''SRO'') revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [15] There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of December 14, 2020, no single exchange has more than approximately 14% of the market share of executed volume of multiply-listed equity options trades for the month of December 2020.[16] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity options order flow. More specifically, for the month of November 2020, the Exchange had a total market share of 3.90% of all equity options volume.[17]

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow (as further described below), or discontinue or reduce use of certain categories of products, in response to transaction and non-transaction fee changes. For example, on March 1, 2019, the Exchange filed with the Commission an immediately effective filing to decrease certain credits assessable to Members pursuant to the PCRP.[18] The Exchange experienced a decrease in total market share between the months of February and March of 2019. Accordingly, the Exchange believes that the March 1, 2019 fee change may have contributed to the decrease in the Exchange's market share and, as such, the Exchange believes competitive forces constrain options exchange transaction and non-transaction fees.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [19] in general, and furthers the objectives of Section 6(b)(4) of the Act [20] in particular, in that it is an equitable allocation of reasonable fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act 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 and dealers.

The Exchange believes its proposal to extend the waiver of the cap of 1,000 contracts per leg for cPRIME Agency Order rebates for all tiers under the PCRP until March 31, 2021 provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining

[8] The ''Simple Order Book'' is the Exchange's regular electronic book of orders and quotes. *See* Exchange Rule 518(a)(15).

[9] A ''complex order'' is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the ''legs'' or ''components'' of the complex order), for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. Mini-options may only be part of a complex order that includes other mini-options. Only those complex orders in the classes designated by the Exchange and communicated to Members via Regulatory Circular with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis and communicated to Members via Regulatory Circular, are eligible for processing. *See* Exchange Rule 518(a)(5).

[10] The ''Strategy Book'' is the Exchange's electronic book of complex orders and complex quotes. *See* Exchange Rule 518(a)(17).

[11] *See* Securities Exchange Act Release No. 88349 (March 10, 2020), 85 FR 14995 (March 15, 2020) (SR–MIAX–2020–05).

[12] *See* Securities Exchange Act Release No. 89035 (June 9, 2020), 85 FR 36249 (June 15, 2020) (SR–MIAX–2020–12).

[13] *See* Securities Exchange Act Release No. 89530 (August 12, 2020), 85 FR 50845 (August 18, 2020) (SR–MIAX–2020–26).

[14] *See* Securities Exchange Act Release No. 89771 (September 4, 2020), 85 FR 55873 (September 10, 2020) (SR–MIAX–2020–28).

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[16] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available at: *https://www.theocc.com/market-data/volume/default.jsp.*

[17] *See id.*

[18] *See* Securities Exchange Act Release No. 85301 (March 13, 2019), 84 FR 10166 (March 19, 2019) (SR–MIAX–2019–09).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(4) and (5).

prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [21] There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of December 14, 2020, no single exchange has more than approximately 14% of the market share of executed volume of multiply-listed equity options trades for the month of December 2020.[22] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, for the month of November 2020, the Exchange had a total market share of 3.90% of all equity options volume.[23]

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to transaction and/or non-transaction fee changes. For example, on March 1, 2019, the Exchange filed with the Commission an immediately effective filing to decrease certain credits assessable to Members pursuant to the PCRP.[24] The Exchange experienced a decrease in total market share between the months of February and March of 2019. Accordingly, the Exchange believes that the March 1, 2019 fee change may have contributed to the decrease in the Exchange's market share and, as such, the Exchange believes competitive forces constrain options exchange transaction and non-transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes that its proposal to continue to waive the 1,000 contracts cap per leg for cPRIME Agency Order rebates for all tiers in the PCRP until March 31, 2021 is reasonable, equitably allocated and not unfairly discriminatory because this change is for business and competitive reasons and available equally to all market participants. The Exchange cannot predict with certainty whether any market participant would submit additional cPRIME Agency Orders in excess of 1,000 contracts per leg in light of the proposal to continue to waive the cap of 1,000 contracts per leg for cPRIME Agency Order rebates for all tiers under the PCRP, but believes that market participants would continue to be encouraged to submit larger orders to obtain the additional credits. The Exchange believes that this proposed change would encourage increased cPRIME Agency Order flow, which will bring greater volume and liquidity to the Exchange, which benefits all market participants by providing more trading opportunities and tighter spreads.

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 changes would not impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed change would continue to encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders.

The Exchange does not believe that other market participants at the Exchange would be placed at a relative disadvantage by the proposed change to continue to waive the cap of 1,000 contracts per leg for cPRIME Agency Order rebates for all tiers under the PCRP until March 31, 2021. The proposed change is designed to attract additional order flow to the Exchange. The Exchange believes that this proposal will continue to encourage Members to submit Priority Customer cPRIME Agency Orders, which will increase liquidity and benefit all market participants by providing more trading opportunities and tighter spreads. Accordingly, the Exchange believes that the proposed change will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because it will continue to encourage order flow, which provides greater volume and liquidity, benefiting all market participants by providing more trading opportunities and tighter spreads.

The Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of December 14, 2020, no single exchange has more than approximately 14% of the market share of executed volume of multiply-listed equity options trades for the month of December 2020.[26] Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity options order flow. More specifically, for the month of November 2020, the Exchange had a total market share of 3.90% of all equity options volume.[27]

In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule change reflects this competitive environment because it continues to encourage market participants to provide and send order flow to the Exchange. To the extent this is achieved, all the Exchange's market participants should benefit from the improved market quality.

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) of the Act,[28] and Rule 19b–4(f)(2) [29] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine

[21] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[22] *See supra* note 16.

[23] *See id.*

[24] *See supra* note 18.

[25] 15 U.S.C. 78f(b)(8).

[26] *See supra* note 16.

[27] *See id.*

[28] 15 U.S.C. 78s(b)(3)(A)(ii).

[29] 17 CFR 240.19b–4(f)(2).

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–MIAX–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–MIAX–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 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–MIAX–2020–40 and should be submitted on or before January 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29138 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90815; File No. SR–BX–2020–033]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Utilize the FIX Protocol To Submit Orders to BX's Price Improvement Auction Mechanism

December 29, 2020.

On October 27, 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 3, Section 7(d)(1)(A) to offer BX Participants the ability to utilize the Financial Information eXchange or ''FIX'' protocol to submit orders to its Price Improvement Auction mechanism. The proposed rule change was published for comment in the **Federal Register** on November 16, 2020.[3] The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is 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–2020–033).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29135 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90383 (November 9, 2020), 85 FR 73095.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90816; File No. SR–NYSEArca–2020–98]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change Regarding the Availability of Information for the iShares Gold Trust, the iShares Silver Trust Under NYSE Arca Rule 8.201–E and the iShares S&P GSCI Commodity-Indexed Trust Under Rule 8.203–E

December 29, 2020.

On November 12, 2020, NYSE Arca, Inc. filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding the availability of information for the iShares Gold Trust (formerly the iShares® COMEX Gold Trust) and the iShares Silver Trust, shares of which are currently listed on the Exchange under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), and the iShares S&P GSCI Commodity-Indexed Trust, shares of which currently are listed and traded on the Exchange under Rule 8.203–E (Commodity Index Trust Shares). The proposed rule change was published for comment in the **Federal Register** on November 23, 2020.[3] The Commission has received no comment letters on the proposed rule change.

Section 19(b)(2) of the Act [4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up

to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is January 7, 2021. 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 21, 2021 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–NYSEArca–2020–98).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29136 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90817; File No. SR–NYSEArca–2020–46]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Withdrawal of a Proposed Rule Change To Amend NYSE Arca Rule 5.2–E(j)(6) Relating to Options-Linked Securities

December 29, 2020.

On June 10, 2020, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 5.2–E(j)(6) to accommodate Exchange listing and trading of Options-Linked Securities. The proposed rule change was published for comment in the **Federal Register** on June 22, 2020.[3] On July 28, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On September 16, 2020, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change.[7] On December 7, 2020, the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.[8] The Commission received no comment letters on the proposed rule change. On December 29, 2020, the Exchange withdrew the proposed rule change (SR–NYSEArca–2020–46).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29137 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 89073 (June 16, 2020), 85 FR 37488.

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 89412, 85 FR 46744 (August 3, 2020).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 89898, 85 FR 59572 (September 22, 2020).

[8] *See* Securities Exchange Act Release No. 90575, 85 FR 80206 (December 11, 2020). The Commission designated February 17, 2021, as the date by which the Commission shall either approve or disapprove the proposed rule change.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–574, OMB Control No. 3235–0648]

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Extension:
Rule 498

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''Paperwork Reduction Act''), the Securities and Exchange Commission (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 (''OMB'') for extension and approval.

Rule 498 (17 CFR 230.498) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) (''Securities Act'') permits open-end management investment companies (''funds'') to satisfy their prospectus delivery obligations under the Securities Act by sending or giving key information directly to investors in the form of a summary prospectus (''Summary Prospectus'') and providing the statutory prospectus on a website. Upon an investor's request, funds are also required to send the statutory prospectus to the investor. In addition, under rule 498, a fund that relies on the rule to meet its statutory prospectus delivery obligations must make available, free of charge, the fund's current Summary Prospectus, statutory prospectus, statement of additional information, and most recent annual and semi-annual reports to shareholders at the website address specified in the required Summary Prospectus legend (17 CFR 270.498(e)(1)). A Summary Prospectus that complies with rule 498 is deemed to be a prospectus that is authorized under Section 10(b) of the Securities Act and Section 24(g) of the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*).

The purpose of rule 498 is to enable a fund to provide investors with a Summary Prospectus containing key information necessary to evaluate an investment in the fund. Unlike many other federal information collections, which are primarily for the use and benefit of the collecting agency, this information collection is primarily for the use and benefit of investors. The information filed with the Commission also permits the verification of compliance with securities law requirements and assures the public availability and dissemination of the information.

Based on an analysis of fund filings, the Commission estimates that approximately 10,536 funds are using a Summary Prospectus. The Commission estimates that the annual hourly burden per fund associated with the compilation of the information required on the cover page or the beginning of the Summary Prospectus is 0.5 hours, and estimates that the annual hourly burden per fund to comply with the website posting requirement is approximately 1 hour, requiring a total of 1.5 hours per fund per year.[1] Thus the total annual hour burden associated with these requirements of the rule is approximately 15,804.[2] The

[1] 0.5 hours per fund + 1 hour per fund = 1.5 hours per fund.

[2] 1.5 hours per fund × 10,536 fund = 15,804 hours.

Commission estimates that the annual cost burden is approximately $18,105 per fund, for a total annual cost burden of approximately $190,754,280.[3]

Estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules and forms. Under rule 498, use of the Summary Prospectus is voluntary, but the rule's requirements regarding provision of the statutory prospectus upon investor request are mandatory for funds that elect to send or give a Summary Prospectus in reliance upon rule 498. The information provided under rule 498 will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Written comments are invited on: (a) Whether the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information has practical utility; (b) the accuracy of the Commission's estimate of the burdens of the collections of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burdens of the collections 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.*

December 29, 2020.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29155 Filed 1–4–21; 8:45 am]

BILLING CODE 8011–01–P

[3] $18,105 per fund × 10,536 fund = $190,754,280.

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number MARAD–2020–0175]

Request for Applications To Be Considered for Enrollment in the Cable Security Fleet

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of application period for the cable security fleet program.

SUMMARY: The Maritime Administration (MARAD) requests applications from owners and/or operators of eligible vessels to enroll such vessels in the Cable Security Fleet (CSF). The CSF Program is a newly-authorized program intended to maintain a fleet of active, commercially viable, privately owned United States-flag cable vessels to meet national security requirements and to maintain a United States presence in the international submarine cable services market. The CSF will consist of two vessels. This Notice describes, among other things, statutory requirements to apply and to participate in the CSF, recommendations as to the form and substance of applications, and a deadline for submitting applications for vessel enrollment in the CSF program. The Maritime Administration will negotiate agreements ready for execution with the successful applicants.

DATES: Applications to enroll vessels into the CSF should be made by February 4, 2021. Applications should be submitted to the address listed in the **ADDRESSES** section below.

ADDRESSES: Applications should be addressed to the Director, Office of Sealift Support, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W25–310, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Rhonda Davis, Office of Sealift Support, Maritime Administration, U.S. Department of Transportation, Telephone (202) 366–6379, or *Rhonda.davis@dot.gov.* For legal questions, contact Joseph Click, Attorney Advisor, Maritime Administration, U.S. Department of Transportation, Telephone (202) 366–5882, or *Joseph.Click@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Program Overview

46 U.S.C. 53202(a)(1) directs the Secretary of Transportation (Secretary), in consultation with the Secretary of Defense (SecDef), to establish a fleet of active, commercially-viable cable vessels to meet national security requirements. The Cable Security Fleet, which will be known as the CSF, will consist of privately owned, United States-documented cable vessels, whose owners or operators will enter into Operating Agreements with MARAD to set forth operating qualifications and criteria in exchange for payments. Program participants will enter into Operating Agreements that will require participants to: Continuously and actively operate the subject vessels in the commercial submarine cable services market (including the laying, maintenance, and repair of submarine cables) and provide the United States Government access to participating vessels in times of national emergency. In administering the CSF Program, MARAD will work with a designated agency of the Department of Defense (DoD) to evaluate vessels and operators and to confirm that operating agreements meet the objectives of supporting economic activity and national security. Establishment of the CSF is set forth in the United States Code, Title 46, Chapter 532, referred to as ''the statute'' below.

A. Citizenship Requirements for Owners and Operators

An applicant seeking to enroll its vessels in CSF must meet certain qualifications for vessel control and citizenship. First, an applicant must be a vessel's registered owner or operate the vessel as its principal demise charterer, such that it operates the vessel at its own risk and expense. MARAD will not consider applications from sub-demise charterers, time charterers, vessel managers, or other vessel stakeholders. Additionally, candidate vessel ownership or operation must meet the requirements of one of four citizenship categories:

1. Vessel owned and operated by United States citizens, known as 50501 Citizens, within the meaning of Section 50501 of Title 46, United States Code;

2. Vessel owned by a U.S. citizen, known as a 50501 Citizen, under 46 U.S.C. 50501 or United States Citizen Trust under 46 U.S.C. 53201(11) and chartered to a United States citizen eligible to document vessels, known as a Documentation Citizen, under Chapter 121 of Title 46, United States Code, subject to:

a. Verifications of the U.S.-citizenship of the board and principal officers of the charterer; and

b. Certifications by the charterer that no treaty, statute, or person would influence the vessel's operations in a

manner contrary to the interests of the United States;

3. Vessel owned and operated by an entity that contracts with the Department of Defense to operate vessels for, or charters vessels to, the United States; or

4. Vessel owned by a Documentation Citizen and chartered to a 50501 Citizen.

B. Vessel Technical Considerations

Vessels proposed for enrollment in the CSF must meet certain minimum technical and legal requirements as of the time of application. In addition to the citizenship requirements for each vessel's owner and operator, each vessel must be:

1. 40 years of age or less on the date on which the vessel is enrolled in CSF (unless waived by the Secretary under 46 U.S.C. 53202(e));

2. Found suitable by DoD for cable servicing work in the interest of national security;

3. Found commercially viable by MARAD for submarine cable services.

4. Classed as a cable vessel by the American Bureau of Shipping or another classification society accepted by the United States Coast Guard (USCG); and

5. Documented by USCG under Chapter 121 of Title 46, United States Code, or have its owners demonstrate their intent to document the vessel under Chapter 121 of Title 46.

C. Terms of the CSF Operating Agreements

If MARAD deems an applicant and its proposed vessel to be most qualified for the CSF, then MARAD will negotiate and enter into an Operating Agreement with the applicant for one year, subject to the availability of appropriations with payment for participation at the annual rate of $5 million after the availability of funding and execution of agreements as provided by statute and appropriation.

II. Application for Entry Into the Cable Ship Fleet

A. Application Elements

Qualified cable vessel owners and/or operators seeking to apply for a CSF Operating Agreement may submit applications (one (1) original with two (2) copies) with the following information and materials for ease of review; however, conformity with this applicant guidance, except where explicit in the statute, is voluntary only. MARAD will review and consider all applications it receives and may contact applicants for additional information:

1. Full name of Applicant and address of principal executive office;

2. Notarized affidavit of citizenship status, whether as a 50501 Citizen or Documentation Citizen;

3. Certificate of incorporation;

4. Copy of corporate by-laws or other governing instruments;

5. Description of domestic and international corporate affiliations;

6. Financial data;

7. Vessel's base port where it may be inspected by MARAD or a designated marine surveyor, and a description of the vessel's regular area of operation;

8. Locations and descriptions of any marine depots worldwide where the vessel has access to servicing, spare cables, amplifiers, and other equipment necessary for undersea cable repair;

9. Description of applicant's vessel's regular operations, which may include a listing of submarine cables laid or repaired within the preceding three (3) years, detailing the name of the cable systems laid and repaired, approximate location of repair work, and approximate depths of cable repaired, marine depots used for replenishment of spares, and a listing of marine crew and mission specialist positions (splicers, cable test technicians, cable transmission technicians, and cable engineers), including years of experience.

10. Demise or bareboat charter arrangements, if applicable;

11. Applicant's stated assessment of the vessel's national security value to DoD with respect to cable services;

12. Copies of any Special Security Agreements into which the Applicant has entered with DoD, per 46 U.S.C. 53202(c)(3)(A)(iii).

B. Protection of Confidential Commercial or Financial Information

If an application includes information that the applicant considers to be a trade secret or confidential commercial or financial information, the applicant should do the following: (1) Note on the front cover that the submission ''Contains Confidential Commercial or Financial Information (CCFI)''; (2) mark each affected page ''CCFI''; and (3) highlight or otherwise denote the CCFI portions. MARAD will protect such information from disclosure to the extent allowed under applicable law. In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR 7.29 will be followed. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA.

(Authority: National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116–92, section 3521; 49 CFR 1.93(a))

Dated: December 30, 2020.

By Order of the Maritime Administrator.

Gabriel Chavez,

Secretary, Maritime Administration.

[FR Doc. 2020–29159 Filed 1–4–21; 8:45 am]

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Part II

Department of Agriculture

Food and Nutrition Service

7 CFR Parts 271 and 273

Employment and Training Opportunities in the Supplemental Nutrition Assistance Program; Final Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271 and 273

[FNS–2019–0008]

RIN 0584–AE68

Employment and Training Opportunities in the Supplemental Nutrition Assistance Program

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Final rule.

SUMMARY: The final rule implements the changes made by section 4005 of the Agriculture Improvement Act of 2018 (the Act) to the Supplemental Nutrition Assistance Program (SNAP) pertaining to the Employment and Training (E&T) program and aspects of the work requirement for able-bodied adults without dependents (ABAWDs). In general, these changes are related to strengthening the SNAP E&T program, adding workforce partnerships as a way for SNAP participants to meet their work requirements, and modifying the work requirement for ABAWDs.

DATES: This rule is effective March 8, 2021. The provisions in 7 CFR 237.7(c)(1) pertaining to the consolidated written notice and oral explanation of work requirements, and the provisions in 7 CFR 273.7(c)(11)(iii) and (iv) and 7 CFR 273.7(c)(18) are applicable beginning October 1, 2021.

FOR FURTHER INFORMATION CONTACT: Moira Johnston, Food and Nutrition Service, Office of Employment and Training, 1320 Braddock Place, Alexandria, VA 22314, *ETORule@USDA.gov.*

SUPPLEMENTARY INFORMATION: The final rule implements the changes made by section 4005 of The Agriculture Improvement Act of 2018 (Pub. L. 115–334) (the Act) to the Supplemental Nutrition Assistance Program (SNAP). The Department published the proposed rule on March 17, 2020, and received 75 comments, 72 of which were substantive.

The final rule requires State agencies to consult with their State workforce development boards on the design of their E&T programs and to document in their E&T State plans the extent to which their E&T programs will be carried out in coordination with activities under title I of the Workforce Innovation and Opportunity Act (WIOA). The final rule also makes changes to E&T components including: Replacing job search with supervised job search as a component; eliminating job finding clubs; replacing job skills assessments with employability assessments; adding apprenticeships and subsidized employment as allowable activities; requiring a 30-day minimum for provision of job retention services; and allowing those activities from the E&T pilots authorized under the Agricultural Act of 2014 (Pub. L. 113–79) that have had the most demonstrable impact on the ability of participants to find and retain employment that leads to increased income and reduced reliance on public assistance to become allowable E&T activities.

The final rule also requires that, in addition to providing one or more E&T components, all E&T programs provide case management services to E&T participants. The rule revises the definition of good cause for failure to comply with the requirement to participate in E&T to include instances in which an appropriate component or opening in an E&T program is not available. It also modifies the required reporting elements in the final quarterly E&T Program Activity Report provided by State agencies to include the number of SNAP applicants and participants who are required to participate in E&T, of those, the number who begin participation in the E&T program and an E&T component, and the number of mandatory E&T participants who are determined ineligible for failure to comply. The rule adds workforce partnerships as a way for SNAP participants to meet their work requirements. It also establishes a funding formula for reallocated E&T funds and increases the minimum allocation of 100 percent funds for each State agency to $100,000, as prescribed by the Act. The rule requires State agencies to re-direct individuals who are determined ill-suited for an E&T program component to other more suitable activities.

The final rule also codifies some changes to policy pertaining to able-bodied adults without dependents (ABAWDs). These changes include updating the regulations to reflect the reduction in the number of ABAWD work exemptions from 15 percent to 12 percent (this change was implemented at the start of Fiscal Year 2020) and referring to such exemptions as ''discretionary exemptions,'' as well as adding workforce partnerships and employment and training programs for veterans operated by the Department of Labor or the Department of Veteran's Affairs to the list of work programs for ABAWDs. The rule replaces ''job search'' with ''supervised job search'' as a type of activity that cannot count as a work program for the purposes of an ABAWD fulfilling their work requirement, unless it comprises less than half the work requirement.

The final rule adds the requirement that all State agencies advise certain zero-income households subject to the general work requirement at recertification of employment and training opportunities. The rule also requires State agencies to provide to all households subject to work requirements a consolidated written notice and comprehensive oral explanation of the work requirements for individuals within the household.

Overall, the Department believes the statutory changes made by section 4005 of the Act will strengthen E&T programs, and improve SNAP participants' ability to gain and retain employment, thus reducing participant reliance on the social safety net. Through this legislation, Congress has tasked the Department and State agencies with reviewing and bolstering the quality and accountability of E&T programs for SNAP participants. The final rule allows for more evidence-based components and requires more accountability on the part of both State agencies and E&T participants while also retaining State flexibility. Notably, the addition of case management to the definition of an E&T program fundamentally changes SNAP E&T and the expectation for how State agencies must engage with E&T participants. As a result, the Department made several changes to the way E&T programs are described. In the final rule, an E&T program is defined as a program providing both case management and one or more E&T components. E&T components may be comprised of a number of activities which are designed to achieve the purpose of the component.

The Department discusses each of the final regulatory changes in more detail below.

Consultation With Workforce Development Boards and Coordination With the Workforce Innovation and Opportunity Act (WIOA)

Current regulations at 7 CFR 273.7(c)(5) require that E&T components must be delivered through the State's statewide workforce development system, unless the component is not available locally through such a system. The Act added the requirement in section 6(d)(4)(A) of the Food and Nutrition Act (FNA) that State agencies must design their SNAP E&T programs in consultation with their State workforce development board or, if the

State agency demonstrates that consultation with private employers or employer organizations would be more effective or efficient, in consultation with private employers or employer organizations. The Act also added a new requirement that State agencies include in their E&T State plans the extent to which the State agency will coordinate with the activities carried out under title I of the Workforce Innovation and Opportunity Act (WIOA). The Department proposed to modify the regulation at 7 CFR 273.7(c)(5) to add the requirement that State agencies design their E&T programs in consultation with their State workforce development board or with employers or employer organizations, if the State agency demonstrates such consultation would be more effective or efficient. The Department also proposed to modify the regulation at 7 CFR 273.7(c)(6)(xii), as re-designated, to require State agencies to describe in their E&T State plans how they met this requirement to consult, to include a description of any outcomes from this consultation, and to document the extent to which their E&T programs are coordinated with activities carried out under title I of WIOA.

The Department received 13 comments on this provision, all of which were supportive of the proposed changes, although some commenters provided suggestions for improvement. Commenters supported the required consultation with workforce development boards to ensure SNAP E&T programs benefit from the expertise of these boards and to streamline the delivery of services. Commenters also noted that better alignment across SNAP E&T and title I of WIOA can help reduce service duplication, generate cost savings, and increase access to resources for jobseekers. One workforce training agency; however, cautioned against folding SNAP E&T into WIOA services. This agency noted that SNAP E&T funding offers certain flexibilities and support services that make it especially well-suited for working with job seekers with lower basic skills and greater barriers to employment, a group that is sometimes excluded from WIOA services. The Department agrees that SNAP E&T is well-positioned to serve individuals with greater need for support. The Department would like to clarify that this provision does not require State agencies to fold E&T into WIOA services and cautions against interpreting the provision this way. The Department encourages State agencies to be part of the conversations regarding States' workforce development strategies, to take full advantage of the knowledge and expertise that currently exists within the statewide workforce development system, and to identify and leverage resources where appropriate and practicable. However, the SNAP E&T program remains the responsibility of the State agency and should be designed around the unique characteristics of the SNAP population. In addition, as discussed in the proposed rule, the new requirements for consultation with State workforce development boards and for documenting in E&T State plans the extent to which State agencies have coordinated with activities carried out under title I of WIOA, do not mean that State agencies need approval from their State workforce development board to implement their E&T program. The State SNAP agency will remain responsible for implementing and operating the State's E&T program.

A not-for profit agency suggested that, if a State agency chooses to consult with private employers or employer organizations instead of workforce development boards, the State agency should also demonstrate that they have consulted with labor representatives such as unions or worker centers. The Department agrees that these organizations may offer an important perspective on workforce development opportunities and would not discourage any State agency from reaching out to union or workforce centers, as applicable. However, the statutory requirement is only for States to consult with State workforce development boards, or private employers or employer organizations, if the State agency demonstrates such consultation would be more effective or efficient, and the Department believes it would impose an unnecessary additional burden on State agencies to expand the number of groups State agencies are required to consult with in the design of their E&T programs. A local government agency and three not-for-profit agencies recommended that the Department also encourage State agencies to engage with local employers or industry representatives to become SNAP E&T providers. The Department does encourage State agencies to collaborate and engage with a wide array of entities to develop training opportunities for SNAP E&T but declines to mandate such collaboration and engagement beyond the requirements of Section 4005 of the Act. State agencies can capitalize on the relationships and labor market expertise of State workforce development boards to facilitate connections to local employers and industry representatives. As a result, the Department concludes that no addition to the proposed regulatory text is necessary.

To further collaboration with WIOA services, a State agency requested the Department commit to coordinated guidance from the United States Department of Agriculture and the Department of Labor on SNAP E&T and WIOA services. The coordinated guidance would ''enhance local workforce boards' understanding of the opportunity that SNAP E&T recipients provide and help ensure their due consideration in the distribution of finite local workforce board resources.'' The Department regularly interacts with the Department of Labor, and will continue to explore opportunities to ensure awareness and understanding of SNAP E&T by State and local workforce development system stakeholders, including local workforce boards.

In conclusion, the Department finalizes the regulatory text as proposed without any changes.

Supervised Job Search

Current regulations at 7 CFR 273.7(e)(1)(i) establish job search as an allowable E&T component. In addition, current regulations at 7 CFR 273.7(e)(1) specify that ''job search or job search training, when offered as components of an E&T program, are not qualifying activities relating to the participation requirements necessary to maintain SNAP eligibility for ABAWDs.'' However, with respect to the ABAWD work requirement, the current provision goes on to state that ''job search or job search training activities, when offered as part of other E&T program components, are acceptable as long as those activities comprise less than half the total required time spent in the components.'' The Act replaced the E&T job search component with supervised job search in section 6(d)(4)(B)(i)(I) of the FNA, and defined supervised job search as an E&T component that occurs at State-approved locations at which the activities of participants shall be directly supervised, and the timing and activities of participants tracked in accordance with guidelines issued by the State agency. The Department proposed to codify the new supervised job search component at current 7 CFR 273.7(e)(1)(i), re-designated as 7 CFR 273.7(e)(2)(i). In addition, the Department proposed to make edits to current 7 CFR 273.7(e)(1), at re-designated 7 CFR 273.7(e)(2), to specify that job search, including supervised job search, when offered as components of an E&T program, are not in and of themselves ''qualifying activities relating to the participation

requirements necessary to fulfill the ABAWD work requirement under § 273.24.'' However, job search, including supervised job search, is an acceptable activity when offered as part of other E&T program components and it comprises less than half of the total required time spent in the components. The Department recognizes that job search, supervised or otherwise, can be an important activity for E&T participants seeking employment or looking for a new job where they can apply the skills gained through E&T. The Joint Explanatory Statement of the Committee of Conference, issued with the Act, reinforced that view by stating that ''unsupervised job search'' may be a ''subsidiary component'' for the purposes of meeting a work requirement, so long as it is less than half of the requirement.[1] The Department proposed to add in paragraph 7 CFR 273.7(c)(6)(i) a requirement that State agencies report in their E&T State plans a summary of the State guidelines used to implement supervised job search. The Department also proposed changes related to supervised job search in the section on ABAWD work programs at 7 CFR 273.24(a)(1)(iii), which are discussed in the section titled *Work Programs for Fulfilling the ABAWD Work Requirement* later in this preamble.

In the proposed rule, the Department proposed various factors to consider in interpreting ''State-approved location,'' ''directly supervise participants,'' and ''tracking timing and activities of participants.'' The Department sought comments regarding these phrases. The Department also sought comments describing current job search programs operated as part of E&T programs or other workforce development programs that are directly supervised and where the timing and activities of participants are tracked by the State agency or providers.

The Department received 49 comments on this provision. Twenty-six of the commenters supported defining supervised job search to allow maximum flexibility for State agencies to design programs that meet the needs of local participants. However, one commenter opposed the change explaining supervised job search ''would place patronizing, infantilizing, and absurd restrictions on those seeking new employment.'' The Department notes that the Act replaced job search with supervised job search and requires direct supervision and tracking of timing and activities, therefore the Department must implement the regulatory change.

In responding to the Department's request for feedback, commenters explained that the nationwide COVID–19 public health emergency demonstrated the importance of providing flexibility within supervised job search as the pandemic had limited face-to-face service options and necessitated that State agencies pivot to online or virtual platforms. A workforce training agency explained that, even before the current pandemic, searching and applying for jobs shifted greatly to online methods due to the increased use of technology. As such, the commenter believed that requiring job seekers to complete job search while being in the same physical location as SNAP E&T program staff is not necessary and should not be required. Two State agencies believed that allowing virtual locations would enable State agencies to integrate delivery of their supervised job search activities with the same online job search portals used by their WIOA and unemployment insurance systems, thus furthering the goal of greater integration with WIOA processes. Commenters also explained that geographic variation in where people live and varied access to public transportation may limit the types of physical locations available to them. For instance, in rural areas it may be prohibitive for participants to travel long-distances to attend in-person job search, so online or mobile application options may better suit these individuals. Commenters also noted it may be burdensome to State agencies and E&T providers to provide enough physical locations to accommodate all supervised job search participants, or to provide enough participant reimbursements to cover the transportation or other costs associated with travel. However, several commenters also cautioned that some participants will not have the ability or the technology to perform job search through a computer or mobile phone and, in these cases, State agencies should maintain easily-accessible locations for in-person job search in the community, or allow participants to access online or smartphone-based job search tools through community organizations like the public library. A workforce training agency and a legal services agency also commented about the importance of job seekers having personal technology now that so many job search resources and job application portals are online. The commenters urged the Department to allow E&T supportive services funding to include technology costs as a permissible expenditure for SNAP E&T providers. A workforce training agency noted that State-administered job boards and workforce exchanges may not always contain up-to-date or relevant job postings, so State agencies should be allowed to direct participants to non-governmental social media and job posting sites. On the other hand, two State agencies lauded their workforce agency's online tools for job search and participant activity tracking. One not-for-profit agency recommended that State agencies give participants the option to participate online or in-person based on the preferences of the participant.

The Department appreciates the number of well-thought-out comments received. The Department concludes the definition of ''State approved locations'' will include any location deemed suitable by the State agency where the participant has access to the tools they need to perform supervised job search. At these locations, participants may use any tools, such as virtual tools which include but are not limited to websites, portals, or applications to access supervised job search services. For instance, a State agency may choose to allow supervised job search to occur at any physical location where the participant can adequately access an internet connection with appropriate materials (*e.g.,* a computer, tablet, smart phone) to access virtual tools. If the individual does not have access to the appropriate material to use a virtual tool, the State agency must provide the individual with the materials they need to participate in supervised job search, such as a computer, a tablet, Wi-Fi etc. Alternatively, the State may additionally decide to designate specific locations for a supervised job search. In this instance, the State agency must give the participant a list of locations where they can access the necessary tools and materials, such as a library, American Job Center, etc. In this case, the State agency would have to provide participant reimbursements in accordance with 7 CFR 273.7(d)(4) enabling the individual to access the location. To the extent practicable, the Department encourages State agencies to allow participants to choose their preferred location (*e.g.,* at home, a library, a third party provider) to best meet the needs of the participants and better ensure a successful job search. The Department has updated the definition of supervised job search at 7 CFR 273.7(e)(2)(i) accordingly. The Department also reminds State agencies

[1] Conf. Rept. 115–1072, p. 617, *https://www.congress.gov/115/crpt/hrpt1072/CRPT-115hrpt1072.pdf.*

that 7 CFR 273.7(d)(4) requires State agencies to provide or reimburse the participant for expenses that are reasonably necessary and directly related to participation in the E&T program, including materials to access online programs (*e.g.,* a laptop, tablet, or internet) or transportation assistance to physical locations. State agencies must also provide reasonable accommodations to all E&T participants with a disability in accordance with the Americans with Disabilities Act (Pub. L. 101–336).

Commenters similarly explained that supervision can be effectively delivered through a variety of means including in-person, phone, web-based and text-based methods, and the approach should align with the capabilities of the E&T provider and what will most effectively serve the client. A workforce training agency supported supervision of job search activities as it allows E&T staff to coach participants, build their labor market skills, identify potential barriers to employment, and determine plans for how to address those barriers through supportive services during the job search process. This commenter also explained that participant supervision requirements should be defined based on what supportive components exist as part of the supervision, rather than for pure oversight and compliance reasons. For instance, the commenter believed that time spent sharing and confirming job applications, logging hours committed to independent job search, and receiving assistance from a job coach should all count towards a participant's supervision requirement. Several State agencies noted that supervision of job search services can be completed remotely through web-based services that support active monitoring of participant progress with activities, as well as efficient communication with participants. The State agencies highly recommended that the Department consider technology and remote supervision when defining the supervised job search component for the purposes of E&T. For instance, one State agency explained how participants can utilize the State's workforce agency's online portal to complete career exploration assessments and skill assessments, in addition to seeking employment. The State agency partners with other community agencies offering job coaching to ensure participants have the skills necessary to become self-sufficient. Through other partnerships, the State agency also offers virtual workshops on resume development and ''How-To'' workshops covering a variety of topics. Another State agency commented that State agencies could use weekly or semi-weekly case management telephonic meetings with participants to discuss digital job search logs and to direct and refine participants' job search moving forward. And a third State agency explained that their current process of developing a job search plan with the participant, combined with at least monthly check-ins to review progress, was an effective model of supervised job search. A not-for-profit agency recommended that State agencies also be allowed to conduct supervised job search programs in an asynchronous format, where program participants engage in job search activities on their own schedule. The Department agrees that both remote and in-person supervision can be effective. As a result, the Department concludes that State agencies will have flexibility to provide supervision through a number of modes (*e.g.,* remote, in-person, or a blend), and encourages State agencies to ensure the mode of supervision aligns with the needs of the participant (*e.g.,* if a participant performs job search online because of the inability to travel long distances, the State agency should consider conducting the supervision remotely as well). Significantly, the Department also concludes, based on language from The Joint Explanatory Statement of the Committee of Conference, issued with the Act,[2] that the intent of the statutory change from job search to supervised job search was to make State agencies more accountable to E&T participants by providing direct supervision and guidance to participant job search activities. The Department appreciates that some State agencies are able to provide a significant number of resources to E&T participants through online portals and websites, and believes these resources provide an effective means of providing some types of job search assistance to participants; however, online resources are not by themselves sufficient to fulfill the statutory obligation to provide direct supervision. To ensure participants engaged in supervised job search are provided the support they need to be successful, the Department concludes that supervision must be provided by skilled staff who can provide meaningful guidance and support to help participants find suitable employment through at least monthly check-ins with participants. These check-ins could cover a number of topics, including reviews of participant job search logs, feedback on job applications, barrier reduction, progress monitoring, and job search coaching, and must be conducted with the aim of helping the participant find suitable employment. This supervision can also be provided asynchronously (*i.e.,* the supervision need not occur at the same time a participant is searching for or applying for a job), but the Department will require at least monthly communication with the participant—either in-person or remotely—with a skilled staff person. Supervision that only occurs through automatic or autonomous computer programs, without at least monthly communication between the participant and skilled staff, would not fulfill the requirement to provide meaningful guidance and support, and would not meet the requirements for direct supervision. The Department has modified the regulation at 7 CFR 273.7(e)(2)(i), as re-designated, accordingly.

Commenters also noted that a number of methods exist to track the timing and activities of participants, including counters and timers in web-based programs to track hours logged in, sign-in sheets, job logs, and a deemed number of hours per job application. Several commenters encouraged the Department to allow State agency flexibility to use technology or other means to log and track job search efforts. The Department concludes State agencies should have discretion to devise the most appropriate means for tracking job search activities given the capabilities of the local programs and the needs of participants, and has modified the regulation accordingly at 7 CFR 277.7(e)(2)(i), as re-designated. The Department also notes that State agencies will continue to have flexibility to determine the most suitable method to track job search hours (*e.g.,* by the number of applications submitted, or the number of hours logged onto a portal). Lastly, the Department would like to clarify that hours spent receiving job search supervision, in addition to hours spent looking for a job, count toward hours spent in the component.

Overall, commenters noted State agencies and their E&T providers should work with E&T participants to ensure participants are directed to supervised job search programs that are accessible and well-matched to the participant's needs. Commenters also believed that the introduction of the requirement for supervision would make job search programs more accountable and responsive to participants to increase

[2] Conf. Rept. 115–1072, p. 617, *https://www.congress.gov/115/crpt/hrpt1072/CRPT-115hrpt1072.pdf.*

their ability to gain regular employment. Several commenters also suggested additional changes or clarifications as detailed below.

Two commenters recommended allowing supervised job search to be coordinated with case management and the assessment process, as having only one entity conduct the activities would save resources and better allow case managers to coordinate services. The Department agrees and encourages State agencies, as a best practice, to coordinate the provision of supervised job search, case management, participant assessments, and any other E&T activities within the same provider. No revision to the regulatory text is necessary.

A not-for-profit agency urged the Department to require State agencies to explain in their E&T State plans how their approach to supervised job search: (1) Is based on evidence that individuals are likely to successfully comply; (2) targets individuals likely and able to find employment through job search; and (3) provides adequate information to each individual about the program design, anticipated outcomes, sanctions for noncompliance, how to obtain assistance overcoming obstacles to compliance (such as the lack of child care or transportation), reasonable accommodations for persons with disabilities, and where to obtain additional information. The Department agrees all E&T components operated by the State agency, not just supervised job search, should employ successful strategies to help participants move toward self-sufficiency, be appropriately targeted to individuals based on their training needs, and provide adequate information to the participant. For these reasons, the Department emphasized in the proposed rule the importance of State agency accountability for E&T programs and introduced new processes to ensure individuals are directed to the most appropriate component, or exempted from mandatory E&T, if appropriate. These efforts include the requirements that all E&T participants receive case management and that case managers share information about possible exemptions or good cause circumstances with the State agency, as well as the introduction of a new form of good cause if there is not an appropriate or available opening in E&T. The Department also agrees that State agencies must provide E&T participants with information about the E&T program, consequences for non-compliance, participant reimbursements, and any other information that would help mandatory E&T participants with compliance. For this reason, the Department proposed that all households with individuals subject to the work requirements receive a consolidated written notice and oral explanation of those work requirements. In addition, several commenters recommended the Department require a direct link between job search activities and employment opportunities in order for the component to be approved. The commenters believed this language would help ensure that training be relevant and targeted to individuals who are able and likely to benefit from it. The Department agrees that the intent of replacing job search with supervised job search was to better support individuals to find suitable employment, not just fill work hours, and has added to the definition of supervised job search at 7 CFR 273.7(e)(2)(i), as redesignated, that job search activities must increase the employment opportunities of the participant.

Several State agencies and workforce training agencies requested that the Department change how State agencies must summarize the State guidance for the supervised job search component in their E&T State plans. The commenters explained that, instead of requiring specific sites for supervised job search to be documented in the plan, the State agencies should be allowed to include the specific criteria used by the State agency to approve supervised job search location. The Department agrees that, given the broad definition of supervised job search, it would likely be far too burdensome to have to identify in the E&T State plan all the approved locations. As a result, the Department has modified the regulation at 7 CFR 273.7(c)(6)(i) to require that State agencies instead provide the criteria used to approve locations and an explanation of why those criteria were chosen.

The Department received several requests to clarify how job search and job search training can be integrated as subsidiary activities of another component. As stated in the proposed rule, with the replacement of job search with supervised job search, unsupervised job search may no longer be a standalone E&T component. However, also as stated in the proposed rule, job search that does not meet the definition of supervised job search is allowed as a subsidiary activity of another E&T component, so long as the job search activity comprises less than half of the total required time spent in the component. One State agency, in particular, asked the Department to clarify whether job search may only be a subsidiary activity of another component when offered to a mandatory E&T participant or ABAWD, or whether this construction also applies to E&T volunteers. The Department appreciates how the statement in the proposed regulatory text of ''required time spent in the component'' could be understood as only referring to mandatory participants. Therefore, the Department is clarifying that, in this context, allowable E&T components are the same whether offered to mandatory or voluntary E&T participants for this purpose, and has consequently modified the regulatory text at 7 CFR 273.7(e)(2)(i) to remove ''required.'' The State agency also questioned how to measure if job search makes up less than half the time in the component. The State agency provided the example of an E&T provider who employs a comprehensive curriculum with vocational education classes the first several months, followed by full-time job search. The State agency wondered if such a program could track all hours under the educational component, provided the hours spent in job search make up less than half of the total hours over the duration of the entire component. For purposes of fulfilling the ABAWD work requirement, the Department has always provided discretion to State agencies on how they measure the length of time participants spend in job search when job search is integrated into another component, to ensure job search makes up less than half the total required time spent in the component. The Department will allow similar discretion to State agencies when determining if time spent in unsupervised job search makes up less than half the time spent in the broader E&T component.

The Department also received a question about supervised job search and the ABAWD work requirement. This commenter asked if the Department has the flexibility to allow supervised job search activities to count for the ABAWD work requirement if the activities are offered through WIOA. The answer is, if an individual is enrolled in a program under title 1 of WIOA, supervised job search can count toward the ABAWD work requirement. However, supervised job search offered through any other WIOA program cannot count toward the ABAWD work requirement, unless it makes up less than half the requirement.

A not-for-profit agency expressed a number of concerns about the existing regulations that allow State agencies, at their option, to require SNAP applicants to participate in E&T, and expressed specific concerns related to requiring applicants to participate in job search. The commenter asked the Department to

require the following assurances in E&T State plans: That State agencies must adhere to the requirement at 7 CFR 273.7(c)(2) to screen each work registrant to determine whether it is appropriate to refer the individual to an E&T program component; that State agencies must reimburse applicants for all reasonable and necessary costs to participate in any E&T activity, including supervised job search, as required by 7 CFR 273.7(d)(4); that supervised applicant job search must not impose a new condition of eligibility in accordance with 7 CFR 273.2(a); and that applicant job search cannot delay determining SNAP eligibility. The Department agrees that all State agencies must adhere to the above policies for all E&T participants, whether they have chosen to serve applicants or not. Treating applicants differently than other E&T participants would not further the purposes of E&T and the changes required by the Act designed to enhance the effectiveness and accountability of SNAP E&T programs. Therefore, the Department has clarified the regulation at 7 CFR 273.7(e)(2), as re-designated, to indicate that, if a State agency requires an applicant to participate in E&T, the State agency must screen the applicant to determine if it is appropriate for that individual to participate in E&T in accordance with paragraph 7 CFR 273.7(c)(2) of this section, provide the applicant with participant reimbursements in accordance with 7 CFR 273.7(d)(4), and inform the applicant of E&T participation requirements, including how to access the component and consequences for failing to participate. The Department has also added a reference in the supervised job search paragraph at 7 CFR 273.7(e)(2)(i) citing the criteria necessary to serve applicants in 7 CFR 273.7(e)(2).

The Department also received several comments on the job search training component requesting the Department add the phrase ''employment opportunities'' to the sentence in paragraph 7 CFR 273.7(e)(2)(ii), as re-designated, thereby stating, ''a direct link between the job search training activities and job-readiness and employment opportunities must be established for a component to be approved.'' The commenters believed the addition of ''employment opportunities'' would allow providers to include activities such as job placement services, which may increase employment opportunities, but not affect their job-readiness. While the Department believes that job placement activities can be part of a job search training, the purpose of the job search training component is to improve a participant's skills to search for and acquire a job. These skills can be valuable in the future when the participant engages in new job searches. For this reason, the Department is not adding ''employment opportunities'' to the description of job search training.

The Department also received a comment requesting that job readiness training not be included as part of supervised job search, but instead be included as part of the education component. The Department received a similar comment requesting the Department to clarify that soft skills and job readiness training can be considered an education component. The Department understands that the commenters are confused about where to properly categorize job readiness training. The Department already recognizes work readiness training (*i.e.,* job readiness training) as part of the E&T education component, but notes that work readiness training is not formally listed within the education component at 7 CFR 273.7(e)(2)(iv), as re-designated. The Department has updated the regulatory text at 7 CFR 273.7(e)(2)(iv) to include work readiness training to reduce confusion and facilitate proper categorization of work readiness activities in the education component in the future.

In conclusion, the Department adopts the proposed regulatory language with the above noted changes to the definition of supervised job search, the modification of what State agencies must report on their E&T State plan, the addition of clarifying language about requiring applicants to participate in E&T, and the explicit addition of work readiness as an allowable activity to the education component.

Employability Assessments

Current regulations at 273.7(e)(1)(ii) permit the use of job skills assessments as part of a job search training component in a State's E&T program. The Act replaced job skills assessments in section 6(d)(4)(B)(i)(II) of the FNA with ''employability assessments.'' The Department proposed to incorporate this change into the regulations by modifying paragraph 7 CFR 273.7(e)(1)(ii), re-designated as 7 CFR 273.7(e)(2)(ii), to remove the reference to job skills assessments and replace it with employability assessments.

The Department received six comments on this provision, with all commenters supporting the change. One commenter explained the shift to employability assessments in the Act recognized that a more holistic focus on ''employability'' explicitly acknowledges the role that non-skill barriers (such as a suspended driver's license, a criminal record, or unreliable childcare) can play in impacting how a person fares in the job market. However, one not-for-profit agency and one local government agency asked the Department to clarify that employability assessments can be part of both case management and the job search training component. The Department agrees that employability assessments can be helpful in a number of contexts and thus they are allowable under either category. However, State agencies and their providers should coordinate assessments so a participant does not undergo an employability assessment twice in a short period of time. One commenter asked for further clarification on the statement from the proposed rule that ''the information collected through employability assessments should be used, together with ongoing case management, to improve and individualize services to E&T participants.'' The commenter wondered if providers must continue to offer case management as a follow-up to an employability assessment. As discussed later in this preamble, State agencies and their providers are encouraged to continue to offer case management to all E&T participants so long as they are engaged with E&T and the participant shows interest in continuing case management. The Department encourages State agencies to work with their E&T providers to determine appropriate follow-up steps after an employability assessment, bearing in mind the needs of the participant, the structure of the E&T program, and provider capacity.

Additionally, a not-for-profit agency urged the Department to proceed carefully and mindfully in the design and delivery of employability assessments. In this commenter's experience employability assessments can be used to screen out an individual from job placement, even when the individual is very motivated to work. The commenter also explained that employability assessments are subject to racial bias in that people of color—and Black people in particular—are disproportionately over-represented with regards to homelessness, involvement in the criminal legal system, and chronic unemployment. The commenter recommended the Department take a ''zero exclusion'' approach to employability assessments—as well as services offered—that assumes employability

and worker motivation, and makes every effort to accept and accommodate all jobseekers receiving SNAP E&T services. The commenter also recommended that State agencies collect information on the characteristics of jobseekers determined ''not ready'' for employment based on employability assessments. The Department appreciates the experience and perspective of the commenter and agrees that, in general, State agencies should strive to serve all individuals who are motivated to work or train for employment. State agencies are prohibited from discriminating against SNAP participants, in accordance with 7 CFR 272.6, and must have agreements in place with their providers to ensure discrimination is prohibited. The Department notes; however, that employability assessments may uncover circumstances that would make an individual exempt from a work requirement or provide good cause for non-compliance. If the E&T case manager is made aware of these circumstances, the Department requires at 7 CFR 273.7(e)(1), as re-designated, that the case manager inform the appropriate State agency staff. If the exemption or good cause is granted, the individual would no longer be required to participate in E&T. The Department also notes that State agencies are encouraged to collect information on E&T program performance, and may track the number of jobseekers determined ''not ready.''

In conclusion, the Department codifies the regulatory language as proposed without any changes.

Removal of Job Finding Clubs

Current regulations at 7 CFR 273.7(e)(1)(ii) include job finding clubs as an allowable activity under the job search training component. The Act modified the job search training component in section 6(d)(4)(B)(i)(II) of the FNA to remove job finding clubs from the list of activities that can be included in a job search training program. As a result, the Department proposed to modify the regulation at 7 CFR 273.7(e)(1)(ii), now re-designated as 7 CFR 273.7(e)(2)(ii), to remove job finding clubs as an activity under the job search training component.

The Department received one comment on this provision from a workforce training agency, who claimed it was contradictory to remove job finding clubs and require that job search be supervised, as the commenter viewed these activities as similar. As already discussed, the Department views supervised job search as encompassing a robust set of supervisory activities and does not believe the removal of job finding clubs from job search training activities will inhibit the implementation of supervised job search. In addition, while job finding clubs are specifically eliminated as an allowable activity, other activities that increase the employability of participants are still permitted, such as State or agency facilitated peer-to-peer learning opportunities or offering job search trainings in a group format.

In conclusion, the Department codifies the regulation as proposed without any changes.

Job Retention

Current regulations at 7 CFR 273.7(e)(1)(viii) allow job retention services as an allowable E&T component. These regulations explain that State agencies offering this component must provide no more than 90 days of job retention services. The Act modified the job retention E&T component in section 6(d)(4)(B)(i)(VII) of the FNA to require that State agencies choosing to provide job retention services must offer a minimum of 30 days of services, but did not modify the existing 90 day statutory maximum for the receipt of job retention services. As a result, the Department proposed to modify the current regulations at 7 CFR 273.7(e)(2)(viii), as re-designated, to add a 30-day minimum for the receipt of job retention services. Consistent with the statute, the proposed regulation stated that job retention services would need to be provided for a minimum of 30 days and no more than 90 days.

The Department received nine comments on this provision, all of which were supportive of the addition of the 30-day minimum. Commenters did, however, request clarification on some aspects of the rule as described below. A local government agency and a workforce training agency supported the minimum of 30 days, but requested that State agencies be allowed to offer up to 365 days of job retention services. The commenters explained the extended period of job retention services would better support the transition to employment and to a more independent lifestyle because, in the commenters' experience, the challenges that participants juggle as they begin to work can last throughout the first full year of employment. The Department agrees that some E&T participants may benefit from extended job retention services, but the Department does not have discretion through rulemaking to extend job retention services beyond the 90-day limit in the FNA.

A not-for-profit agency encouraged the Department to offer additional guidance to specify that job retention services must include support for child care and transportation costs associated with retaining employment. The commenter explained many job retention participants may benefit from these services, but do not receive them, and as a result may not successfully transition to employment. The Department agrees that child care and transportation assistance may be helpful supports for the newly employed. However, as with all components, State agencies have flexibility to determine what services to offer under its job retention component. Job retention services may include providing or reimbursing participants for costs associated with transportation and childcare so that an individual can go to work. It is true that per § 273.7(d)(4), State agencies are required to provide participant reimbursements that are reasonable and necessary, and directly related to participating in an E&T component, including the job retention component. However, employment, in and of itself, is not a job retention service and, therefore, the State agency is not required to provide participant reimbursements so that an individual can go to work. Rather, if a State agency offers a service outside of work, such as a class on workplace etiquette, that requires individuals to travel to get there, a State agency is required to provide or reimburse individuals for their transportation costs in accordance with § 273.7.d(4). The Department encourages State agencies to consider offering job retention services, and work with their E&T providers to identify available and appropriate services that will support successful employment, but the Department cannot require a State agency to provide job retention services, nor require that the State agency provide child care and transportation services as part of the job retention component, outside of the required participant reimbursements that are reasonable and necessary for participating in a job retention activity outside of work.

Three commenters were concerned with preamble language that offered examples of how the State agency could demonstrate a good faith effort to provide at least 30 days of job retention services. The commenters explained that the example of creating a case management program for job retention participants that extended at least 30 days would deter some providers and participants from participating in the job retention component, because many providers of job retention do not create a case management plan for each

participant, but rather offer services based on the most salient needs of the participant at the time of contact. One commenter explained it would also be confusing to have a broader E&T case management plan and a more specific one for job retention. Instead the commenters proposed that service providers describe a general approach to job retention case management in their agreements with the State agency. A not-for-profit agency believed that a good faith effort to provide job retention services should also include a reasonable number of documented outreach attempts to the participant. The Department appreciates the comments that developing a separate case management plan for job retention may not always be feasible or helpful. The Department only intended to include a case management plan as an example of how a provider is making a good faith effort to provide at least 30 days of job retention. The Department requires that the provider must demonstrate in some way that a good faith effort has been made to provide 30 days of services. This could include, among other ideas, making a reasonable number of attempts to contact a participant, discussing the 30 day minimum requirement with the participant at the outset, or outlining specific steps the provider or the participant will take over the next 30 days to maintain a job.

In conclusion, the Department codifies the regulation as proposed without any changes.

E&T Pilot Activities

The Act provided the Secretary with discretion to allow programs and activities from the E&T pilots authorized under the Agricultural Act of 2014 (Pub. L. 113–79) (2014 Farm Bill) as regular E&T components in section 6(d)(4)(B)(i)(VIII). The Act specified that this determination must be based on the results from the independent evaluation of the 2014 Farm Bill E&T pilots, showing which programs and activities have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance. As a result, the Department proposed adding similar language to the regulations in a new paragraph at 7 CFR 273.7(e)(2)(ix) to create a new E&T component category. The Department would note that the independent evaluation of the 2014 Farm Bill E&T pilots will not be completed until late 2021; as a result, the Department is not yet able to specifically identify new E&T components from the 2014 Farm Bill E&T pilots.

The Department received 13 comments on this provision. As the evaluation is not yet complete, commenters generally expressed support in engaging with pilot activities once the Department has completed their assessment. However, one commenter recommended that States that participated in the pilots be allowed to continue those activities until the evaluation is complete and the Department has identified which activities have been found effective. The commenter explained Congressional interest in continuing these pilots is reflected in the Congressional prioritization of reallocated 100 percent E&T Federal funds. The Department appreciates the commenter's interest in the 2014 Farm Bill E&T pilots. As discussed later in this preamble, 50 percent of reallocated 100 percent funds shall be reallocated to State agencies requesting such funds to conduct employment and training programs and activities for which such State agencies had previously received pilot funding that the Secretary determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance. However, until the final assessment, the Act allows the Department some discretion in determining activities with the most demonstrable impact, including using interim pilot reports or other information relating to performance of programs and activities.

In conclusion, the Department codifies the regulatory text as proposed without any changes.

Subsidized Employment and Apprenticeships

Current regulations at 7 CFR 273.7(e)(1)(iv) describe a work experience program as a program designed to improve the employability of household members through actual work experience or training, or both, and to enable individuals employed or trained under such programs to move promptly into regular public or private employment. The Act added subsidized employment and apprenticeship in section 6(d)(4)(B)(i)(IV) of the FNA as examples of allowable activities under a program designed to improve the employability of individuals through actual work experience or training (*i.e.,* a work experience program). The Department proposed to modify the regulation at 7 CFR 273.7(e)(1)(iv), now re-designated as 7 CFR 273.7(e)(2)(iv), to better align the definition of a work experience program and activities with other Federal workforce development programs, by delineating work experience programs into two sets of activities: Work activities and work-based learning. Subsidized employment and apprenticeships were added as work-based learning activities. The Department strongly encouraged State agencies interested in incorporating work-based learning activities into their E&T programs to work with their State Departments of Labor, American Job Centers, Perkins Career and Technical Education (CTE) providers, and other stakeholders, such as community colleges and community-based organizations, to capitalize on existing work-based learning infrastructure and services. The Department also proposed amending 7 CFR 273.7(d)(1)(ii)(A) to allow E&T funds to be used to subsidize the wages of E&T participants.

The Department received 41 comments on this provision. Commenters were very supportive of the changes to the definition of work experience and the alignment of the definitions of work experience, work activity, and work-based learning with definitions in other programs, as well as the inclusion of apprenticeships and subsidized employment as allowable activities. Several commenters mentioned they would like to implement subsidized employment as soon as possible, particularly in light of the spike in unemployment resulting from the COVID–19 public health emergency. However, some commenters were concerned that wages earned through subsidized employment would count as income for the SNAP eligibility determination, potentially making E&T participants ineligible for SNAP and, consequently, ineligible for E&T and the subsidized wage. FNS is not aware of any existing laws that would allow income from subsidized employment to be excluded when determining eligibility for SNAP. The Department advises, as a best practice, that the State agency advise participants of whether earnings from a work-based learning activity under an E&T program could potentially decrease the amount of SNAP benefits they receive or make their household ineligible for SNAP, and by extension, E&T, depending on their circumstances.

A not-for-profit agency explained they appreciated the Department's recognition in the proposed rule that the work experience component must be consistent with the Fair Labor Standards Act (FLSA), must not displace existing workers, and must provide participants with the same benefits and opportunities as anyone else doing a

substantially similar job. The commenter encouraged the Department to partner with Department of Labor (DOL) to issue guidance helping states avoid FLSA violations when using work-based learning models. The Department agrees that, with the introduction of subsidized employment, State agencies may be partnering with employers unfamiliar with E&T, and appreciates that guidance on avoiding FLSA violations, as well as other technical assistance on implementing a subsidized employment program, may be helpful. The Department will work with DOL to determine the most appropriate next steps to assist States agencies building their work-based learning programs in E&T.

A State agency asked for clarification on the application of the FLSA hour limitation rules to the ABAWD work requirement and the work experience component. The commenter explained that they understood the hours worked by an ABAWD in a work experience component would be countable towards the ABAWD work requirement; however, with the FLSA limitation of hours, the commenter believed an ABAWD could be in a situation where they participate in a work activity, as defined at 7 CFR 273.7(e)(2)(iv), for the number of hours equal to their benefit divided by the minimum wage, but this number of hours may not be sufficient to meet the ABAWD work requirement. The commenter explained TANF participants are ''deemed up'' for participation in the TANF work requirement when they complete the maximum hours allowable under FLSA rules. The State agency recommended for the work experience component that ABAWD hours be treated the same as they are in the TANF program and with SNAP workfare. The Department understands the commenters concerns; however, the FNA is specific in this area and the Department does not have discretion to allow work experience hours to be ''deemed up'' as they are in TANF. An ABAWD who participates in a work experience component is prohibited from being required to work more than their benefit divided by the higher of the applicable Federal or State minimum wage, in accordance with the FLSA. However, if those hours are not sufficient to meet the ABAWD work requirement, the ABAWD would then need to participate in another activity to meet the balance of hours necessary to meet the ABAWD work requirement. The Department encourages State agencies to provide additional opportunities through the E&T program that would allow the ABAWD to meet the ABAWD work requirement.

The Department would also like to make a clarification to the language in 7 CFR 273.7(e)(5)(iii) regarding voluntary E&T participants being permitted to work in an E&T program or workfare for more hours in a month than the value of their household allotment divided by the higher of the applicable Federal or State minimum wage. The Department recognized that the language at 7 CFR 273.7(e)(5)(iii), as proposed, could have been interpreted in some circumstances to allow voluntary E&T participants to choose to work additional hours for less than minimum wage in violation of Federal and State minimum wage laws. The clarified final regulation will now only permit those additional hours if the voluntary E&T participant earns a wage at least equal to minimum wage for the additional hours. For instance, if an E&T participant volunteers to participate in a subsidized employment activity, the participant may volunteer to participate for more hours in a month than their household allotment divided by the higher of the applicable Federal or State minimum wage, so long as the subsidized employment activity provides the participant with a wage at least equal to the higher of the applicable Federal or State minimum wage for those additional hours. The Department would also like to note that voluntary E&T participants in a work activity will not be allowed to volunteer for additional hours beyond the number of hours in a month that is equal to the value of their household allotment divided by the applicable Federal or State minimum wage, as allowing such excess would translate to receiving less than the minimum wage in the form of SNAP benefits. The Department has made this clarification at 7 CFR 273.7(e)(5)(iii), as re-designated.

A workforce training agency cautioned that, while subsidized wages can provide an incentive to employers to hire people with greater barriers to work, there must be oversight to ensure that employers do not just use the subsidy as a discount on labor, replacing the worker as soon as the subsidy ends with another subsidized worker. The commenter explained there needs to be systems of accountability to ensure employers retain and advance workers. The Department agrees that the objective of work-based learning, including subsidized employment, is to create a learning environment with the employer that includes specific training objectives and leads to regular employment. The objective of work-based learning, including subsidized employment, is not to provide employers with low-cost workers until the subsidy ''runs out.'' Work-based learning is also part of the broader work experience component. The Department explains in the regulatory text that a work experience program is designed to improve the employability of household members through actual work experience or training, or both, and to enable individuals employed or trained under such programs to move promptly into regular public or private employment. The Department expects State agencies implementing subsidized employment programs to have agreements in place with employers to provide actual training to SNAP participants and a plan to move participants into unsubsidized employment as a result of the subsidized employment experience, either with the same employer or with another employer. As part of outcome reporting for E&T, as required in 7 CFR 273.7(c)(17), State agencies will be expected to report on participant outcomes for participants engaged in the work experience component.

The Department also received comments from a State agency and a workforce training agency that urged the Department to clarify whether wages or stipends provided by the employers participating in subsidized employment can be considered the non-Federal amount for which they may receive 50 percent reimbursement (*e.g.,* the employer pays a total training wage or stipend of $15 per hour, with $7.50 reimbursed through E&T). The commenters recommended allowing wages or stipends provided by employers to be eligible for 50 percent reimbursement in order to increase the potential number of subsidized employment opportunities that may be offered. The Department is hereby clarifying that the Department will reimburse the State agency 50 percent of non-Federal funds expended on allowable E&T activities and services, including allowable costs associated with wages though a subsidized employment program, in accordance with applicable SNAP laws and regulations, as well as the Federal cost principles in title 2 of the CFR. The Department would also like to make a clarification to the regulatory text at 7 CFR 273.7(d)(1)(ii) to explain that while the E&T grants may be used to subsidize wages as part of the subsidized employment activity within the work experience component, that the E&T grant will not otherwise be permitted to subsidize wages for E&T participants.

These commenters also asked the Department to clarify if wages earned

for both classroom training and work are eligible for reimbursement under SNAP E&T. A State agency explained one of their E&T providers employs a model where participants earn wages for time spent in the classroom instruction phase of the curriculum, as well as the following phase, when individuals begin applying their knowledge through actual work. The Department is hereby clarifying that if an individual is in a job (*e.g.,* subsidized employment, apprenticeship etc.), and that job requires classroom training in addition to the regular work, then State agency expenditures on wages earned for the classroom training are eligible for 50 percent reimbursement.

A local government agency agreed with the addition of apprenticeships and subsidized employment as allowable work experience activities, but suggested that pre-apprenticeship training should also be included, as pre-apprenticeship programs can function as an on-ramp to success in an actual apprenticeship program. The Department agrees and, for this reason, included pre-apprenticeships as a type of work-based learning program in the regulatory text at 7 CFR 273.7(c)(2)(iv)(A)(2).

A local government agency explained the most recent reauthorization of the Carl D. Perkins Career and Technical Education Act included simulated environments in the definition of work-based learning. The commenter recommended ensuring this option is included in allowable activities in E&T. The commenter explained instruction in a classroom setting is not always feasible for participants, particularly those with family or dependent care responsibilities, so online instruction fosters familiarity with technology, and is better aligned with the future of work. The commenter cautioned, however, that given the ''digital divide'' faced by many economically disadvantaged households, online learning should only be one in a range of options, with the provision of necessary supports. The Department agrees that simulated environments can be one way to deliver work-based learning, and included simulated environments in the definition of work-based learning in the proposed rule, and will keep simulated environments as part of the final rule at 7 CFR 273.7(c)(2)(iv)(A)(2).

A workforce training agency noted that in the Department's revised definition of work experience, work activity, and work-based learning, there no longer appears to be a place for ''non-workfare activities'' that build a participant's general skills, knowledge, and work habits, and provide a history of work experience, but are not aligned with a career path in a specific field. The commenter explained the definition of work activity appears similar to workfare activities, to provide participants with the ''general skills, knowledge, and work habits necessary to obtain employment,'' while work-based learning is intended to build skills and experience in a given career field. The commenter believed some populations require work-based learning experiences that are more general in nature to allow them to build a work history that will lead to other employment. For example, an E&T provider may provide work experiences for E&T participants on parole or probation. These experiences are extremely important in helping the participant demonstrate the ability to obtain and retain future employment; however, they are not always connected to a specific career path. The commenter urged that the final language should allow for these types of work experiences within the definition of work-based learning or should broaden the definition of work activity. The Department recognizes that some E&T providers provide services that prepare individuals for the ''first rung'' of a career ladder. Mastery of soft skills and other work readiness activities—including general skills building, developing good work habits, and building a work history—are important foundational elements of any career pathway. Thus, these experiences can be included under work experience as part of a career pathway program. The Department also notes that, in some cases, basic skills training may be a better fit under another activity like work readiness in the education component.

The Department also received a comment from a not-for-profit agency opposing any work requirement in exchange for any form of basic assistance, including SNAP. As a result, the commenter rejected the premise in the proposed definition of a work activity, stating that work activities are ''performed in exchange for SNAP benefits.'' The commenter expressed that people experiencing hunger should not have to ''perform activities'' in exchange for food. The Department appreciates the commenter's point of view, but the Department believes it is important, to the extent practicable, to align the definition of work activity in SNAP with the definition from TANF. Household members participating in a work activity or workfare are being compensated for their work through the SNAP allotment. The FNA in section 6(d)(4)(F) and regulations at 7 CFR 273.7(e)(4)(ii), as re-designated, prohibit members of a household from being required to work in an E&T program or participating in workfare for more hours than value of the household allotment for the month divided by the higher of the applicable State or Federal minimum wage. The Department stands by the proposed definition of work activity as one of several different types of work experience that can be offered by a State agency to develop the skills and experience of E&T participants, and move them toward self-sufficiency.

In conclusion, the Department codifies the regulatory language as proposed, with a modification to the language at 7 CFR 273.7(e)(5)(iii) pertaining to voluntary E&T participant work hours.

WIOA Programs

In the proposed rule, the Department proposed to modify 7 CFR 273.7(e)(2)(v), as re-designated, pertaining to allowing ''WIA or State or local program'' to serve as E&T components. The Department proposed to strike ''or a WIA or State or local program'' from the regulatory language because with the Act's inclusion of subsidized employment and apprenticeships as allowable activities in E&T, all activities operated under WIOA (formerly referred to as the Workforce Improvement Act or WIA) are now allowable within other E&T components. Similarly, any services offered by the State agency or through State or local programs can be included in one of the other E&T components. By making this change, the Department is not intending to convey that programs operated under WIOA would be unallowable as E&T activities; in fact, all would be allowable and coordination would be encouraged. The Department received no comments on this change and hereby codifies the regulatory language as proposed.

Case Management

Current regulations at 7 CFR 273.7(c)(4) establish the requirement that each State agency must design and operate an E&T program that must consist of one or more E&T components as described in 7 CFR 273.7(e)(1). The Act modified the definition of an E&T program in section 6(d)(4)(B)(i) of the FNA to require that each State E&T program must also provide case management services, such as comprehensive intake assessments, individualized service plans, progress monitoring, or coordination with service providers, in addition to at least one E&T component. The Department

proposed to modify the regulation at 7 CFR 273.7(c)(4) to add that State agencies must offer case management services to all E&T participants. The Department also proposed to modify the regulations at 7 CFR 273.7(e) to add a new paragraph (e)(1), stating that case management services are a required part of all State E&T programs, and to provide examples from the Act of case management services. The Department proposed in new paragraph 7 CFR 273.7(c)(6)(ii), requiring that State agencies include information in their E&T State plans about case management operations, including a description of their case management services and models, the cost for providing the services, how participants will be referred to case management, how the participant's case will be managed, who will provide services, and how the service providers will coordinate with E&T providers, the State agency, and other community resources, as appropriate. In addition, the Department proposed various changes to the definitions in 7 CFR 271.2, the screening and referral process for E&T at 7 CFR 273.7(c)(2), and other E&T provisions to reflect the inclusion of case management services in the E&T program.

The Department received 35 comments on the case management provision, most of which believed case management was a beneficial addition that would help individuals successfully participate in E&T. Commenters supported the flexibility within the proposed regulation allowing case management services to be tailored to the needs of the participants and the capacity of the service provider. Many State agencies and workforce training agencies mentioned that case management is already a regular part of their E&T programs. Commenters also supported the requirement that case managers inform the appropriate State agency staff about possible participant exemptions or good cause circumstances, although some commenters were concerned that the State agency may not take the appropriate action with that information. In addition, while all commenters felt that case management would be helpful to E&T participants, some commenters were concerned that mandatory participants could be sanctioned for failing to participate in case management. Commenter concerns are discussed at greater length below.

The Department received several requests to clarify what services may constitute case management, to clearly state that State agencies have discretion to develop their own case management programs, and to clarify if hours spent in case management count toward the ABAWD or E&T work requirements. As stated in the proposed rule, State agencies would have flexibility in the types of case management services offered, but the provision of case management services should generally be consistent with the examples provided in the Act, and driven by the needs of the participant. In the proposed rule, the Department stated that, to be allowable, the State agency would need to be able to demonstrate how a case management service is supporting an individual to successfully participate in E&T. Several not-for-profit agencies explained that E&T participants can face a number of barriers to employment, including housing instability, domestic violence, and unmet physical and behavioral health care needs. The commenters recommended that case management providers have broad flexibility in the types of services and supports they can provide participants to address these barriers. The Department understands that many different kinds of services can be offered under the umbrella of case management and that E&T participants can face a large number of barriers to successful participation in E&T. However, the Department wants to clarify that, while case managers may assist participants with barrier removal (*e.g.,* perform an assessment of participant barriers, identify resources in the community to address those barriers, make referrals), SNAP E&T funds can only be used for allowable E&T activities and support. E&T funds must be used for the administrative costs of planning, implementing and operating SNAP E&T. This includes allowable components and activities, and supports that are reasonably necessary and directly related to participating in E&T, such as transportation, dependent care or other work, training or education related expenses. For instance, case managers might identify substance use disorder as a significant barrier to training or employment and in such a case would be allowed to make a referral to a substance use disorder treatment center. However, the State agency would not be allowed to support treatment costs at a substance use disorder treatment center with E&T funds, as this is not an allowable E&T component nor an allowable participant reimbursement. Similarly, a case manager might learn that an individual needs transportation assistance to get to the E&T site or help purchasing training supplies that are required in order to successfully participate in an E&T component. In such instances, the case manager could provide the individual with participant reimbursements to fund those costs.

Another State agency asked for clarification that hours a participant spends reducing barriers identified in their individual employment plan and assigned through case management may count towards the work requirement. Case management is part of the E&T program. Thus, time spent participating in case management counts towards the time a participant spends in E&T. In addition, E&T is a way for ABAWDs to fulfill the ABAWD work requirement, with certain restrictions as detailed in 7 CFR 273.7(e)(2). As such, hours an E&T participant spends with a case manager must count towards the participant's mandatory E&T requirement and ABAWD work requirement. However, hours spent by the individual actually participating in the barrier removal activities do not count, unless the activity is an allowable E&T activity. For instance, hours a participant spends with a case worker identifying a temporary housing solution must count toward their work requirement, but not hours spent actually moving into temporary housing, as moving is not an E&T component or activity. On the other hand, a case manager may identify limited English proficiency as a barrier to successful participation in an E&T activity and refer the individual to an education component to build basic reading skills. Time spent in the education component would count toward work hours just as would time spent in any other E&T component. The Department has modified the regulation at 7 CFR 273.7(e)(1) to state that case management can include a number of activities and supports, but the services must directly support an individual's participation in an E&T program to count towards the individual's work requirement. Case management may include referrals to activities and supports outside of the E&T program, but State agencies can only use E&T funds for allowable components, activities, and participant reimbursements.

The Department also notes that 7 CFR 273.7(e)(1), as re-designated, requires a case manager to report to the appropriate State agency staff any likely exemptions or potential good cause circumstances applicable to an E&T participant. In some cases, an individual facing significant barriers may be better served with a referral to another program, and can return to E&T when they are able to seek work or train for a job. In these circumstances, a case manager would be allowed to assist the individual with any State agency

follow-up on the request for an exemption or good cause, and the Department would encourage case managers to make a warm hand-off to other appropriate non-E&T services, if and when the exemption or good cause is granted. More discussion of the case manager's responsibilities to inform the appropriate State agency staff about exemptions and good cause is found later in the preamble, in the section on State agency accountability for participation and good cause.

Several commenters wrote of their support for the statement at 7 CFR 273.7(e)(1) that ''the provision of case management services must not be an impediment to the participant's successful participation in E&T,'' but urged the Department to strengthen this provision by specifying that, if a participant is otherwise participating in SNAP E&T activities, the participant may not be sanctioned for noncompliance solely because of non-compliance with case management activities. One not-for-profit agency recommended that the case management provider be required to gather input from the SNAP E&T participant about their desired level of participation. If the participant is still engaged in other SNAP E&T activities, but no longer interested in case management services, the participant would not be sanctioned for noncompliance solely for not participating in case management. Another not-for-profit agency suggested that case management should be provided to each individual at least once and be offered on an ongoing basis, but not be required beyond the initial interaction, if not desired or needed by the participant. A legal service agency recommended that the rule should explicitly state that case management activities not add additional case maintenance, paperwork burdens, or eligibility steps that could result in delays, reductions, or terminations of SNAP benefits due to non-compliance with case management activities. A workforce training agency cautioned that the Department should also not require the provision of case management services with a particular frequency (*e.g.,* once a month). The Department acknowledges that a mandatory E&T participant can be sanctioned for failure to comply with case management, as case management is part of the E&T program, but the Department also believes that State agencies have sufficient flexibility in the design of their case management services to ensure that case management supports individuals participating in E&T and does not become a barrier for low-income individuals who need access to E&T or food assistance. The Department also recognizes the wide variability in how E&T programs are structured across States, and that case management will be provided in a number of ways depending on the structure of the program and the needs of the participants. For instance, some participants may receive case management services embedded in a component, whereas other participants may receive stand-alone case management services separate from a component. Some participants may desire regularly occurring case management meetings, whereas other participants may only desire receiving case management when requested. The Department believes it is important to maintain this flexibility, and expects State agencies and their providers to work with participants to determine the best and most efficient delivery of case management services. The Department also reminds State agencies that the purpose of case management is to support participation in the E&T program. While all E&T participants must receive some case management, there is not an expectation that participants receive ongoing case management or multiple sessions of case management, if that is not desired by the participant, and the participant is otherwise successfully participating in an E&T component. The Department strongly urges State agencies and their providers to communicate upfront with participants about the participant's need for and interest in case management, and plan for case management services that meet those interests and needs. If the State agency or a provider finds that an individual has received some case management services, but is not currently engaged with case management, and is otherwise successfully participating in an E&T component, the Department would strongly encourage the State agency or the provider to communicate with the participant about their interest in case management, and adjust the provision of case management services accordingly.

The Department strongly believes that E&T programs should not unduly burden participants with administrative hurdles, meaningless tasks, and inefficient processes. Several commenters agreed that overly intensive or complex services, such as exhaustive skills assessments, numerous in-person meetings, or multiple hand-offs between providers can deter individuals, even in voluntary E&T programs, from completing the case management process, especially for those that already face transportation or accessibility barriers. One not-for-profit agency urged the Department to require State agencies to include in their State E&T plans a description of how the case management services will support the goals of guiding participants to appropriate services, support individuals throughout the E&T activity, and provide additional services. The Department agrees that case management services must be tailored to the need of participants. State agencies and their providers should only provide services when there is a clear connection between those services and supporting the participant to succeed in the training or improving the employability of the participant. State agencies must also design their case management processes in a way that reduces hand-offs and unnecessary steps. The Department recognizes that State agencies will provide case management services in a number of ways—through State agency staff, E&T provider staff, or through other professionals—so it may not be possible to describe all case management services and the way they are provided in the E&T State plan. The Department notes that the regulatory text at 7 CFR 273.7(e)(1), as re-designated, states that the purpose of case management services shall be to guide the participant towards appropriate E&T components and services based on the participant's needs and interests, support the participant in the E&T program, and provide activities and resources that help the participant achieve program goals. However, the Department has modified the regulation at 7 CFR 273.7(c)(6)(ii) to require State agencies to include in their E&T State plan a general description of how the State agency will ensure E&T participants are provided with targeted case management services through an efficient administrative process. The Department will also continue to work with State agencies to develop case management processes that are efficient and adaptable to make best use of E&T resources and reduce participation barriers.

The Department also received a comment from a not-for-profit agency suggesting that the proposed rule incorrectly implemented the case management statutory provision by requiring case management be provided to all E&T participants. The commenter stated that the changes to section 6(d)(4)(B)(i) of the FNA only required case management to be a part of every State E&T program, not that every E&T

participant must receive case management. The commenter explained a State E&T program can contain case management and one component, or case management and multiple components. In the latter instance, all E&T participants are not required to participate in all components. The Department does not concur. The Department believes reading the statute in a manner that only offers case management to some E&T participants instead of all E&T participants does not make sense or further the purpose of the Act's changes. This change means all States agencies must now offer both case management and at least one component to each participant, and each individual must receive both case management and at least one component.

The Department received general support for including a description of the case management services offered by the State in the State E&T plan. However, several commenters did not support requiring cost information associated with the case management services in the E&T State plan. A not-for-profit agency that works with service providers and several workforce training agencies explained that providers integrate case management into other individually tailored services within E&T components, such as career counseling and job readiness training, and it would be burdensome and difficult for providers to account for each activity separately. They asked the Department to allow the cost of case management services to be embedded within component costs when participants receive case management services as part of that component. In addition, two workforce training agencies, who already provide case management to E&T participants, asked that the Department not impose onerous tracking, reporting, and other requirements for case management on E&T providers. The Department agrees that regulations pertaining to case management should not impose unnecessary burdens on E&T providers or participants. The flexibility provided within the regulations allows E&T providers, in conjunction with the State agency, to develop and provide case management services that are tailored to the needs of participants, the capacity of the E&T provider, and the structure of the E&T program in the State. The Department also understands that, in many circumstances, embedding case management in the E&T component will best serve the needs of the E&T participant, and that separately tracking the cost of those case management services could indeed be onerous. As a result, the Department has modified the regulation at 7 CFR 273.7(c)(6)(ii) to remove the requirement that State agencies include the estimated cost of case management services in the E&T State plan. However, the Department notes that State agencies must still track the receipt of case management services for the E&T quarterly reports to ensure every E&T participant receives case management. The Department provides State agencies with discretion regarding how they collect data from their providers. As such, State agencies should work with their respective E&T providers to develop reporting systems that efficiently and accurately gather the appropriate information required for E&T quarterly and annual reports.

The Department also received a comment from a workforce training agency urging the Department to set aside a portion of E&T 100 percent funds to only be used for case management, and a separate comment from a not-for-profit agency to provide additional 100 percent funds for case management. Both commenters explained that the provision of high quality case management services is expensive, and may be cost prohibitive for some agencies if they do not receive dedicated or additional funds. In addition, both commenters explained that setting aside dedicated case management funds would encourage agencies to work more with individuals facing high barriers. The Department understands that the provision of high-quality case management services is resource intensive. Each State agency receives 100 percent funds that can be used to offset the costs of case management services, and State agencies have discretion in how these funds are distributed to their E&T providers. In addition, FNS reimburses State agencies 50 percent for allowable costs paid for with non-Federal funds above that amount, which would include costs associated with case management. The Department encourages State agencies to work with their E&T providers to ensure these resources are used to provide robust E&T case management services while maximizing the impact of E&T.

Lastly, the Department also received a comment regarding the frequency of case management meetings. The commenter had read in the Regulatory Impact Assessment (RIA) that the Department estimated approximately monthly case management meetings. The commenter was concerned about what they viewed as the Department's decision to regulate the number and frequency of meetings. The Department is clarifying that the values provided in the RIA are only used to estimate the impact of the regulation on the affected public, and that the Department understands, as discussed above, that the number and frequency of case management meetings will vary by individual, depending on their circumstances, the structure of the E&T program, and the capacity of the E&T providers.

In conclusion, the Department codifies the proposed regulations with changes made to the description of case management at 7 CFR 273.7(e)(2) and the information required in the E&T State plan at 7 CFR 273.7(c)(6)(ii).

Referral of Individuals

Section 4005 of the Act added a new requirement for State agencies regarding any E&T participant, not otherwise exempted from the general work requirement, who is determined by the operator of an E&T component to be ill-suited to participate in that E&T program component. For work registrants determined to be ill-suited, the Act required the State agency to do the following: (1) Refer the individual to an appropriate E&T component; (2) refer the individual to an appropriate workforce partnership, if available; (3) re-assess the individual's physical and mental fitness; or (4) to the maximum extent practicable, coordinate with other Federal, State, or local workforce or assistance programs to identify work opportunities or assistance for the individual. During this time, also per the Act, the State agency shall ensure that an individual undergoing and complying with the process above shall not be found to have refused without good cause to participate in an E&T program. This new requirement was added at new section 6(d)(4)(O) of the FNA. The Department proposed to codify this new requirement in a new paragraph at 7 CFR 273.7(c)(18). The Department believes this new provision was intended by Congress to increase the accountability of State agencies, particularly for mandatory E&T participants. While State agencies are already required to develop State criteria to determine who should be required to participate in E&T, State agencies often do not apply sufficient due diligence to ensure the SNAP participants who are referred to the E&T program have the capacity to benefit from the particular training or that the particular component to which they are referred matches the SNAP participant's needs and skill level. Unfortunately, in these situations, SNAP participants could fail to benefit from the program and, ultimately, could be disqualified

for failure to participate. This new provision strives to strengthen State accountability for their E&T programs by requiring State agencies take additional steps to ensure SNAP participants who are determined ill-suited for an E&T component receive the targeted help they need to move toward self-sufficiency. The Department proposed several new processes to implement the provision, including a requirement that individuals with an ill-suited determination receive a Notice of E&T Participation Change (NETPC) from the State agency soon after their ill-suited determination.

The Department received 44 comments on this provision. Commenters were generally supportive and believed the provision would ensure more participants are directed to activities most likely to help them move toward self-sufficiency. However, many commenters had questions and concerns on segments of the provision as proposed, most notably the term ''ill-suited,'' the applicability of the provision to self-referrals and voluntary households, the NETPC requirements, and the inability to stop the ABAWD time clock after an ill-suited determination.

Several commenters explained that the term ''ill-suited'' was insensitive and stigmatizing, and did not take a strengths-based approach to working with participants. A not-for-profit agency explained that people are not ''ill-suited'' for programs, but programs can be ill-suited for people. Another commenter explained there may be multiple reasons a referral from a State agency may not be successful, including a lack of an available slot or a lack of follow-up from the participant or provider, and believed these other reasons should also be communicated back to the State agency under a mandatory E&T program. Alternative terms like ''incomplete referral,'' ''revised referral,'' or ''reassigned referral'' were suggested. The Department agrees that a switch to different terminology for this situation could be less stigmatizing, but also notes ''ill-suited'' is the language used in the statute. For the purposes of the regulations, the Department will use the phrase ''provider determination'' in place of ''ill-suited determination.'' The Department also recognizes there are many reasons why a participant may not successfully complete a component, but for the purposes of this regulation the Department is finalizing language pertaining to individuals who are determined by the provider to not be a good fit for the component.

Commenters also asked the Department to recognize a new referral is a significant burden on the time and hopefulness of a jobseeker, and can be a demoralizing process. Commenters spoke of the need for State agencies to have as much information as possible about E&T providers so that State agencies can make the best possible referrals, thus heading off instances when an individual and an E&T program are not well-aligned. One workforce training agency explained it frequently receives referrals from the State agency for individuals who do not meet criteria for enrollment; this commenter believed a handbook for State agency staff which offered more information about available providers would be helpful. A not-for-profit agency that works with many E&T providers suggested a more upstream solution to invest additional resources into data systems, as well as the development of robust and holistic intake and referral processes. The commenter encouraged the Department to support the development of these systems. The commenter further explained these data systems could support making a better match and facilitating the back and forth with a client when a provider determination is made. The Department agrees that E&T participants must always be treated with care and respect, which is why State agencies should implement screening and referral processes that are both effective and efficient. The Department encourages State agencies to work with their providers to develop appropriate screening criteria so they only refer individuals who meet the providers' criteria for enrollment. The Department also agrees that State agencies should consider developing data systems and other processes to improve their ability to screen and refer individuals to appropriate providers. The Department will continue to offer technical assistance to support State agencies in these efforts.

The proposed rule stated that the E&T provider has the authority to determine if an individual referred to or participating in an E&T component should receive a provider determination for that E&T component. Two commenters urged the Department to make an addition to paragraph 7 CFR 273.7(c)(18)(i) to require the State agency to ensure E&T providers are informed, not only of their authority, but also their responsibility to make a provider determination for a particular E&T component. The commenters believed this addition would place an expectation on the provider to inform the State agency whenever an individual was not a good fit for the program component. The Department agrees that, not only do E&T providers have the authority to make a provider determination, the E&T providers must also have the responsibility to make this determination. The addition of ''responsibility'' more clearly lays out the Department's expectation that E&T providers will identify individuals who are not a good fit and notify the State agency of the provider determination in accordance with 7 CFR 273.7(c)(18)(i).

Commenters also shared that E&T providers should have more guidance on what constitutes a provider determination, to ensure consistency among providers and to avoid discriminatory practices. Commenters also felt that E&T providers should be given guidance on how to approach the decision to make a provider determination with compassion and a spirit of assistance, acknowledging that some E&T participants, particularly ABAWDs, may face barriers that would make it hard for them to meet E&T program expectations. For instance, providers should consider how to enable an individual to participate rather than immediately making an E&T provider determination. Another commenter explained that, while the end goal of the provider determination may be to match a jobseeker with more appropriate programming, in practice the determination screens a jobseeker out of an available E&T component with the hope that the State agency will have another, better option available for the individual down the line. The commenter recommended that the Department take steps to make transparent the criteria that inform an E&T provider determination and to offer opportunities for feedback and revision of these criteria. In addition, the commenter was concerned that deferring sole authority to E&T providers to make these determinations could result in a patchwork of unaligned and confusing approaches that are subject to staff discretion and, therefore, also subject to staff's implicit or explicit racial biases. The Department agrees that E&T providers should not indiscriminately refer E&T participants back to the State agency. The Department has long discouraged providers from ''creaming''—serving only participants that show potential for good outcomes. The Department encourages providers to make every reasonable effort to assist individuals' participation in the training to which they have been referred, only making a provider determination if absolutely

necessary. In accordance with 7 CFR 272.6(a), State agencies are prohibited from discriminating against any applicant or participant in any aspect of SNAP administration for reasons of age, race, color, sex, disability, religious creed, national origin, or political beliefs. Non-discrimination language must also be in all contracts or agreements between State agencies and their E&T providers, and the USDA non-discrimination statement must be on all forms. In addition, the Department at 7 CFR 272.6 has procedures in place to monitor for discrimination and manage complaints. At the same time, the Department acknowledges there is great deal of flexibility in the types of E&T programs offered among and within States, and believes it is not feasible to develop a finite list of criteria for use in making provider determinations for all E&T providers to abide by. In fact, a finite list of criteria could actually be harmful by reducing the flexibility State agencies and E&T providers have to target programs to individuals with a wide range of needs. The Department encourages State agencies to work up-front with their providers to identify the criteria for referring individuals to that provider and ensure staff are properly screening prior to referring individuals. This would go a long way in reducing the need for provider determinations. In addition, the Department agrees that State agencies have a responsibility to monitor their E&T providers to ensure provider determinations are fair and non-discriminatory. The Department will provide oversight of State agency implementation of this provision through ongoing management evaluations.

A not-for-profit agency encouraged the Department to consider allowing E&T participants to request re-assignment if the participant believes the provider is ''ill-suited'' to the participant's needs and interests. As stated above, the Department will allow E&T providers the flexibility, with State agency oversight, to develop the criteria for use in making a provider determination. However, the Department encourages State agencies and providers to take into consideration participants' needs and interests when determining whether it is appropriate to refer and enroll them in certain activities. The Department would encourage the use of provider determinations when a participant does not feel they are a good fit for the E&T component.

The Department received two comments from not-for-profit agencies recommending that anyone who has received a provider determination should have the right to appeal that decision through the fair hearing process. The Department understands that individuals may disagree with the decision made by a provider that they are not a good fit for a particular component. However, the Department does not believe that requesting an appeal through the fair hearing process at 7 CFR 273.7(f)(6) is the appropriate approach, as a provider determination does not, in and of itself, result in a sanction or disqualification from SNAP benefits. The Department would encourage any participant who disagrees with the provider determination to discuss their concern with the State agency. The State agency may be able to help the participant resolve any issues that may have led to the provider determination and to then allow a re-referral. In addition, as discussed above, if an individual believes they have been discriminated against, the Department has procedures in place at 7 CFR 272.6 to file a complaint, and all State agencies must make these procedures available to all SNAP participants.

The Department received one comment on the timing for notifying the State agency when a provider determination has been made. One commenter recommended that the E&T provider be required to notify the State agency expediently, with a timeframe of no longer than 14 days. The Department agrees that timely notification of the provider determination is an important step and, the sooner the State agency knows of the determination, the sooner the State agency can inform the participant and begin to take one of the four actions in 7 CFR 273.7(c)(18)(i)(B). The Department notes that E&T providers are required at 7 CFR 273.7(c)(4) to notify the State agency within 10 days if a participant fails to comply with E&T requirements. The Department is choosing to adopt the same 10-day timeframe for E&T providers to notify the State agency of the provider determination and has updated the regulatory text.

Commenters had differing opinions about the types of information that should be shared between the State agency and the E&T provider regarding E&T participants. Several commenters had concerns over provider-participant confidentiality when E&T providers share data with the State agency on the ill-suited determination, actions that may result in a breach of trust with the participant. Two commenters recommended the Department define specific fields that minimize confidentiality concerns, such as ''participant does not meet specific provider eligibility criteria,'' and recommended that all E&T participants sign a release of confidential information at intake with the provider. One commenter suggested that the provider include a recommended next step, such as ''suggest reassessment for exemption for mental/physical fitness,'' when they notify the State agency of the provider determination. However, a not-for-profit agency did not believe it was necessary for the State agency to even receive the reason for the provider determination. The commenter strongly supported the proposal to require the State agency to act on the provider determination, even if the E&T provider does not inform the State agency of the reason for the determination, as the State agency can make its own decision about the next step. On the other hand, a local government agency believed the State agency could not appropriately monitor for potential discriminatory actions if there is not a requirement that the provider share information on provider determinations with them. A not-for-profit agency urged the Department to hold State agencies accountable for collecting, analyzing, and reporting on the characteristics of jobseekers with a provider determination, focusing on the characteristics of race, ethnicity, gender, and age. To enhance State agencies' ability to provide oversight, the commenter also recommended that the Department build out ''accountability mechanisms'' for situations in which the E&T provider makes a provider determination but fails to provide the reason for that determination. The Department understands that E&T providers may develop relationships with E&T participants and may learn personal or sensitive information. At the same time, the Department recognizes that the sharing of particular information could assist in State oversight, prevent discrimination, and ensure the appropriateness of subsequent referrals. Thus, the Department concludes that E&T providers should provide the reason for a provider determination to the State agency, so that the State agency can make the best possible decision about next steps; however, if the provider does not provide the reason, the State agency must continue to process the provider determination without the reason. In addition, the Department is encouraging, but not requiring, the E&T provider to share a recommended next step when they notify the State agency of the provider determination so that the State agency has as much information as possible to make their decision about

the next step. The Department Encourages State agencies to include appropriate protocols for the secure handling of personal or sensitive information in their agreements with providers, including any such protocols based on Federal or State law and guidance. E&T providers should follow their internal protocols, as well as any protocols outlined in their agreements with the State agency, consistent with applicable laws regarding secure handling of such information.

Several State agencies expressed concern with the section of the proposed rule that would require the State agency to be the entity that makes the choice among the four available actions. These State agencies agreed that rescreening the individual for mandatory participation in the E&T program is the responsibility of eligibility workers, but they did not think eligibility workers would be the most appropriate group to refer the individual to another E&T component, workforce partnership, or another assistance program. One State agency suggested that case managers would be the most appropriate entity to make the re-referral and, in their State, case managers are embedded with E&T providers. As a result, requiring the individual with a provider determination to go back to the State agency, rather than to their provider case manager, would be problematic because: The participant has an established relationship with their case manager (not with an eligibility worker); individuals will lose trust they have built with their case manager; individuals will be forced to ''start over'' potentially causing them to disengage from the program; eligibility workers are not well-versed in the specific E&T components offered in the State; and case managers know more about the participant's circumstances and are better able to recommend other appropriate next steps, including possible exemptions. The State agency recommended that the Department provide flexibility to allow individuals with a provider determination to go back to their case managers for next steps, while still allowing eligibility functions to remain with the eligibility workers. Several commenters stated that allowing case managers or staff associated with the E&T providers to re-refer the participant to another component would also reduce the number of times an individual bounces around to different offices, thereby reducing confusion and inconvenience. Another State agency operating both a mandatory and voluntary E&T program explained that E&T providers are very capable of assigning the participant to a new component, referring the participant to another partner organization, reassessing the individual, and obtaining other assistance for the participant. Similarly, a second State agency operating a voluntary program explained that the proposed provision assumes that State agencies are not already implementing a ''no wrong door'' approach to service delivery. The State agency explained their existing process already allows for a ''no wrong door'' approach, which provides for re-referrals within the provider network and for participants to be screened for suitability before receiving services across multiple programs. The Department does not disagree that E&T providers may, in some cases, have the necessary skills and capacity to reassess individuals and determine a more appropriate component. However, the Department believes, particularly with regard to mandatory programs, but also with voluntary programs, that the State agency, not other entities, must determine if a participant with a provider determination should actually continue to participate in E&T. Congress included, as one of the four options after an individual receives a provider determination, that the State agency reassess the individual's mental and physical fitness. The Department interprets this to mean that Congress intended for the State agency to only re-refer an individual to E&T or, at the participant's discretion, refer to a workforce partnership (the two methods of meeting a mandatory E&T requirement), if the individual remained eligible for E&T. Only the State agency can determine if an individual is eligible to participate in E&T, and if it would be appropriate for the individual to do so.

A professional organization noted the proposed rule goes beyond what is specified in the Act to dictate that the decision regarding appropriate next steps after a provider determination is a function of eligibility staff. The commenter urged the Department not to assign this as a function of eligibility staff, and allow State agencies to identify which parties within the E&T program are the most appropriate to be involved in the decision-making and communication with the clients. A State agency also asked the Department to clarify the difference between an eligibility function and the functions of State staff that are more directly engaged in E&T. When the Department refers to an eligibility function or eligibility staff, the Department is referring to the workers who make eligibility determination for SNAP benefits (including determining exemptions from the work requirements and referring individuals to E&T) as specified in section 11(e)(6) of the FNA. State E&T staff are those who evaluate participants' suitability for certain E&T activities and otherwise coordinate activities within the E&T program. The Department believes that the decision about which of the four actions to take at 7 CFR 273.7(c)(18)(i)(B) for an individual with a provider determination must be performed by an eligibility worker because only an eligibility worker can determine if it is appropriate, as a condition of eligibility, to refer someone to E&T in accordance with State agency criteria. Similarly, only an eligibility worker can re-screen an individual for exemptions from work registration as that determination is closely related to eligibility. While other State agency staff beyond eligibility workers could refer an individual to a workforce partnership or coordinate with other Federal, State, or local workforce or assistance programs, the Department does not think it is logistically or administratively feasible to split the decision-making authority at 7 CFR 273.7(c)(18)(i)(B) between eligibility and non-eligibility staff. That being said, the Department does believe that State E&T staff, case workers, and E&T providers likely have important information to share that may inform which of the four actions would be the most appropriate for an individual with a provider determination. The Department would encourage these staff to share this information with the eligibility worker to inform the eligibility worker's decision. In addition, the Department believes State agencies must take greater accountability for individuals they refer to E&T programs—both in voluntary and mandatory programs. If an individual has already received a provider determination after an initial referral to an E&T program, the State agency must seriously consider if E&T is the most appropriate placement for the individual, or if another program, as described in 7 CFR 273.7(c)(18)(i)(B)(4), would be a better use of a participant's time. As described earlier, E&T provider staff are encouraged to provide the reason for the provider determination and make a recommendation regarding the best next action to the State agency, but ultimately the decision about the next action rests with eligibility staff in the State agency. In light of these explanations, no modification to the regulatory language is made.

A State agency operating a voluntary program noted that its State E&T program had contracted with several E&T providers who operate multiple components, and found that such providers are able to re-assign individuals from one component to a more appropriate component without re-involving the State agency. The commenter explained how the E&T provider enters the component change in the E&T data system and thus the State agency is informed. The State agency requested that the Department modify language to allow an E&T provider offering multiple components approved by the State agency to move participants to a more appropriate component without referring the individual back to the State agency. The commenter believed granting E&T providers this discretion would ensure an individual could move into a more suitable activity as soon as reasonably possible while maintaining continuity of case management services. The Department notes that section 6(d)(4)(O) of the FNA refers to an individual being ''ill-suited'' for a ''component'' and not for an ''E&T program.'' However, the Department agrees with the commenter that, if an E&T provider makes a provider determination for one component and believes an individual would be a good fit for another State-approved component offered by the same provider, a reasonable next step would be for the E&T provider to enroll the individual in the second component. The Department believes that the intent of the statutory language was to give E&T providers a tool to refer individuals back to the State agency when an E&T provider makes a determination that it is unable to serve the participant well. As a result, if an E&T provider determines an individual is ill-suited for a component and there is a more suitable component available, the State agency will have the option to either require the E&T provider to refer the individual back to the State agency with a provider determination, if the individual is ill-suited for one component, or allow the E&T provider to switch the individual to another component without referral back to the State agency. In the latter case, the E&T provider must inform the State agency of the new component. If an E&T provider does not have a more suitable component, the E&T provider must refer the individual back to the State agency with a provider determination. The Department has added this language to allow State agency discretion at 7 CFR 273.7(c)(18)(i).

Several commenters, including State agencies operating voluntary E&T programs, explained that implementing the ill-suited process, as described in the proposed rule, would be onerous and confusing for a voluntary E&T program to operate, and would likely create unnecessary burdens for both participants and State agency staff. One commenter recommended that, for voluntary programs, the State agency require E&T providers to refer participants with a provider determination to other providers, but only if appropriate and desired by the participant. Commenters explained that, since voluntary participants cannot be sanctioned for failure to comply with E&T, it is not necessary to include voluntary households in the actions described at 7 CFR 273.7(c)(18). The Department agrees that voluntary participants cannot be sanctioned for failure to comply with E&T, but also notes that the Act does not differentiate between voluntary and mandatory E&T participants with regard to the ill-suited process. In addition, the Department believes there is value in requiring voluntary participants with a provider determination to be reassessed by the State agency to determine the next most appropriate action. As stated above, the State agency must be accountable to E&T participants and the efficient use of E&T resources even in voluntary programs. The State agency has a responsibility to properly screen individuals for participation in E&T and match participants to the most appropriate E&T component. The State agency must also ensure all participants, both mandatory and voluntary, are being adequately served by the State's E&T providers.

The Department also received comments on the interaction between reverse referrals and provider determinations. A State agency explained that voluntary E&T participants may be referred to a specific program by the State agency or they may self-refer to an E&T provider. This State agency explained their E&T program is structured so that all E&T providers provide case management and case managers work with the participant to place them into the most compatible component. Using the proposed model, the State agency believed few individuals would be placed in a component where they are ''ill-suited.'' However, the State agency wondered what would happen if an E&T participant self-referred to an E&T provider and the individual received a provider determination for that component. The State agency explained they would prefer that the E&T provider, using their case management services, refer the participant to a more appropriate E&T provider, rather than back to the State agency, adding unnecessary complexity. The Department does not believe that the process described in the rule is inconsistent with self-referrals as described by this State agency, and the Department notes that self-referrals can occur in both voluntary and mandatory programs. Self-referrals (also known as reverse referrals) happen when a SNAP participant identifies an E&T provider without being directly referred to that provider and independently asks to enroll in the program. The E&T provider must determine, by contacting the State agency, that the individual is a SNAP participant and request the individual be formally referred by the State agency to the E&T component offered by the provider. If then referred by the State agency, the E&T provider may then enroll the participant in the component. The Department would expect, as a best practice that, if a potential E&T participant self-refers to an E&T provider, the E&T provider would assess the individual for compatibility with the E&T components offered prior to sending a request to the State agency for a formal referral to their E&T component. The Department reminds State agencies that E&T providers cannot enroll SNAP participants as E&T participants unless the State agency has first screened individuals to determine if it is appropriate to refer them to E&T and then refers them to the E&T program in accordance with 7 CFR 273.7(c)(2). If an E&T provider is asking the State agency to enroll walk-ins without first making sure the individual is a good fit for their program and is, in fact, a SNAP participant, and if the State agency is not scrutinizing self-referral requests from providers to ensure it is appropriate to refer individuals to the E&T program, then both the E&T provider and the State agency are failing in their responsibility to ensure participants are matched to programs where they are likely to be successful. The State agency has an accountability role to play in ensuring that self-referrals should be officially referred to E&T and, if not, to assist the individual in finding a more appropriate program.

Several commenters expressed concerns with the Notice of E&T Participation Change (NETPC). Some commenters strongly recommended the Department make the NETPC optional for voluntary E&T participants or do away with the notice requirement entirely. A not-for-profit agency

explained the State agency and local E&T providers with whom they work already have structures in place for communicating with voluntary E&T participants, and did not believe that State and Federal administrative resources should be spent on sending an unnecessary and confusing notice. The commenter urged the Department to, at a minimum, consider different parameters for the notice (*e.g.,* in a voluntary state, the NETPC language would need to inform the participant that E&T has no bearing on SNAP eligibility and not doing E&T would not harm their SNAP benefits). A State agency that runs both a voluntary and mandatory E&T program explained that the Act already requires all E&T programs to provide case management services to E&T participants, and believed it is more appropriate that the provider determination be addressed during regular on-going case management. The commenter suggested the case manager could re-assess the individual's physical and mental fitness to participate in the assigned E&T component or refer the individual to a more appropriate E&T component or workforce partnership. Another State agency, running both a voluntary and a mandatory program, explained the ill-suited notification for participants should be left to the discretion of State agencies. The commenter explained that, in their State, all E&T participants have an Employment and Career Development plan, which is updated by the participant and their case worker when circumstances change. The State agency believed this form would provide sufficient notification of the participant's changing requirements. A professional organization suggested the Department should consider providing only basic guidance that notices be given in some State-established form, acknowledging that State agencies are in the best position to identify how and when notice should be given. The commenter stated this approach would in part alleviate the burden on State agencies to establish a new written notice and procedure, but still allow State agencies to ensure that participants are communicating with their providers and case managers regarding critical decisions in the services they are receiving. This could help to reduce confusion on the part of the SNAP participant by ensuring the necessary conversations are had with staff who already have a relationship with and knowledge of the participant.

On the other hand, some commenters supported the formal noticing requirement and asked that the Department include more information in the notice. A not-for-profit agency explained notice issues have been a core element of confusion for individuals subject to a work requirement, and noted that life circumstances can change quickly for this population, potentially changing their exemption status. This commenter noted that clear communications outlining steps that can be taken to maintain benefits, including pursuing an exemption or good cause, are important to ensuring participants have continued access to the SNAP benefits they need. This not-for-profit agency recommended: Requiring State agencies to not only mail the NETPC, but also to send it via other channels like email; requiring the State agency to mail the notice to the individual subject to the work rules to ensure the message is targeted to the individual of interest; including language about exemptions and good cause in the notice; informing the E&T participant about next steps and explaining that the E&T participant is not at risk of sanction for failure to comply with E&T during that time; explaining the State agency will follow-up (by taking one of the four steps); and informing participants they will get a follow-up notice if a negative action is being taken on their SNAP case. A different not-for-profit agency explained the NETPC should clearly articulate the reason for the ''ill-suited'' determination, the next steps that the State agency will take to match the jobseeker to another opportunity, the time frame in which those next steps will occur, and how the jobseeker can appeal the decision. Another not-for-profit agency recommended that the Department work with State agencies to establish automatic notification procedures to ensure that E&T providers alert State agencies of a provider determination as soon as it is made. This commenter also explained State agencies should be directed to establish procedures that then communicate this notification in multiple formats (such as mail, email, and text or phone) to participants immediately upon its receipt from the provider. In addition, another not-for-profit agency urged the Department to amend 7 CFR 273.7(18)(ii) to provide notice that an ABAWD's countable months may still accrue unless the individual meets or is otherwise not subject to the ABAWD work requirement.

The Department's intent in requiring the NETPC in the proposed rule was to ensure that the individual with a provider determination understood that they had received such a determination and that they should no longer attend their E&T program, to provide the participant with some background about what would happen next and, in the case of an ABAWD, inform the ABAWD about the accrual of countable months if the ABAWD is subject to the time limit and not meeting the work requirement in accordance with 7 CFR 273.24. The Department agrees with commenters that there may be other ways, beyond a formal notice, to share this information with participants. Therefore, with this final rule, the Department is not requiring the State agency to send a NETPC, but is requiring that the State agency develop and implement procedures to notify individuals about the provider determination, steps the State agency will take to identify another opportunity, and necessary information to contact the State agency. The Department acknowledges that entities outside the State agency, such as E&T providers or other case management staff, may have a relationship with the E&T participant who received the provider determination, but the Department believes that it is the State agency's responsibility, not providers, to notify the individual of the provider determination. This is because, as noted previously, the State agency is responsible for taking one of the four actions in 7 CFR 273.7(c)(18)(i)(B) and, as discussed below, if the individual with the provider determination is an ABAWD, the State agency is responsible for informing the ABAWD that they will accrue countable months unless the ABAWD fulfills the work requirement in accordance with 7 CFR 273.24, has good cause, lives in a waived area, or is otherwise exempt. The Department is providing State agencies with discretion to determine how the State agency will notify the individual with the provider determination—for instance, in writing or verbally. The State agency must, at a minimum, document this notification in the case file. The Department is not requiring that the State agency notify the participant of the reason for the provider determination, although the State agency may do so. In any case, as previously stated, State agencies can move forward with processing a provider determination before obtaining the information from the provider as to the reason for the provider determination. In the case of either a mandatory or voluntary E&T participant, the State agency must also notify the participant that they are not being sanctioned as a result of the provider determination. The Department has added these

requirements to 7 CFR 273.7(c)(18)(i)(A).

With regard to an ABAWD who receives a provider determination, the State agency must notify the ABAWD, at the same time the State agency informs the ABAWD of the information above, that he or she will accrue countable months toward the three-month participation time limit the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination, unless the ABAWD fulfills the work requirements in accordance with 7 CFR 273.24, or the ABAWD has good cause, lives in a waived area, or is otherwise exempt. The Department has modified the language regarding the accrual of countable months in the final rule to state the ABAWD will accrue countable months ''the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination.'' The Department recognizes that ABAWDs could potentially receive a provider determination during a partial benefit month, which is not to be considered a countable month under 7 CFR 273.24(b)(1). Additionally, for ABAWDs that are notified of a provider determination during the middle of a full benefit month, this provision will not penalize ABAWDs for lost opportunities to meet the ABAWD work requirement that month. The Department does not believe it is appropriate to penalize ABAWDs for being referred to an E&T component for which an ABAWD is determined to be ill-suited, likely due to no fault of their own, nor for the time during which such an ABAWD may not have definitive communication of the provider determination. This change will mean that ABAWDs can only be assigned countable months when the ABAWD has a full month (and a full opportunity) to fulfill the work requirement after being notified of a provider determination. As a result, ABAWDs would not accrue a countable month for the month in which they receive notification of a provider determination. The ABAWD would be expected to fulfill the ABAWD work requirement by working (paid or unpaid) or participating in a work program or workfare program during the next full benefit month, unless the ABAWD has good cause, lives in a waived area, or is otherwise exempt. The regulations at 7 CFR 273.7(c)(18)(i)(A) and 7 CFR 273.7(c)(18)(ii) have been modified to reflect this change, and a corresponding change has been made to the definition of countable months at 7 CFR 273.24(b)(1). The State agency might find it appropriate on these occasions to consider whether the individual should be considered for an exemption or good cause determination and inform the ABAWD of exemption and good cause determination processes.

The Department notes that notifying individuals of the provider determination, in accordance with 7 CFR 273.7(c)(18)(i)(A), is necessary even for voluntary E&T participants, as the individual may not understand their participation in that component has ended, and wonder what their next step to receive training and assistance should be. In addition, in some cases, ABAWDs may be voluntary participants and, as discussed above, it is particularly important that ABAWDs receive information about the accrual of countable months in the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination.

The Department is also making a change to the timing of when the State agency must notify E&T participants of a provider determination. Given how crucial it is for ABAWDs to receive that notification, so that they may begin to identify other opportunities to fulfill the ABAWD work requirement, and for other E&T participants to be notified of the provider determination, so that they are not left wondering what their next step ought to be, the Department is adding a requirement to 7 CFR 273,7(c)(18)(i)(A) that the State agency must notify E&T participants with a provider determination of that determination within 10 days of receiving the notification from the E&T provider.

The Department also received comments regarding when the State agency should be required to take one of the actions in 7 CFR 273.7(c)(18)(i)(B). One not-for-profit agency recommended that the State agency be required to take one of the four actions at the next recertification because the State agency is already required to contact the participant at that time and will have the opportunity to ask questions related to the provider determination. The same commenter also suggested the participant should be given the opportunity to contact the State agency sooner for help in identifying E&T opportunities. Another commenter believed the final rule should specify steps the State agency can take to ensure that an individual with a provider determination is moved into a more suitable activity as soon as reasonably possible. Some of these steps might include having State agency staff speak with the participant about their employment goals and interests, requiring the State agency to maintain an up-to-date database of existing workforce development programming, specifically targeted to jobseekers who face more significant barriers to employment, or having the State agency employ system navigators who can better coordinate options on behalf of a participant. Given the flexibility State agencies have to structure their E&T programs based on agency priorities and the needs of local providers, the Department is providing State agencies flexibility with regard to when they take one of the actions in 7 CFR 273.7(c)(18)(i)(B), so long as the action is taken no later than the individual's recertification. The Department also believes it is important for the State agency to be responsive to individuals with a provider determination who would like to move on to one of the next steps as soon as possible. As a result, if an individual with a provider determinations tells the State agency they would like the State agency to make a decision among the four options and refer, the State agency should do so as soon as possible. The Department believes that the vast majority of E&T participants will be properly screened and initially assigned to components for which they are a good match and thus expects this provision to only apply to a small subset of the overall E&T population. The regulation at 7 CFR 273.7(c)(18)(i)(B) has been updated accordingly.

The Department received a comment from a not-for-profit agency suggesting that, rather than making a re-assessment of general work requirement exemptions, including a re-assessment of mental and physical fitness, one of the four options at 7 CFR 273.7(c)(18)(i)(B)(*3*), all participants should be reassessed for exemptions at the point that an E&T provider makes a provider determination. The commenter explained that, in their State, many mandatory E&T participants and ABAWDs could end up qualifying for an exemption from mandatory E&T or the ABAWD work requirement after a short period of time. The commenter believed re-assessing exemptions should be the starting point before seeking to refer participants to additional programs or identifying other work opportunities. Further, the commenter believed the regulation at 7 CFR 273.7(c)(18)(i)(B)(*3*) should also include an evaluation of exemptions for all the work requirements the participant is subject to, not just the general work requirement. The Department agrees that individuals who should be exempt

from any work requirement receive those exemptions, and that it is the responsibility of the State agency to screen for and provide those exemptions. The Department considered requiring the State agency to first re-assess individuals with a provider determination for an exemption from the general work requirement before taking one of the other three actions; however, the Department concluded that this requirement would be administratively burdensome for the State agency because not all individuals with a provider determination will need a re-assessment for an exemption. The Department decided that providing re-assessment as one of the four options would allow State agencies to perform the re-assessment if they had reason to believe a re-assessment was necessary (*i.e.,* received information from the provider, a case manager, or a participant suggesting an individual may be exempt). The Department would strongly encourage the State agency to re-asses the individual for an exemption if the E&T provider suggested the reason for the provider determination was related to an exemption. In addition, the Department does not believe it is necessary to require State agencies to always re-assess an ABAWD with a provider determination for exemptions from the ABAWD work requirement; however, the State agency may do so at any time.

The Department would also like to clarify a misunderstanding of the proposed regulatory text at 7 CFR 273.7(c)(18)(i)(B)(*1*). In the proposed rule, the Department explained that, if the State agency chose to re-refer an individual with a provider determination to another E&T component, the individual must also receive case management in accordance with 7 CFR 273.7(c)(2). A not-for-profit agency explained many individuals re-referred to an E&T component might not actually be placed into the component due to a lack of provider slots, the participant not meeting eligibility criteria, or the participant or provider not following through with the referral. The commenter further explained that many SNAP agencies are not configured to provide case management outside of their E&T providers, and many E&T providers would not be willing to provide case management if they did not have available component slots or the participant did not meet eligibility criteria. The commenter concluded that case management should only be required if the SNAP participant is successfully placed in a component. The Department identifies several misunderstandings in this statement, and would like to clarify both the overall role of case management in E&T, the general purpose of the provider determination, and the application of next steps in 7 CFR 273.7(c)(18)(i)(B). First, all E&T programs must provide case management to all E&T participants. If a State agency chooses to re-refer a participant to an E&T component after the individual received a provider determination, the State agency must provide that participant with case management, whether through the E&T provider or through some other means. This case management could be a continuation of the case management the participant was receiving before the provider determination, or a new set of case management services. As discussed previously in the case management section of the preamble, the State agency should tailor case management services to the needs of the participant. Second, the Department does not understand why a State agency would refer an individual to an E&T component after the individual received a provider determination if the component does not have a place for the participant, if the participant does not meet eligibility criteria, or there is a likelihood that the provider will not follow through on the referral. State agencies should not refer individuals to E&T components that do not have available slots or are inappropriate for the individual. The State agency has a choice among the four actions in 7 CFR 273.7(c)(18)(i)(B) and can choose the most helpful path for an individual in moving toward self-sufficiency. If there is not an appropriate E&T component available, the State agency should refer the participant to a workforce partnership in accordance with 7 CFR 273.7(c)(18)(i)(B)(*2*), if available and of interest to the participant, or coordinate with another program in accordance with 7 CFR 273.7(c)(18)(i)(B)(*4*). No changes to the regulatory text are necessary with this clarification.

The Department received one comment recommending the Department require the State agency to inform individuals who are referred to an E&T component, in accordance with 7 CFR 273.7(c)(18)(i)(B)(*1*) that the participant may be disqualified for failure to report or begin the new E&T component. The Department believes that modifications to paragraph 7 CFR 273.7(c)(2) in this rulemaking regarding screening and referral to E&T sufficiently outline the necessary steps the State agency must take to inform E&T participants regarding compliance with E&T. The requirements in paragraph 7 CFR 273.7(c)(2) apply to individuals who are referred to E&T as a result of actions in 7 CFR 273.7(c)(18)(i)(B)(*1*); therefore, no additional regulatory changes are necessary.

The Department received one comment requesting the Department clearly state in 7 CFR 273.7(c)(18)(i)(B)(*4*), if the State agency finds that the best option is to coordinate with Federal, State, or local workforce or assistance programs, rather than refer the individual to E&T or a workforce partnership, then that individual must be exempted from mandatory E&T. The Department discussed in the preamble to the proposed rule that if a State agency determines that other work opportunities or assistance would be most appropriate for the individual, then the State agency cannot subject the individual to mandatory E&T requirements because the other work opportunities or assistance would not fulfill a mandatory E&T requirement. In other words, it would be not be fair to subject an individual to a mandatory E&T requirement if the State agency has determined that other Federal, State, or local workforce or assistance programs would be more beneficial. The Department agrees that an individual should not be required to participate in E&T if the State chooses this option and has modified the regulation at 7 CFR 273.7(c)(18)(i)(B)(*4*) to more clearly state this understanding. In addition, the Department notes that if a State agency chooses the option at 7 CFR 2737.7(c)(18)(i)(B)(*3*) to reassess the mental and physical fitness of the participant, and the State agency determines that an individual does not meet an exemption from the general work requirement, but the State agency also determines the individual should be exempted from mandatory E&T, the State agency must exempt the individual.

The Department also received comments on the requirement in 7 CFR 273.7(c)(18)(ii) that, from the time an E&T provider determines an individual is ill-suited for an E&T component until after the State agency takes one of the actions in paragraph 7 CFR 273.7(c)(18)(i)(B), the individual shall not be found to have refused without good cause to participate in mandatory E&T. A not-for-profit agency explained that taking one or all of the actions in 7 CFR 273.7(c)(18)(i)(B) does not guarantee State agency follow-up on referrals or successful identification of an appropriate and available placement by the State agency. The commenter, therefore, suggested that the statement

in 7 CFR 273.7(c)(18)(ii) be revised to state, ''from the time an E&T provider determines an individual is ill-suited for an E&T component until after the State agency takes one of the actions in (i)(B) of this section that leads to State-confirmed enrollment in an appropriate SNAP E&T component or workforce partnership that meets mandatory E&T requirements, or else leads to an exemption, the individual shall not be found to have refused without good cause to participate in mandatory E&T.'' The Department understands that, at the time a State agency takes one of the four actions in 7 CFR 273.7(c)(18)(i), there may still be actions the participant must take to follow through, for example, beginning the E&T program or workforce partnership; however, the Department believes it would be too administratively burdensome to track the end of the period when an individual cannot be found to have failed to comply with mandatory E&T to multiple disparate end points (*i.e,* when someone starts E&T, when someone receives good cause etc.). In addition, while the language in 7 CFR 273.7(c)(18)(ii) specifies for a period after a provider determination during which an individual cannot be found to failed to comply with E&T, at the end of this period, State agencies still have a responsibility to determine exemptions and good cause related to the mandatory E&T requirement, as appropriate, as they would in any other case. As a result, the Department does not believe the additional language proposed by the commenter is necessary, and does not modify the text at 7 CFR 273.7(c)(18)(ii).

The Department received several comments urging the Department to not allow ABAWDs to accrue countable months after they received a provider determination. A professional organization suggested ABAWDs would be unduly penalized for a decision that is ultimately outside of their control, and the work that ABAWDs did complete within those months would go unacknowledged. The commenter believed that pausing the accrual of countable months while awaiting the State agency to take action on one of the four options in 7 CFR 273.7(c)(18)(i)(B) would also allow State agencies adequate time to react, re-assess, and reassign ABAWDs. A not-for-profit agency explained that, at present in their State, when organizations attempt to refer individuals back to the State agency for reasons of suitability, administrative delays often prevent a timely response. The commenter noted this leaves the ABAWD in limbo at no fault of their own. The commenter argued the time spent waiting for State agencies to respond should not count towards the three-month time limit. Another not-for-profit agency explained the Department is essentially saying that it is acceptable to disconnect an ABAWD from the E&T service that was allowing that individual to fulfill the ABAWD work requirement, at the same time expecting that individual to fulfill the work requirement on their own, while the State agency has unlimited time to take one of the four required action steps to match that ABAWD to an appropriate service. Moreover, the commenter explained, the ABAWD is not at fault if their E&T provider makes a provider determination for the services offered by the provider. Given the unequal expectations in this situation, the commenter strongly encouraged the Department to reconsider its requirement that ABAWDs may accrue countable months toward their three-month participation time limit after having received a provider determination, while at the same time acknowledging that doing so may be outside of the scope of this particular rulemaking. Another not-for-profit agency was concerned that E&T providers may actually be hesitant to make a provider determination for an ABAWD if they know that an ABAWD may begin to accrue countable months, resulting in an ABAWD continuing in a component where they are not able to benefit and may ultimately not complete. This not-for-profit agency also urged the Department to add regulatory language that would direct State agencies to re-assess ABAWDs for good cause if the ABAWD received a provider determination. The commenter explained that not all individuals who receive a provider determination for a particular component would have good cause, but some might, and ABAWDs should be re-assessed after a provider informs the State agency of a poor match to determine if it might suggest they should have good cause for not fulfilling the ABAWD work requirement.

The Department understands the concern that an ABAWD may accrue countable months after receiving a provider determination and, in many cases, the ABAWD may receive the determination through no fault of their own (*e.g.,* the ABAWD was mis-assigned by the State agency). However, the mandatory protection from sanction in section 6(d)(4)(O) of the FNA only applies to the requirement to participate in E&T. ABAWDs have many ways to meet the ABAWD work requirement outside participation in E&T. The Department also notes that ABAWDs will accrue countable months even if they are participating in E&T, but not fulfilling the ABAWD work requirement in accordance with 7 CFR 273.24(a)(1). The Department does believe it is important that the ABAWD be notified of the provider determination as soon as possible, so that the ABAWD can seek out other work or training opportunities. For this reason, the Department has directed State agencies in 7 CFR 273.7(c)(18)(i)(A) to notify ABAWDs within 10 days of receiving notification of the provider determination from the E&T provider, that the ABAWD will accrue countable months toward their three month participation time limit the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination, unless the ABAWD fulfills the ABAWD work requirement in accordance with 7 CFR 273.24, or the ABAWD has good cause, resides in a waived area, or is otherwise exempt. As discussed earlier, as a best practice, providers are encouraged to provide the reason for the provider determination to the State agency and suggest a recommended next step for the individual. If the provider was providing case management, the case manager is required in accordance with 7 CFR 273.7(e)(1), as re-designated, to share information about a possible exemption or good cause with the State agency.

In conclusion, the Department is making several changes to the proposed regulatory text at 7 CFR 273.7(c)(18): Replacing the phrase ''ill-suited determination'' with ''provider determination;'' stating that the E&T provider has the authority and the responsibility to make a provider determination; requiring the E&T provider to notify the State agency of the provider determination within 10 days; replacing the requirement to send the NETPC with a requirement to notify the participant about the provider determination and the accrual of countable months for an ABAWD; stating that ABAWDs will accrue countable months toward their three month participation time limit the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination, unless the ABAWD fulfills the ABAWD work requirement in accordance with 7 CFR 273.24, or the ABAWD has good cause, resides in a waived area, or is otherwise exempt; requiring the State agency to notify the E&T participants of the provider

notification within 10 days; requiring that the State agency notify the individual that they are not being sanctioned as a result of the provider determination; allowing the State agency to take one of the four actions in 7 CFR 273.7(c)(18)(i)(B) by no later than the next recertification; allowing, at State agency option, an E&T provider to enroll a participant in another component offered by the provider if the initial component was not a good fit; and requiring that, if the State chooses option 7 CFR 273.7(c)(18)(i)(B)(*4*), the participant must not be required to participate in E&T.

State Agency Accountability for Participation in an E&T Program and Good Cause

The Act introduced several new provisions that emphasize State agencies' responsibilities to build E&T programs that are well-targeted to E&T participants' needs and support E&T participants as they engage with those programs. In addition to addressing these provisions in the proposed rule, the Department also proposed additional ways to enhance State agency responsibility and capacity to build E&T programs that provide robust work and training opportunities to participants. In this section, the Department will discuss three of these additional provisions: A new form of good cause provided to E&T participants when there is not an appropriate or available opening in the E&T program; clarification of the application of good cause for failure or refusal to participate in an E&T program for ABAWDs; and a clarification that State agencies must first determine if non-compliance with a work requirement was without good cause before sending a notice of adverse action. Later sections of the preamble discuss other accountability provisions, like new State agency reporting requirements regarding mandatory E&T participants on the quarterly reports, and a new requirement to provide a consolidated written notice and oral explanation of all applicable work requirements to households.

The Department believes that, if a State agency requires participation in E&T as a condition of eligibility, it has a responsibility to build an E&T program that can accommodate all mandatory E&T participants. In situations where there is not an appropriate and available opening for a mandatory E&T participant in the E&T program, the Department does not believe that the mandatory E&T participant should be disqualified for failing to comply with the E&T requirement, as the lack of an appropriate and available opening in an E&T program is beyond the E&T participant's control. As a result, the Department proposed to add new § 273.7(i)(4) to define good cause to include circumstances where the State agency determines that there is no appropriate and available opening in the E&T program to accommodate a mandatory E&T participant. The Department proposed that the period of good cause would extend until the State agency identifies an appropriate and available opening in the E&T program, and the State agency informs the SNAP participant of such an opening. The Department proposed in 7 CFR 273.7(c)(2) that, if there is not an appropriate and available opening in an E&T program for a mandatory participant, the State agency must determine the participant has good cause for failure to comply with the mandatory E&T requirement in accordance with paragraph 7 CFR 273.7(i)(4). The Department also proposed in paragraph 7 CFR 273.7(e)(1), as re-designated, that case managers must inform the appropriate State agency staff about the lack of an appropriate and available E&T component for a mandatory E&T participant. Lastly, the Department noted in the proposed rule preamble that, ideally, if there is not an appropriate and available opening in the E&T program, the State agency should consider exempting the individual from mandatory E&T under the discretion provided to State agencies in 7 CFR 273.7(e)(2), re-designated as 7 CFR 273.7(e)(3). The Department also noted that this proposed new form of good cause would only apply to mandatory E&T participants and would not provide all ABAWDs with good cause for failure to fulfill the ABAWD work requirement in 7 CFR 273.24. In other words, an ABAWD who is also a mandatory E&T participant, but for whom there is not an appropriate and available opening in an E&T program, would receive good cause for failure to participate in E&T, but would not receive good cause for failure to comply with the ABAWD work requirement.

The Department received 28 comments on this provision, most of which were very supportive, although two commenters, while supportive, were concerned the provision would be applied too liberally and provided suggestions to mitigate this possibility. In addition, four supporters felt that the good cause for mandatory E&T should also apply to the ABAWD work requirement. The Department did not receive any comments opposing the addition of the new form of good cause for mandatory E&T.

Commenters believed that the addition of the new form of good cause for mandatory E&T provides an important safeguard for mandatory E&T participants who are not able to participate in E&T, through no fault of their own, because the State agency has not provided an appropriate or available slot in an E&T program. However, one not-for-profit agency felt that the Department's introduction of this new form of good cause overestimated the demand for such ''exemptions,'' while underestimating the flexibility of the work requirement, as most E&T programs struggle to recruit participants into E&T. The commenter believed that good cause for this purpose should only ever be granted when a participant attempts to access a slot and is denied entry for lack of an opening. Further, the commenter believed the Department could mitigate concerns about over-use of this good cause provision if participants, upon receiving good cause for non-compliance, were expected to find work experience and volunteer opportunities outside a State agency's formal E&T program, pushing the participant to re-engage with their community and build work experience. The Department agrees with the commenter that the focus of State agencies should be on building robust E&T programs that provide participants opportunities in training and work experience programs that lead to improved employment outcomes, and not on excusing participants from the requirement to participate because there is not an appropriate or available opening. The Department has invested considerable resources to support State agencies in growing their capacity and developing E&T programs that are responsive to the needs of individuals and the employers. However, the Department feels strongly that, if a State agency is going to require individuals to participate in E&T as a condition of eligibility, it should hold up its end of the bargain by creating enough appropriate and available E&T opportunities so the individuals may meet this requirement. The Department would like to clarify that State agencies have the flexibility to determine who they serve in E&T, and the responsibility to screen and refer individuals to E&T only if appropriate. States have the discretion to exempt an individual or categories of individuals from participating in E&T. The Department notes that well-managed programs should have very few circumstances where there is a need to

provide this new form of good cause. State agencies should be continuously monitoring the capacity of their E&T providers, properly screening individuals to determine if it is appropriate to refer them to E&T program, and only referring individuals to providers that have appropriate and available openings. If a State agency is unable to provide an appropriate slot for an individual required to participate in E&T, the State agency should use its flexibility to exempt them from participation—otherwise, the State agency must provide good cause until a slot is available.

The Department also believes it would be unnecessarily restrictive to limit this new form of good cause to circumstances where a participant attempts to access a slot and is denied entry for lack of an opening. For instance, with the introduction of the requirement that all E&T participants receive case management, the Department would expect case managers to play a role in sharing information with the appropriate staff in the State agency about client participation. If a case manager is made aware that there is not an appropriate and available opening for a particular E&T participant, the case manager, as proposed in 7 CFR 273.7(e)(1), must share this information with the appropriate State agency staff, so that the State agency can determine if it is appropriate to provide good cause. The Department believes it would be unreasonable to require a participant to attempt to access a program, when the participant, through the case manager, already knows an opening does not exist.

The Department also appreciates the comment from the same not-for-profit agency that a mandatory E&T participant who is found to have good cause for non-compliance with E&T, because of a lack of an appropriate or available opening should be expected to find other work or volunteer experience. The Department agrees that E&T is not the only avenue available to SNAP participants to advance their skills and training, and would encourage State agencies to assist SNAP participants with referrals to other agencies or organizations. However, State agencies cannot require SNAP participants to engage in other work or training opportunities in place of E&T. In accordance with section 6(d)(4)(E) of the FNA, State agencies can only require work registrants to participate in a SNAP E&T program as defined in section 6(d)(4)(B)(i) of the FNA. The Department does note; however, that the Act requires State agencies to advise all work registrants living in households without earned income and without an elderly or disabled member about employment and training opportunities in the community, and the Department has added this requirement at 7 CFR 273.14(b)(5). Moreover, the Department encourages State agencies, as a best practice, to provide this information to additional households, including mandatory E&T participants for whom the State does not have an appropriate or available opening in E&T, to guide these participants toward other opportunities. Lastly, as already noted, ABAWDs who receive good cause for failure to participate in E&T because of a lack of an appropriate or available opening are still subject to the ABAWD work requirement, and must work or participate in a work program or workfare program to receive benefits beyond the three-month time limit. The Department encourages the State agency, as a best practice, to share the employment and training information discussed above with these ABAWDs or any SNAP participant that is likely to benefit from this information.

Four commenters expressed their concern regarding the Department's proposal that good cause for lack of appropriate or available opening in mandatory E&T would not apply to the ABAWD work requirement. A State agency stated that the Department's justification that there are many ways to fulfill the ABAWD work requirement, other than through SNAP E&T, is not consistent with the recent Families First Coronavirus Response Act (FFCRA) (Pub. L. 116–127), which temporarily suspended the time limit for those ABAWDs not offered a slot in a work program or workfare program. Given this precedent, the State agency felt USDA should stipulate at 7 CFR 273.7(i)(4) that good cause should be granted for failure to fulfill the ABAWD work requirement during periods when the Secretary determines, or Congress appoints by law, that the options available to meet the work requirement are limited. An act of Congress to suspend the ABAWD time limit, such as with FFCRA, does not need to be incorporated into the regulation because such act specifically suspended the ABAWD time limit statute and regulations. In addition, section 6(o)(4) of the FNA and 7 CFR 273.24(f) already allow the Secretary to waive the ABAWD time limit upon request from a State agency, if certain conditions are met, therefore such provision does not need to be adopted by this final rule. More broadly, the Department does not believe it is good policy, or consistent with FFCRA, to provide good cause for the ABAWD work requirement when an appropriate E&T slot is unavailable. As noted by the commenting State agency, Congress only temporarily suspended the ABAWD time limit for those not offered slots in work program beyond SNAP E&T. As stated in the proposed rule, there are many ways to fulfill the ABAWD work requirement other than through SNAP E&T. The lack of appropriate or available opening in a SNAP E&T program would not prevent an ABAWD from fulfilling the ABAWD work requirement in another way.

Another State agency commented that this new form of good cause for a lack of appropriate or available opening, does not have any applicability in a voluntary E&T State and, in a voluntary State, ABAWDs who were unable to find an appropriate and available E&T opening would still lose eligibility if they exceeded their three-month time limit. The Department agrees that, in voluntary States, ABAWDs who exceed their three countable months because they are unable to find an opening in an E&T program, another work program or workfare, or work enough hours to meet the work requirement would lose eligibility regardless of the good cause provision. This same State agency misinterpreted the Department's explanation in the proposed rule preamble suggesting that State agencies should, as appropriate, exempt individuals from mandatory E&T if there is not an appropriate and available opening. The State agency thought the Department was saying State agencies should use ABAWD discretionary exemptions under section 6(o)(6) of the FNA and 7 CFR 273.24(g) to exempt individuals from E&T. The Department is clarifying that the reference in the proposed rule preamble to exempting individuals from mandatory E&T referred to exemptions under 7 CFR 273.7(c)(2).

An anonymous commenter explained that, if an ABAWD received good cause for non-compliance with E&T because there was not an appropriate or available opening, the Department should not assume that the ABAWD will be able to find other opportunities to meet the ABAWD work requirement. This commenter noted that ABAWDs face many barriers to employment and E&T services may be necessary to prepare the ABAWD for work. However, as the Department has previously noted, there are many ways to fulfill the ABAWD work requirement, including other work programs that can prepare ABAWDs for work. The lack of an appropriate or available opening in a SNAP E&T program would not prevent

the ABAWD from fulfilling the ABAWD work requirement in another way.

A not-for-profit agency also suggested that ABAWDs who receive good cause from participating in mandatory E&T, because there is no appropriate and available opening, will be confused when they also do not receive good cause from the ABAWD work requirement and may, as a result, lose eligibility because they do not understand they are still subject to the ABAWD time limit. The commenter suggested that the Department require State agencies to send a notice to ABAWDs in this situation explaining all relevant information about the application of good cause and what they must do to maintain eligibility. The Department agrees this application of good cause could be confusing to ABAWDs and, for this reason, is requiring State agencies to include a clear, thorough description of good cause in the consolidated written notice and oral explanation of all applicable work requirements for individuals in the household during the application process and at recertification, in accordance with 7 CFR 273.7(c)(1).

The Department also proposed two changes to good cause regulations pertaining to the ABAWD work requirement in paragraph 7 CFR 273.24(b)(2). First, if an individual is determined to have good cause for failure or refusal to comply with mandatory E&T under 7 CFR 273.7(i), the Department proposed the State agency be required to provide good cause for failure to meet the ABAWD work requirement, without having to make a separate good cause determination (an exception to this proposed policy, as discussed, is that good cause for failure to comply with mandatory E&T under the proposed 7 CFR 273.7(i)(4) for lack of an appropriate or available E&T opening would not provide good cause for failure to comply with the ABAWD work requirement). The Department proposed this change to codify long-standing practice (see *Supplemental Nutrition Assistance Program—ABAWD Time Limit Policy and Program Access* published on November 19, 2015 [3] and *Policy Clarifications for Administering the Supplemental Nutrition Assistance Program (SNAP) Employment and Training (E&T) Programs* published on January 19, 2017) [4] that, good cause under 7 CFR 273.7(i) for failure to comply with mandatory E&T (7 CFR 273.7(a)(ii)) or State-assigned workfare (7 CFR 273.7(a)(iii)) also provides good cause under 7 CFR 273.24(b)(2) for purposes of the ABAWD work requirement. However, while this longstanding policy provided good cause for ABAWDs who were referred to a mandatory E&T program or State-assigned workfare to meet their ABAWD work requirement, it did not provide good cause for ABAWDs participating in other work programs or other types of workfare programs. So, the Department proposed a second change that, if an ABAWD is participating in work, a work program, or workfare, and would have fulfilled the ABAWD work requirement in 7 CFR 273.24, but missed some hours for good cause, the individual would be considered to have fulfilled the ABAWD work requirement if the absence from work, the work program, or workfare is temporary and the individual retains his or her job, training or workfare slot. The Department proposed this change so that State agencies can apply fair and consistent treatment to ABAWDs who have good cause, regardless of how the ABAWD chooses to meet the ABAWD work requirement.

The Department received 18 comments on this provision, all of which were supportive. Two commenters did recommend the Department make an additional change to the regulatory text at 7 CFR 273.24(b)(2) to strike the language, ''and the individual retains his or her job, training or workfare slot,'' reasoning that some employers and trainers will not be able to retain the SNAP participant even if he or she has a good cause circumstance. The commenters proposed that good cause be allowed in cases where the absence is temporary, whether or not the individual retains his or her job, training or workfare slot. For example, a worker who has COVID–19 might lose his or her job due to an extended absence, but be available for work upon recuperation. The Department agrees that there may be conditions outside of an ABAWD's control that cause both a temporary absence from work, a work program, or workfare, and also cause an ABAWD to lose his or her job, training, or workfare slot. The COVID–19 public health absence is an example of such situation. As a result, the Department has modified the language at 7 CFR 273.24(b)(2) to strike the language ''and the individual retains his or her job, training or workfare slot.''

In the proposed rule, the Department also noted a discrepancy in the process for establishing good cause and issuing a notice of adverse action between current paragraphs 7 CFR 273.7(c)(3) and 7 CFR 273.7(f)(1)(i). The Department proposed revising the language in 7 CFR 273.7(c)(3) to clarify that, before a State agency issues a notice of adverse action to an individual or a household, as appropriate, for non-compliance with SNAP work requirements, the State agency must determine that the non-compliance was without good cause. The Department received three comments on this provision, all of which were supportive. Several commenters recommended that the Department also make a change to 7 CFR 273.24(b)(2) to explicitly require the State agency establish whether good cause exists for non-compliance with the ABAWD work requirement before sending a notice of adverse action. The Department agrees that, as a best practice, the State agency should establish whether an ABAWD had good cause before issuing a notice of adverse action in accordance with section 7 CFR 273.24(b)(2). However, the Department is declining to make a regulatory change at this time, but may consider this change in future rule-making.

In the proposed rule, the Department also stated the expectation that the new authority allowing E&T providers to determine if an individual is ill-suited for their E&T component (*i.e.,* an E&T provider determination), and the new requirement that all E&T participants receive case management, do not absolve the State agency from doing a thorough initial screening to ensure it is appropriate to require an individual to participate in an E&T program. Existing statutory and regulatory language clearly indicate that the State agency has primary responsibility for the design and operation of their E&T program, which may include agreements with one or more E&T providers who may provide case management, E&T components, or other activities as outlined in the E&T State plan. While State agencies may choose the method of delivery that best meets their operational needs, the Department emphasized in the proposed rule that each State agency retains responsibility for its E&T program. This includes properly screening individuals for exemptions from the requirement to participate in E&T, and following up on information from E&T providers and case managers that may affect exemptions or good cause determinations after the State agency makes the determination to require participation. The Department proposed in paragraph 7 CFR 273.7(e)(1), as re-designated, that the E&T case manager

[3] *https://fns-prod.azureedge.net/sites/default/files/resource-files/ABAWD-Time-Limit-Policy-and-Program-Access-Memo-Nov2015.pdf.*

[4] *https://fns-prod.azureedge.net/sites/default/files/resource-files/Policy%20Clarifications%20for%20Mandatory%20E%26T-508.pdf.*

must inform appropriate State agency staff of a possible exemption and if there is not an appropriate or available E&T opening for the participant. If the State agency determines the participant does in fact meet an exemption or have good cause, the State agency must then exempt or provide good cause to the individual, if appropriate.

The Department received several comments on the requirement that case managers share possible exemption and good cause information with the State agency. The commenters were supportive and felt the requirement will better target E&T programs to those most likely to benefit; however, commenters felt the proposed requirement did not protect the participant if the State agency fails to act upon the information. Some commenters also recommended the Department clarify that the case manager should assist the participant in reporting all potential good cause for non-compliance, not just good cause when there is a lack of an appropriate or available opening in E&T. The Department agrees that case managers may assist participants in following-up with State agency staff on the status of an exemption or good cause determination, but ultimately only State agency eligibility staff, having the authority to determine an exemption or good cause, can make that determination. The Department also agrees that case managers must provide to the State agency information on all potential good cause circumstances for non-compliance with a work requirement, beyond just circumstances relating to a lack of an appropriate or available opening in E&T, and has added this to the final regulatory text.

As a result, the Department codifies the final regulation as proposed with the modification that case managers must share with the State agency all potential instances of good cause.

Improving Accountability in State Agency Quarterly Reports

Current regulations at 7 CFR 273.7(c)(9), 7 CFR 273.7(c)(10), and 7 CFR 273.7(c)(11) require State agencies to submit quarterly E&T Program Activity Reports. 7 CFR 273.7(c)(11) specifies that the fourth quarter report provide a list of all the E&T components offered during the fiscal year, as well as the number of ABAWDs and non-ABAWDs who began participation in each component. The report must also provide the number of ABAWDs and non-ABAWDs who participated in the E&T program during the fiscal year. The Department is committed to ensuring that State agencies are providing mandatory E&T participants with real opportunities to gain skills and appropriate services that help them be successful. Therefore, the Department proposed adding additional reporting elements to this fourth quarter report focused on mandatory E&T participants: The unduplicated number of SNAP applicants and participants required to participate in an E&T program during the fiscal year and, of those, the number who actually begin to participate in an E&T program. An E&T participant begins to participate in an E&T program when the participant commences at least one part of an E&T program, including an orientation, assessment, case management, or a component. The Department proposed to codify this new requirement by inserting a new paragraph at 7 CFR 273.7(c)(11)(iii).

The Department received 21 comments on this provision. Commenters were very supportive, explaining their belief that the new data elements will generate useful information on the take-up rate of E&T and the number of individuals who actually begin participation. Commenters expressed their concern that high non-participation rates in E&T likely indicate increased hardship among those terminated from SNAP and poorly designed or implemented programs that do not engage mandatory E&T participants.

While all commenters supported including the first proposed data element, the ''number of SNAP participants required to participate in E&T by the State agency,'' the Department received several comments suggesting the Department replace the second proposed data element, ''of those, the number who begin participation in an E&T program'', with ''of those, the number who are successfully placed into a qualifying component.'' These commenters stated that activities such as orientation and assessment are considered participation and may take place at the State agency prior to component placement, yet generally do not allow participants to meet the minimum hours of mandatory programs. Moreover, commenters explained the language of placement rather than participation narrowly focuses the accountability for placement into a qualifying component on the State agency, whether or not the participant actually appears at the placement site. Other commenters also provided a different variation to the modification described above, requesting to replace ''and of those the number who begin participation in an E&T program'' with ''of those the number who were actually enrolled in an E&T component or case management.'' These commenters, like those above, felt it was important to capture if participants were engaging with the main elements of an E&T program, rather than just attending an assessment or orientation, but did not have the same concerns with the verbs participate versus placed, and considered case management and component participation equally important to capture.

Two commenters recommended State agencies report both the number of individuals who, as proposed, begin to participate in an E&T program, as well as the number who begin participating in an E&T component. These commenters believed adding the third data element specific to participation in an E&T component would capture issues related to the ''hand off''—from the State agency to a specific training activity (*i.e.,* the E&T component). The commenters stated this has been a challenge for many E&T programs, and obtaining useful information about participation in a component could provide important insights for State agencies and policymakers interested in improving SNAP E&T. Further, these commenters suggested the addition of this third data element would not be a burden to E&T providers or the State agency, as current regulations at 7 CFR 273.7(c)(11) already require the reporting of participation in individual components as well as in an E&T program.

One commenter suggested a much longer list of data elements to be added to the fourth quarter report, including the number of SNAP participants who are mandated to report for an E&T assessment, the number of mandatory participants who receive an E&T assessment, the number of mandatory participants who participate in an E&T activity, the number who are sanctioned for non-compliance, and the number of those mandated to participate who are later found to be exempt. The commenter also suggested the Department require State agencies to report on the employment rates in the second quarter and the fourth quarter after SNAP recipients are required to participate in E&T. Lastly, a not-for-profit agency suggested the Department also collect both the sanction rate and the employment rate for the full universe of those assigned to mandatory E&T in order to present a complete account of the impact of mandatory programs on SNAP participants.

The Department agrees that the proposed requirement to collect data on the number of participants required to participate in E&T and the number who begin to participate in the E&T program

would not allow for analysis of how many mandatory E&T participants actually begin to participate in a component. For instance, a mandatory E&T participant may attend an orientation the same day they visit the SNAP office for their certification interview but, because of State agency mis-communication, not understand when or where to begin their E&T component, and eventually be sanctioned for failure to comply with the requirement to participate in E&T. With the proposed regulatory language, these individuals would be counted as having begun to participate in the E&T program, but would actually receive very little benefit from E&T. As a result, the Department has added a third data element at 7 CFR 273.7(c)(11)(iii) to also collect the number of individuals who begin participation in an E&T component. The Department believes it is important to gather information on the number who ''participate'' in a component, rather than just the number ''placed'' in a component, because the Department believes that the ''hand-off'' between the State agency and the E&T provider of the component is a challenging transition, and many E&T participants should be better supported by the State agency to cross the bridge and show up for the component. Individuals can be placed in an E&T component but, due to no fault of their own, never make it to the component to begin training. For example, a State agency may not inform an individual that they may receive transportation assistance to their appointment, and as a result, the individual does not show up to their appointment due to lack of transportation. Further, while the Department believes that case management is an important service, the Department would like to capture the number of individuals who begin participation in a component as a standalone measure. The Department believes the components are where the training and skill development occurs. The Department counts an E&T participant as beginning to participate in an E&T component when the participant commences the first activity in the E&T component. The Department also appreciates the comment that State agencies should be required to provide data on the number of mandatory E&T participants who are determined ineligible for failure to comply with the requirement to participate in E&T. The Department believes this is an important complementary piece of information to the number of individuals who begin to participate in E&T and the number who begin to participate in a component. The Department, as stated above, believes it is important that State agencies support all mandatory E&T participants to fulfill their requirement. Data on the number of participants determined ineligible will provide both State agencies and the Department with important information to improve E&T programs. The Department believes that the addition of these new data elements adequately addresses the need to support improved oversight of State mandatory E&T programs, but will continue to monitor data received from State reports and make revisions as necessary.

In conclusion, the Department has added a third and fourth data element to 7 CFR 273.7(c)(11)(iii) to capture the number of mandatory E&T participants who begin to participate in an E&T component and the number of E&T participants who are determined ineligible for failure to participate in E&T.

Workforce Partnerships

The Act established workforce partnerships. Workforce partnerships are not an E&T component, but they are partnerships between the State agency and other entities that create a new way for SNAP participants to gain high-quality, work-related skills, training, work, or experience that will increase the ability of the participants to obtain regular employment. The Act added workforce partnerships to the list of work programs through which an ABAWD may fulfill the ABAWD work requirement, and workforce partnerships may be a way for mandatory E&T participants to meet their E&T requirement. The Act added workforce partnerships to several sections of the FNA, including sections 6(d)(4)(B)(ii), 6(d)(4)(E), 6(d)(4)(H), and new paragraph 6(d)(4)(N). The Department proposed adding the description and requirements for workforce partnerships to new paragraph 7 CFR 273.7(n). In addition, the Department proposed including two additional State agency responsibilities associated with workforce partnerships. First, the Department proposed to require State agencies to re-screen any individual for the requirement to participate in mandatory E&T when the State agency learns the individual is no longer participating in a workforce partnership. Second, the Department proposed to require State agencies to provide sufficient information to household members subject to the general work requirements of 7 CFR 273.7 and ABAWD work requirements of 7 CFR 273.24 about workforce partnerships, so that individuals could make an informed decision about participation.

The Department received 12 comments on this provision. While no comments opposed the addition of workforce partnerships as a way for SNAP participants to meet their work requirement and gain new skills, some commenters appear to have misunderstood the general structure and purpose of workforce partnerships. Commenters also shared some concerns about the Department's requirement to inform SNAP participants about the availability of workforce partnerships.

The Department received several questions about how workforce partnerships would be structured and the interaction between workforce partnerships and E&T programs. Each of these questions is answered in more detail below, but the Department would like to emphasize that key to understanding workforce partnerships is that they are a new concept introduced by the Act in 2018. Workforce partnerships, as described in 7 CFR 273.7(n), as amended by this final rule, are not industry or sector partnerships as defined under WIOA. Workforce partnerships are also not part of the E&T program. Workforce partnerships, as described in 7 CFR 273.7(n), are a particular opportunity available to State agencies to provide SNAP recipients one additional way to meet their work requirement (*i.e.,* mandatory E&T or the ABAWD work requirement) while gaining skills. The Act provided specific instructions regarding what may constitute a workforce partnership, and how they are to be managed by the State agency. While State agencies are encouraged to pursue workforce partnerships with interested employers or eligible WIOA training services providers, there is no requirement that they do so. In addition, if a State agency chooses not to pursue workforce partnerships, as described in 7 CFR 273.7(n), the State agency is still encouraged to partner with employers and training providers to identify and build new opportunities for skills training for SNAP participants through the E&T program.

A State agency expressed concerns that E&T funding cannot be used for workforce partnerships. The commenter suggested this may make it difficult to motivate organizations to participate in creating workforce partnerships that provide 80 hours per month of work and training. The Department understands the commenter's concern, but the Act explicitly prohibits any FNA funding from being used for workforce partnerships. *See* section 6(d)(4)(B)(ii)(I)(bb)(CC) of the FNA.

Another State agency explained that many E&T providers already create internships and work experiences with private employers. The commenter asked if the requirement to provide work registrants with information about workforce partnerships also requires State agencies to furnish an exhaustive list of all possibilities, including opportunities through E&T, to the participant. The State agency was concerned that such a list could prove unwieldy and create a burden, having to constantly update the evolving available work sites and participating employers. As discussed above, the Department emphasizes that workforce partnerships described in 7 CFR 273.7(n) are completely separate concept from the E&T work experience component at 7 CFR 273.7(e)(2)(iv). In addition, if a State agency is offering an E&T work experience component, the activities provided under the component would be prohibited from inclusion in a workforce partnership, as workforce partnerships may not use funds authorized by the FNA and all E&T components are supported by FNA funding. If a State agency has certified one or more workforce partnerships, only the activities associated with those workforce partnerships must be provided to individuals targeted for participation in a workforce partnership, in accordance with 7 CFR 273.7(n)(10).

The State agency also asked if State agencies would be able to use private employers for workfare, if workforce partnerships could include work experience, and if so, if the work experience could more closely mirror TANF work experience. The State agency recommended that the relationship with workforce partners mirror the relationship with partners engaged in TANF work experience to create a more flexible system. As discussed above, workforce partnerships at 7 CFR 273.7(n) are a separate concept from E&T components at 7 CFR 273.7(e)(2), workfare at 7 CFR 273.7(m), or any other activity described in current regulations which provide work experience or training for SNAP participants. The introduction of workforce partnerships does not change how workfare or any of the E&T components are regulated or operated. As stated in 7 CFR 273.7(n)(4)(i), workforce partnerships must ''assist SNAP households in gaining high-quality, work-relevant skills, training, work, or experience that will increase the ability of the participants to obtain regular employment.'' Thus, within the bounds of the workforce partnership requirements at 7 CFR 273.7(n), State agencies will have flexibility in identifying work, training, or experience that increases the employability of SNAP participants.

The same State agency asked what the requirements will be for certification of workforce partnerships, and if the requirements would be flexible and designable by the State. The Act established specific requirements for certification of a workforce partnerships and the Department included these requirements at 7 CFR 273.7(n)(4). The Department encourages any State agency interested in certifying a workforce partnership to reach out to the Department for technical assistance on specific questions regarding the certification requirements.

Two commenters asked if participation with workforce partnerships is ''all or nothing'' for participants looking to fulfill the ABAWD work requirement. That is, because ABAWDs can fulfill their work requirement through a combination of work, volunteer hours, and training, can workforce partnerships be offered for fewer than 20 hours per week so that ABAWDs can meet the balance of their work requirement in another way? The commenters felt the proposed requirement to certify that workforce partnerships offer at least 20 hours per week of training, work, or experience may limit the number of workforce partnerships available to participants. The Department understands that ABAWDs may look to fulfill their work requirement through several types of activities, but the Act requires that, to be certified, workforce partnerships must provide not less than 20 hours a week of training, work, or experience. *See* sections 6(d)(4)(N)(i)(I) and 6(d)(4)(B)(ii)(I)(bb)(BB) of the FNA. This requirement is reflected at 7 CFR 273.7(n)(4). The Department would also like to emphasize that participation in a workforce partnership must be voluntary; ABAWDs cannot be required to participate in a workforce partnership.

Another State agency explained how they interpreted the proposed workforce partnership regulation to mean State agencies would need to create ''Workforce Partnerships'' similar to those in WIOA. The State agency asked how the proposed workforce partnerships would be distinguished from the current WIOA partnerships. The State agency also explained their interest in examples of partnerships that operate outside of the WIOA regulations. As discussed above, workforce partnerships described at 7 CFR 273.7(n) are a new concept created by the Act in 2018 and are separate from industry or sector partnerships defined by WIOA, from the E&T program, workfare, and other activities currently described in regulations. Workforce partnerships, as described at 7 CFR 273.7(n), must meet very specific criteria, including a set of certification requirements, and are one additional way for SNAP participants to meet their SNAP work requirements and gain skills. The Department is not aware of any existing workforce partnerships that meet the criteria in 7 CFR 273.7(n).

The Department also received two comments regarding the burden of providing a list of workforce partnerships to all SNAP work registrants at certification and recertification, as required in proposed 7 CFR 273.7(n)(10). A local government agency felt this requirement, as proposed, was onerous, unnecessary, and potentially confusing to work registrant households who may not be a good match for a slot in a workforce partnership, but who would be required to receive information about them anyway. The local government agency explained they would be in a better place to determine if a work registrant was a good match for a workforce partnership and, therefore, State agencies should be given the flexibility to target information about workforce partnerships to those most likely to benefit. A State agency and a professional association did not oppose providing the list, but felt it would take at least a year to develop and make the system changes to distribute it, particularly given the backlog of system changes resulting from the COVID–19 public health emergency. The Department's intent in requiring the State agency to provide the list of workforce partnerships at certification and recertification was to ensure that SNAP households were made aware of their existence. Since SNAP households cannot be required to participate in a workforce partnership, but a workforce partnership can be a way for a SNAP participant to meet their work requirements, the Department wanted to make sure work registrants who could benefit from participation, received the appropriate information. In response to comments, the Department has concluded that State agencies need not provide a list of workforce partnerships at certification and recertification to all work registrants, as this would be overly burdensome and potentially confusing to some SNAP participants. However, the State agency must inform any SNAP participant determined as likely to benefit from participation in a

workforce partnership of the availability of the workforce partnership, and provide the participant with all available pertinent information regarding the workforce partnership to enable the participant to make an informed choice about participation. State agencies are also encouraged to include workforce partnerships in the list of employment and training opportunities provided to households with no reported earned income at 7 CFR 273.14(b)(5).

In conclusion, the Department codifies the regulations pertaining to workforce partnerships as proposed, with one modification at 7 CFR 273.7(n)(10) to require the State agency to target information about workforce partnerships to SNAP participants most likely to benefit from participation in workforce partnerships.

Minimum Allocation of 100 Percent Funds

Current regulations at 7 CFR 273.7(d)(1)(i)(C) provide that no State agency will receive less than $50,000 in Federal E&T grant funds and set forth the methodology to ensure an equitable allocation among the State agencies. The Act increased this baseline of Federal E&T funds for each State to $100,000 in section 16(h)(1)(D) of the FNA. The Department proposed to modify 7 CFR 273.7(d)(1)(i)(C) to reflect the change in the baseline, and received one comment on this provision, which was supportive. The Department is therefore finalizing the regulatory language as proposed.

Prioritized Reallocation of Employment and Training Federal Grant Funds

Current regulations at 7 CFR 273.7(d)(1)(i)(D) provide the process for the Department to reallocate unobligated or unexpended Federal E&T funds to other State agencies requesting additional E&T funds. The Act introduced priorities for the reallocation of these funds in section 16(h)(1)(C)(iv) of the FNA. Those priorities are: At least 50 percent shall be reallocated to requesting State agencies that were awarded grants to operate E&T pilots under the Agricultural Act of 2014 (Pub. L. 113–79) (also known as the 2014 Farm Bill), to conduct those E&T programs and activities from the pilots that the Secretary determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance; at least 30 percent must be available to State agencies requesting funds for E&T programs and activities authorized under section 6(d)(4)(B)(i) of the FNA that are targeted to individuals with high barriers to employment and that the Secretary determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance; and the remaining funds to other State agencies requesting additional funds for E&T programs and activities that the Secretary determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance. The Department proposed to add new paragraph 7 CFR 273.7(d)(1)(iii) to specify these priorities for the reallocation of funds. Additionally, the Department proposed to add new paragraph 7 CFR 273.7(c)(6)(xix) to specify that State agencies requesting additional funds would need to submit those requests when their E&T State Plan is submitted for the upcoming Federal fiscal year. Lastly, the Department proposed to reallocate any unobligated funds remaining after the prioritized reallocation process described above at the proposed new 7 CFR 273.7(d)(1)(iii)(E) to State agencies requesting additional funds for E&T programs and activities that the Secretary determines have the most demonstrable impact.

The Department received five comments on this provision, all of which were supportive of the proposed rule; however, commenters did provide some additional suggestions as detailed below.

With regard to the 30 percent reallocation focused on individuals with substantial barriers to employment, three commenters suggested that, when the State agency requests funds, the State agency estimate the percentage of E&T participants that the State agency expects to serve for each of the listed categories of highly-barriered individuals. Another commenter suggested it may be advantageous for reallocated funds to serve a specific target population of jobseekers (*e.g.,* individuals experiencing homelessness) who are disproportionately under-represented among existing E&T participants in the State seeking additional E&T funds. The Department agrees that focusing reallocated funds on individuals with high barriers to employment is an opportunity to target E&T funds to individuals most likely to need extra support, which is the objective of the 30 percent reallocation. However, the Department does not believe additional qualifying criteria (like the percentage of E&T participants that the State agency expects to serve falling into each of the listed categories) are necessary to achieve this objective. The Department believes creating additional criteria to determine how funds are distributed would actually hamper the Department's ability to balance all concerns and re-distribute funds in the most efficient and impactful manner.

Two commenters recommended that the Department require State agencies include in their request for reallocated funds under 7 CFR 273.7(d)(1)(iii)(F) whether the State agency plans to initiate or maintain new services, enhanced services, or new slots with the reallocated E&T funding. The Department does not believe the required inclusion of this information in the State agency's request would significantly alter how reallocated funds are distributed, as a result the Department does not believe a change is necessary.

In conclusion, the Department codifies the regulatory text as proposed without any changes.

Advisement of Employment and Training Opportunities

The Act added a requirement at section 11(w) of the FNA that, at the time of recertification, State agencies advise SNAP household members subject to the requirements of section 6(d) of the FNA (the general work requirements) of available employment and training opportunities, if these individuals are members of households containing at least one adult, with no elderly or disabled individuals, and with no earned income at their last certification or required report. The Department proposed to codify this requirement in proposed paragraph at 7 CFR 273.14(b)(5). As a minimum standard for meeting this requirement, the Department proposed that State agencies provide the household, in either electronic (*e.g.,* on a website or in an email) or in printed form, a list of available employment and training services for household members subject to the general work requirements. The Department clarified that employment and training services are not limited to SNAP E&T. Rather, State agencies should also provide information about the availability of opportunities through the American Job Centers or local community-based organizations. This is particularly important in areas that do not operate SNAP E&T programs. The Department encouraged State agencies to consult with their Departments of Labor when developing information about available employment and

training services. In meeting this requirement, State agencies should consider how to best target lists of employment and training opportunities to increase access of work opportunities for SNAP participants, including creating tailored lists for certain regions or municipalities, or for SNAP participants with particular career interests or barriers to employment.

The Department received five comments on this provision, all of which were generally supportive. The commenters suggested the list of employment and training opportunities be provided in paper whenever possible because some SNAP participants may not have access to reliable internet, and to make sure the list is updated at least annually. The Department agrees that some SNAP participants may not have reliable access to the internet and believes State agencies are in the best position to know how to ensure participants can access the information, either electronically or in paper form. The Department also believes that the list of training opportunities should be updated as often as is necessary to maintain a reasonable level of accuracy in the information provided, and believes State agencies are in the best position to determine this frequency. The commenters also recommended that the list of training providers be paired with labor market information to help SNAP participants identify the ''fastest growing or largest sectors for entry-level jobs and living wage jobs that can be accessed with limited training, and the career pathways associated with them.'' While the Department believes this information may be helpful to SNAP participants and would encourage interested State agencies to provide this additional information, the Department does not believe that requiring the inclusion of labor market information is necessary to meet the statutory obligation and would constitute an additional burden for State agencies that outweighs the benefits. Commenters also recommended that the list be made available to underemployed SNAP participants and E&T participants. The Department notes that while the list of training opportunities must be provided to the specific set of households with no earned income described in the previous paragraph, State agencies may provide the list to a broader group of SNAP households at their discretion.

In conclusion, the Department finalizes the regulatory text as proposed without any changes.

Work Programs for Fulfilling the ABAWD Work Requirement

Current regulations at 7 CFR 273.24(a)(3) define the types of work programs in which ABAWDs may participate to meet the ABAWD work requirement and thereby remain eligible beyond the 3 months in 36-month time limit. The Act added the following types of programs to that definition in section 6(o)(1) of the FNA: An employment and training program for veterans operated by the Department of Labor or the Department of Veterans Affairs, as approved by the Secretary; and workforce partnerships. The Department proposed to add these programs to the existing paragraph at 7 CFR 273.24(a)(3). As noted earlier, the Act also changed section 6(o)(1)(C) of the FNA by replacing the term ''job search program'' with ''supervised job search program.'' For the purposes of ABAWD work requirements, the Department proposed to implement this terminology change by revising 7 CFR 273.24(a)(3)(iii).

The Department received four comments on this provision, all of which were generally supportive. Commenters supported the Department's clarification that job search does not need to be supervised when integrated as a subsidiary activity into one or more other components, so long as it makes up less than half the time in the component, as provided in The Joint Explanatory Statement of the Committee of Conference issued with the Act (Conf. Rept. 115–1072, p. 617). Commenters also supported the Department's reiteration of current policy that job search, whether supervised or not supervised, and job search training activities can count toward the ABAWD work requirement, so long they are offered as part of other E&T program components and comprise less than half the total required time spent in the components. However, commenters did ask for further clarification regarding how ''total required time spent in the components'' should be measured for the purposes of ensuring job search, supervised job search, and job search training make up less than half the total required time spent in the component (for instance, can the fraction of time spent in job search be calculated over the average length of the component). The Department recognizes that different E&T components run for different lengths of time and comprise different activities at different points in time. For this reason, the Department has always provided flexibility to State agencies to determine the most effective and efficient way to calculate if job search, supervised job search, or job search training make up less than half the total required time spent in the component for the purpose of compliance with the ABAWD work requirement. The Department will continue to provide this flexibility to State agencies.

In conclusion, the Department finalizes the regulatory text as proposed without any changes.

Discretionary Exemptions for ABAWDs Subject to the Time Limit

Current regulations at 7 CFR 273.24(g) state that each State agency shall be allotted exemptions equal to an estimated 15 percent of ''covered individuals,'' as defined at 7 CFR 273.7(g)(ii). States can use the exemptions available to them to extend SNAP eligibility for a limited number of ABAWDs subject to the time limit. When one of these exemptions is provided to an ABAWD, that one ABAWD is able to receive one additional month of SNAP benefits. The Act changed the number of exemptions allocated by the Department to State agencies each Federal fiscal year from 15 percent to 12 percent of the ''covered individuals'' in the State, and this change took effect in Fiscal Year 2020. The Department proposed replacing the number ''15'' with the number ''12'' in paragraphs 7 CFR 273.24(g)(1) and 7 CFR 273.24(g)(3), and also proposed changing the name of these exemptions from ''15 percent exemptions'' to ''discretionary exemptions'' in paragraph 7 CFR 273.24(g).

The Department received six comments on this section. Two commenters supported the change, three commenters opposed the change, and one did not express a clear opinion. A not-for-profit agency who supported the change felt that these exemptions hold back able-bodied adults who could otherwise rise out of welfare, thus trapping prospective workers in dependency and taking benefits away from those more in need. The commenter explained that reducing the number of exemptions would provide more opportunity for work to more individuals. The commenter also felt the name change to ''discretionary exemptions'' emphasized that States should use discretion when applying the exemptions to unusual circumstances when ABAWDs face unique barriers to work or training not already covered by another exemption. The commenters who opposed the provision emphasized how important these exemptions are for low-income individuals struggling with multiple barriers to work, including domestic violence survivors. However, the

commenters also acknowledged that the Department has no discretion in implementing the statutory change from 15 to 12 percent. The Department agrees that there is no discretion in implementing this change.

In conclusion, the Department finalizes the regulatory text as proposed without any changes.

Informing SNAP Participants About Their Work Requirements

In the proposed rule, the Department noted that many of the changes made by section 4005 of the Act emphasized State agency responsibility to assist SNAP participants in finding and retaining employment. The Department believes that foundational to this increased accountability for both the State agency and SNAP participants is improved communication between the State agency and SNAP participants regarding the nature of any work requirement that the SNAP household may be subject to, consequences for not complying with work requirements, and how to find more information. The Department also noted in the proposed rule that a single individual may be subject to multiple work requirements, which may be confusing for the household to decipher to ensure compliance, especially if these requirements are communicated to the individual at different times via different mediums. In order to streamline and improve communication between the State agency and the household, and to improve the household's customer service experience, the Department proposed to consolidate the State requirement to inform individuals of their applicable work requirements (*i.e.,* the general work requirements, including the mandatory E&T requirement, and the ABAWD work requirement). This consolidated work information requirement would take two forms: A single written notice and a comprehensive oral explanation of all the work requirements that would pertain to a particular household. The consolidated work information requirement would merge two existing requirements to inform the household about their work requirements (*i.e.,* the general work requirement and mandatory E&T) with a new more clearly delineated requirement to inform ABAWDs regarding their ABAWD work requirement and time limit. The consolidated work information requirement to inform households of all applicable work requirements would be added at new 7 CFR 273.7(c)(1), 7 CFR 273.7(c)(2) and 7 CFR 273.24(b)(8). The Department proposed that the new written notice would need to include all pertinent information related to each of the applicable work requirements for individuals in the household, including: An explanation of each applicable work requirement; exemptions from each applicable work requirement; the rights and responsibilities of each applicable work requirement for individuals subject to the work requirements; what is required to maintain eligibility under each applicable work requirement; pertinent dates by which an individual must take any actions to remain in compliance with each of the applicable work requirements; the consequences for failure to comply with each applicable work requirement; and any other information the State agency believes would assist the household members with compliance. If the household were to contain an individual who is subject to mandatory E&T, the written notice would also need to explain the individual's right to receive participant reimbursements for allowable expenses related to participation in E&T, up to any applicable State cap, and the responsibility of the State agency to exempt the individual from the requirement to participate in E&T if the individual's allowable expenses exceed what the State agency would reimburse, as provided in paragraph 7 CFR 273.7(d)(4).

The Department received 28 comments on this provision. Seventeen commenters supported the provision, ten commenters provided conditional support with suggestions for improvement, and two commenters opposed the provision. Supporters generally felt that the new consolidated requirement to provide information about the work requirements to households will help individuals understand their responsibilities and expectations, allow participants to share concerns or ask questions, and increase participant awareness of what they must do to prevent unexpected termination of SNAP benefits.

Several commenters in support of providing the consolidated work information to participants proposed adding to the written notice an explanation of the process for requesting good cause consideration, examples of good cause circumstances, and contact information to initiate a good cause request. The Department agrees, and has added an explanation of good cause to the list of pertinent information in 7 CFR 273.7(c)(2)(iii).

In addition to including good cause information, a legal services agency and a not-for-profit agency also recommended that the written and oral information include: The full scope of ways that an individual can meet the work requirement; the list of exemptions on the notice itself (so that the State agency does not direct individuals to a website they may not be able to access); how to claim exemptions; and the fact that an exemption can be claimed at any time if there is a change in circumstances. Conversely, the Department also received a comment from a State agency arguing that including the full list of exemptions for each work requirement on the written statement would be unmanageable and confusing to participants. The Department is interested in balancing the need to provide pertinent information to participants with the readability of the document. As a result, the Department has revised the final regulation at 7 CFR 273.7(c)(2)(iii) to require that the written notice include information on how to claim an exemption and claim good cause, and provide contact information to initiate a request. However, the Department notes that it is the responsibility of the State agency to screen for exemptions from the general work requirement, mandatory E&T and the ABAWD work requirement, and not the responsibility of the participant to ''request'' an exemption. Similarly, it is the State agency's responsibility to establish good cause for failure to meet the general work requirements and not the responsibility of the participant to ''request'' good cause. That being said, participant circumstances can change after certification and the Department believes it would be helpful to the participant to know how to inform the State agency of this change in circumstance, if the participant believes they may qualify for an exemption or good cause. The Department also understands that providing the entire list of exemptions, particularly from mandatory E&T, could be quite extensive and confusing to participants. Nonetheless, the State agency is required to screen for exemptions during the application process, and has an opportunity to explain the exemptions to the client at that time. Providing the full list of exemptions is also a helpful reference for participants should their circumstances change. For these reasons, the Department believes it is important to include the full list of exemptions in the written notice. Lastly, with regard to the comment to include an explanation of ways the individual can meet the work requirement, the Department believes the requirement, as proposed, to include in the written notice ''what is required to maintain

eligibility under each applicable work requirement,'' already calls for a description of the ways the individual may meet their work requirement and believes it unnecessary to make an addition to the regulatory text. Nevertheless, the Department encourages State agencies to include examples of how to meet the mandatory E&T and ABAWD work requirements, as applicable, in the written notice and oral explanation to aid participant comprehension.

A legal services agency commented that the proposed regulatory text at 7 CFR 273.7(c)(1) and 7 CFR 273.7(c)(2) was unclear regarding to whom the oral explanation and written notice should be directed, *i.e.,* the head of household or each individual household member with a work requirement. The commenter asked the Department to clarify that the oral explanation and written notice must be given specifically to the individual with the work requirement, not solely to the head of household, because the individual's compliance impacts the rest of the household. The commenter explained that, because the work rules are unique and extremely complex, communicating this important information only to the head of household and not also directly to the individual subject to the work requirement, means the message could be muddled or not communicated at all. The commenter also asked that the State agency be required to include in the oral explanation that the individual should review the written notice, as well as where the individual can go to find resources and learn more information. The Department understands the interest in providing the written notice and oral explanation to each individual in a household subject to a work requirement, to ensure information is shared accurately and comprehensively with the individual who needs it. However, the Department believes that such a requirement for the oral explanation would be impractical given the challenge, in some instances, of tracking down in a short period of time several individuals per case, and could potentially slow application processing. The proposal is also out of sync with other SNAP regulations pertaining to the eligibility process, like the SNAP interview, that do not require the participation of more than one individual. The Department also notes that, for the purposes of work registration, an authorized representative has long been allowed to register others in the household because work registration must occur prior to certification (see 7 CFR 273.7(a)(1)(i)). For similar practical reasons, the Department believes one written notice should be sent to the household, but language should be included in the written notice that clearly states which individuals in the household are subject to which work requirement. Information to this effect has been added to the final regulatory text. The Department has also modified the text in 7 CFR 273.7(c)(1)(ii) through (iii) to more clearly indicate that the household is the recipient of the oral explanation and written notice.

A workforce training agency recommended adding a requirement that the State agency must follow up by phone and mail to notify ABAWDs and mandatory E&T participants in advance of dates by which an individual must take action. The commenter explained that mandatory participants often do not understand that they must report to a location to establish a plan for E&T, and miss important information because they did not receive a piece of mail or understand the consequence of missing that date. Similarly, the commenter believed ABAWDs should have specific follow-up by case managers if they are approaching their third month of eligibility and need to prove compliance with the work requirement. The Department agrees that ABAWDs and mandatory E&T participants may often miss important information detailing the necessary steps to maintain eligibility. For this reason, with this final rule-making, the Department has added the requirement at 7 CFR 273.7(c)(1)(ii) and 273.24(b)(8) that, during the application process, at recertification, and whenever an individual loses an exemption or there is a new household member, the State agency must provide each household with a written notice and oral explanation regarding the applicable work requirement for individuals in the household. The Department also believes the new requirement that each E&T participant receive case management services will help participants better navigate their work requirements and support participants who are struggling to meet important milestones. As a result, the Department does not believe that an additional State notification requirement is necessary.

Two non-profit agencies suggested the written notice must be: Provided in a timely manner; written at a widely-accessible reading level; translated as needed; and be accessible to people with disabilities. One commenter asked the Department to consider providing participants with an explanatory video about the information contained in the statement. The commenter also stated that the oral explanation be provided in the SNAP participant's spoken language of choice, or via sign language, as needed. Several commenters urged the Department to develop and share with State agencies model notices that have been user-tested for both plain language and clear information about the steps that participants must take in order to retain their benefits. A professional association asked the Department to clarify that the written notice can be delivered in electronic form without a waiver, consistent with USDA memorandum issued on November 3, 2017, ''Electronic Notice Waivers and Options.'' [5] The commenter suggested the allowance of electronic notices is beneficial to clients who prefer accessing information through electronic devices and may allow for greater access to information.

The Department agrees that, to be helpful to SNAP participants, the oral explanation and written notice must be provided in a timely manner, be clearly written or spoken, and be provided in the appropriate language. Existing SNAP regulations at 7 CFR 272.4(b) lay out procedures to ensure State agencies provide program information in languages that reflect those spoken in the surrounding community. State agencies, in accordance with existing laws, must also provide reasonable accommodations to individuals with disabilities, and regulations at 7 CFR 272.6 lay out procedures for participants to file a discrimination complaint. The Department will consider how to effectively provide technical assistance to State agencies as they develop the written notice and scripts for the oral explanation to help ensure they are clear, comprehensible, and in compliance with existing regulations. The Department will also consider how to support making use of new innovative platforms, like videos, to supplement the requirements in the regulation. State agencies may choose to provide the written notice as an electronic notice if they do so in accordance with the FNS memorandum, ''Electronic Notice Waivers and Options'' issued on November 3, 2017, and other applicable policy guidance and regulations. In particular, the State agency must notify its Regional Office upon adopting e-notices and provide a list of the notices that will be offered electronically. The State agency must also include this information in its SNAP State Plan. As a result, no changes to the regulatory text are required.

[5] *https://fns-prod.azureedge.net/sites/default/files/snap/Memo-Electronic-Notice-and-Other-Options-11317.pdf.*

One State government and one local government agency opposed the requirement to provide a written notice and oral explanation of the work requirements because of the increased administrative burden. In addition, one professional organization, while supportive, also cautioned about the increased burden to State agencies. The local government agency and a professional organization noted that, particularly during the COVID–19 public health emergency, any additional administrative and fiscal requirements imposed on the State agency would be particularly burdensome since they are already experiencing increased applications and special operational demands imposed by the public health emergency. The professional organization requested that the Department consider a reasonable timeline for implementation of the new requirement. A State agency explained that adding the level of detail the Department is proposing would be more confusing to participants and most likely would result in an increased administrative burden for State agencies as they help clients understand the written statement, leading to further delays in individuals beginning to participate in E&T. The State agency further explained their existing process is less burdensome and provides targeted information to participants at different points in the process based on the needs at that time, for instance, at application and interview, and again when the participant makes contact with the E&T provider. The State agency recommended that this process continue to be allowable. The State agency also allowed that participants don't always read their notices and miss important information.

The Department agrees that information about the work requirements can be overwhelming to participants, particularly when multiple individuals in the household may be subject to different requirements. For this reason, the Department believes it is important to have a comprehensive and consolidated written notice of this information during the application process and at recertification, so that participants are clear on the expectations from the start. For instance, information on reimbursements for E&T participants should be provided during certification, and not withheld until the participant makes their first contact with an E&T provider or attends an E&T orientation. During certification, the participant should also be informed that the State agency must exempt the individual if the costs to participate exceed the allowable amount of participant reimbursements. Otherwise, without that explanation, a participant could be inappropriately sanctioned for missing their first E&T appointment because they lacked transportation or child care, not realizing they could have received those services as participant reimbursements to support their participation in E&T. The Department also agrees that developing the new written notice and script for the oral explanation will take time and effort, but as explained by a different State agency, the additional time to develop the written notice and provide the oral explanation is time well-invested by reducing the likelihood of a participant misunderstanding or disregarding the work requirements, and reducing the possibility of participants losing benefits due to noncompliance. Additionally, the Department allowed for a longer implementation period for this provision (until October 1, 2021). As stated above, the Department is considering ways to work with State agencies to ensure the written notices and oral scripts are understandable and responsive to the information needs of participants. Information provided in a clear and comprehendible fashion may be more likely read and understood by participants. The Department would also like to point out that, while the final regulation is requiring the written notice and oral explanation be provided during the application process, recertification, and when a previously exempt individual or new household member becomes subject to a work requirement, nothing in the new regulation would prohibit State agencies or their E&T providers, as a best practice, from regularly sharing information with participants at important stages in their certification period to reinforce information previously provided. As already mentioned for E&T participants, case managers can also be an important support and information resource. The Department also notes that, as a best practice, State agencies are also encouraged to inform ABAWDs about their time limit when the area in which the ABAWD lives comes off a waiver.

In conclusion, the Department finalizes the requirement to provide a written notice and oral explanation of all applicable work requirements as proposed, with clarification of the information to be contained in the written notice and that the household is the target of the oral and written explanation.

Voluntary E&T Participation Time Limits

The Department proposed a technical correction to paragraph 7 CFR 273.7(e)(5)(iii) to align the regulations with the statutory provision at section 6(d)(4)(F)(iii) of the FNA, allowing voluntary participants to participate in E&T activities for more than the maximum number of hours calculated as their benefit divided by the minimum wage and for more than 120 hours in a month. The Department received no comments directly on this provision, but did make a change to this section based on a comment received on the subsidized employment provision discussed earlier in this preamble and to clarify that the Department does not interpret section 6(d)(4)(F)(iii) to override Federal and State minimum wage laws. The Department has modified language at 7 CFR 273.7(e)(5)(iii), as re-designated, to indicate that for any additional hours a volunteer chooses to participate in an E&T work program or workfare beyond the number of hours equal to the household allotment for that month divided by the higher of the applicable Federal or State minimum wage, the participant must earn a wage at least equal to the higher of the Federal or State minimum wage. This adjustment has been added to ensure no E&T participant works for less than the minimum wage.

Procedural Matters

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This final rule has been determined to be significant and was reviewed by the Office of Management and Budget (OMB) in conformance with Executive Order 12866. The table below presents the expected costs of the rule changes. Derivation of these costs, and the overall impact on Federal and State spending, are summarized in the discussion that follows.

TABLE 1—SUMMARY OF IMPACTS

In millions of dollars	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024	Total
Impacts on Federal Transfers (nominal dollars)						
Increased 100% E&T grant funding **	$13	$13	$13	$13	$13	$65
Impacts on Federal (50%) and State (50%) Administrative Costs (nominal dollars)						
Administrative costs/burden—case management +	39.8	39.8	39.8	39.8	39.8	199.0
Administrative costs/burden—related to sending new required ABAWD notice and notifying participants of Provider Determinations + #	0	(*)	6.8	6.8	6.8	20.4
Administrative costs/burden—reporting of additional measures + #	0	0	(*)	(*)	(*)	(*)
Total	39.8	39.8	46.6	46.6	46.6	219.4
Impacts on Burden of Participating Households (costs in nominal dollars)						
Household Burden—case management	4.6	4.6	4.6	4.6	4.6	23.0
Household Burden—Notification of Provider Determination #	0	0	(*)	(*)	(*)	(*)
Household Burden—List of E&T Services	0.8	0.8	0.8	0.8	0.8	4.0
Household Burden—ABAWD Notification #	0	0	1.6	1.6	1.6	4.8
Total	5.4	5.4	7.0	7.0	7.0	31.8

** The 2018 Farm Bill included an additional $13 million per year in 100 percent grant funding for E&T.
+ A portion of these costs are expected to be covered using existing 100 percent grant funding.
# These provisions are effective 10/1/21.

Regulatory Impact Analysis: A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any one year). The Department does not anticipate that this final rule will have economic impacts of $100 million or more in any one year, and therefore, it does not meet the definition of ''economically significant'' under Executive Order 12866. An analysis assessing the costs and benefits of this rule is presented below.

As explained above, this rule codifies the 2018 Farm Bill changes related to E&T program operations, the ABAWD work requirement, and the allocation and reallocation of 100 percent grant funds. Those changes and their expected costs and benefits are summarized briefly below:

Changes to SNAP E&T Programs, Components, and Activities

Pursuant to the 2018 Farm Bill, the final rule makes several changes to E&T components and allowable activities, including:

- Replacing job search with supervised job search as an E&T component and clarifying that ''supervision'' may be provided through a variety of modes including virtual modes to ensure States can continue to deliver services during the COVID pandemic;
- eliminating job finding clubs as an allowable activity;
- replacing job skills assessments with employability assessments;
- adding apprenticeships and subsidized employment as allowable activities;
- requiring a 30-day minimum for receipt of job retention services; and
- allowing activities from the 2014 Farm Bill E&T pilots to become allowable E&T components, if those activities had a demonstrable impact on the ability of participants to find and retain employment that leads to increased income and reduced reliance on public assistance.

The rule also implements the 2018 Farm Bill provision that requires all E&T programs to provide case management services to E&T participants, in addition to one or more E&T components. We expect the cost of the case management to be approximately $39.8 million per year. While all E&T participants must receive some case management, there is no expectation that participants receive ongoing case management if that is not desired by the participant and the participant is otherwise successfully participating in E&T. Consistent with the estimates used for the Paperwork Reduction Act section of the proposed rule, we assume approximately 460,000 annual E&T participants participate on average for 3.27 months. We further assume the average participant receives just over 1 hour total of case management services (30 minutes for the initial case management meeting and 15 minutes for subsequent monthly meetings). In addition, we expect caseworkers to spend approximately 10 minutes per case management session preparing for the meeting and 5 minutes recording case notes and otherwise documenting the case management interactions (for a total of 1.87 hours per case). Using a fully-loaded hourly rate (including benefits and indirect costs) of approximately $46.32 [6] results in an annual cost of about $39.8 million, shared equally. The Department believes that initially most States will use 100 percent grant funding, including the increased funding provided through the 2018 Farm Bill, to pay for the required case management services. In some States this may mean States reallocate funds from other activities in order to provide sufficient case management.

The case management requirement will also increase burden on individual

[6] Based on May 2019 BLS Occupational and Wage Statistics for ''Social Workers, All Other,'' available at *https://www.bls.gov/oes/tables.htm,* plus approximately 50 percent for fringe and overhead. Overhead is included because this is a new activity and will likely result in hiring of additional staff or contractors.

SNAP participants as they will be required to participate in monthly discussions with their case manager regarding their E&T participation and plans for self-sufficiency. While the Department expects most of the conversations will be held by telephone, in some instances E&T participants may need to travel to meet their case manager in person. Therefore, the average number of burden hours per participant includes travel time. Total burden per participant is 1.4 hours, compared to an estimate of 1.32 hours for State agencies (excluding the time needed for note taking and other documentation).[7] The additional burden is expected to cost SNAP E&T participants approximately $4.6 million annually. While these estimates include travel time to permit E&T participants to meet their case manager in person, the Department notes that the rule provides States with flexibility to deliver case management services virtually. It is likely that few participants will meet face-to-face with a case manager during the current public health emergency; therefore the burden on participants could be lower for the duration of the pandemic.

TABLE 2—ANNUAL COST OF BURDEN ASSOCIATED WITH CASE MANAGEMENT SERVICES

	State agency burden	Household burden
E&T participants per year	460,000	460,000
Burden hours per participant	1.87	1.4
Hourly wage rate *	$46.32	$7.25
Total Annual Cost (Federal and State shares millions)	$39.8	$4.6

* State Agency rate is a fully loaded rate. Household rate is equal to the federal minimum wage. Totals may not sum due to rounding.

Changes to Funding Allocation/ Reallocation

The final rule establishes a funding formula for reallocated E&T funds, in accordance with statutory changes. It also codifies the increase to $100,000 in the minimum allocation of 100 percent funds to State agencies. While these changes may affect the amount of funds received by individual States, the Department does not expect these changes to affect overall spending on SNAP E&T. Prior to the 2018 Farm Bill, three States (Virgin Islands, Wyoming and North Dakota) received less than the $100,000 minimum allocation and now receive a larger grant. Over the past three years, less than $10 million per year in 100 percent grant funds have been reallocated, and the amount available for reallocation has been declining.

Changes Affecting Work Requirements

Pursuant to the 2018 Farm Bill, the rule makes a number of changes affecting SNAP work requirements (both the ABAWD requirement and mandatory E&T). The final rule:

- Adds workforce partnerships to the list of programs that may be used to meet SNAP work requirements;
- adds employment and training programs for veterans operated by the Department of Labor or the Department of Veterans Affairs to the list of work programs that may be used to meet the ABAWD work requirement;
- requires State agencies to provide an oral explanation and written notice to ABAWDs of all applicable work requirements during certification, recertification, and when a previously exempt individual or new household member becomes subject to a work requirement;
- codifies the statutory change that reduces the number of ABAWD work exemptions from 15 percent to 12 percent and change their name to ''discretionary exemptions;''
- requires State agencies to provide good cause for noncompliance with E&T if an appropriate or available opening in the E&T program is not available;
- requires State agencies to re-direct individuals who are determined by a provider not to be a good fit for the E&T component to other more suitable activities and notify the participant of the provider's determination; and
- requires that, at recertification, all State agencies advise certain types of households subject to the general work requirement of employment and training opportunities.

Most of these provisions are not expected to have cost impacts. Most States have not historically and do not currently use all of their available discretionary exemptions, so the reduction in the number of available exemptions is unlikely to impact individual ABAWDs.[8] While the regulatory impact analysis for the final rule *Supplemental Nutrition Assistance Program: Requirements for Able-Bodied Adults Without Dependents* assumed that some States would use their carryover exemptions and would subsequently use more (although not all) of their available discretionary exemptions to exempt individual ABAWDs in response to the rule's changes to waiver eligibility, those regulatory changes have been set aside by a Federal court. Furthermore, the Families First Coronavirus Response Act generally suspended the ABAWD work requirement and time limit for the duration of the COVID–19 public health emergency, so individual ABAWDs are unlikely to be at risk of losing SNAP at this time. Together, these recent changes reduce the need for States to use all of their available exemptions.[9]

Permitting individuals to fulfill the ABAWD work requirement or mandatory E&T through workforce partnerships, which are operated by private employers or non-profit groups, may result in additional ABAWDs meeting the work requirement and retaining SNAP eligibility. However, such programs are not currently widespread. Given the lack of available data for such programs and the requirements for establishing a workforce partnership, the Department does not believe they will become

[7] For more information on the derivation of these estimates, please see the Paperwork Reduction Act section of this proposed rule.

[8] Typically States use far fewer exemptions in a fiscal year than they earn (see FY 2020 Discretionary Exemptions with Carryover). In 2019, nine States used more exemptions than they earned for FY 2019 and thus had to use a portion of their carryover exemptions. In three of those States, most carryover exemptions were used as an adjustment to account for misreporting of exemptions used in earlier years. Of the remaining 44 States, none used more exemptions in 2019 than they earned in 2020 (the first year exemptions were reduced to 12 percent).

[9] A small number of States have continued to offer work program slots to ABAWDs, which results in those ABAWDs being subject to the ABAWD work requirement and time limit. However, in most cases States have not offered ABAWDs slots in work programs during the pandemic.

commonplace and has, therefore, assumed there would be only negligible impacts of this change on the SNAP ABAWD population.

The requirement that State agencies inform ABAWDs both orally and in writing of the ABAWD work requirement and time limit is expected to result in additional burden for State agencies as this is a new requirement. The Department received a comment that informing ABAWDs of their work requirement may take longer than proposed; as a result FNS has increased the burden in the final rule. However, having this information may mean that ABAWDs better understand the work requirement and how to meet it, and thus are better able to fulfill those requirements and retain SNAP eligibility. States agencies are already required to inform work registrants and mandatory E&T participants of their respective work requirements in existing regulations at 7 CFR 273.7(c) (OMB Control Number 0584–0064; Expiration date 12/31/2020, currently under review with OMB). This this additional burden is expected to cost approximately $6.7 million annually when implemented on 10/1/21, with costs divided equally between State agencies and the Federal government. The table below shows how these estimates were derived. The Department notes that the actual burden associated with this provision may be lower if the COVOD–19 public health emergency is still in place at implementation.

TABLE 3—STATE AGENCY COST OF BURDEN RELATED TO SENDING NEW REQUIRED ABAWD NOTICE

	ABAWD written notice
Occurrences per year [10]	2,700,000
Burden hours per occurrence	0.083
Hourly wage rate [11]	$30.12
Total Annual Cost (Federal and State shares, millions)	$6.7

States will also face burden related to the requirement that they notify participants when a provider determination has been made that the individual is not a good fit for the E&T component and re-direct individuals to other more suitable activities. The Department estimates that the burden associated with this activity will be about $0.11 million annually when implemented on 10/1/21. To the extent that fewer individuals participate in E&T due to COVID–19, actual burden associated with notifying individuals of the provider determination may be lower for the duration of the pandemic.

TABLE 4—STATE AGENCY COST OF BURDEN RELATED TO NOTIFYING PARTICIPANTS OF PROVIDER DETERMINATION

	Notify participant of provider determination
Occurrences per year [6]	46,000
Burden hours per occurrence [12]	0.083
Hourly wage rate [13]	$30.12
Total Annual Cost (Federal and State shares, millions)	$0.11

The Department also anticipates a small ($0.06 million) one-time burden for State Agencies to develop the new ABAWD written notice and the list of employment and training services that will be provided to work registrant households at recertification This assumes States spend on average 24 hours developing the list of E&T services and 40 hours developing the ABAWD notice, and an average wage of $18.41 per hour (64*18.41*53 State Agencies = $62,447).

ABAWDs will also face new burden associated with reviewing the ABAWD written notice when received. Households with work registrants, who will receive a list of E&T services at recertification, will face additional burden associated with reading that list. Each activity is expected to result in a minimal amount of administrative burden, about $2.4 million total over the two activities.

TABLE 5—HOUSEHOLD COST OF BURDEN RELATED TO NEW INFORMATIONAL ACTIVITIES

	ABAWD written notice	List of employment and training services
Occurrences per year [4]	2,700,000	5,496,000

[10] Estimates of occurrences of ABAWD notifications are based on the expected number of SNAP ABAWD participants in FY 2021. For more information on these estimates, please see the Paperwork Reduction Act section of this rule.

[11] Based on the Bureau of Labor Statistics May 2019 Occupational and Wage Statistics for ''eligibility interviewers, government programs,'' available at *https://www.bls.gov/oes/tables.htm.*

[12] Estimates of occurrences of notifying individuals of a provider determination assume 10 percent of E&T participants are found to be ill-suited for their assigned activity. For more information on these estimates, please see the Paperwork Reduction Act section of this rule.

[13] Based on the Bureau of Labor Statistics May 2019 Occupational and Wage Statistics for ''eligibility interviewers, government programs,'' available at *https://www.bls.gov/oes/tables.htm.*

TABLE 5—HOUSEHOLD COST OF BURDEN RELATED TO NEW INFORMATIONAL ACTIVITIES—Continued

	ABAWD written notice	List of employment and training services
Burden hours per occurrence [14]	.08	0.2
Hourly wage rate [15]	$7.25	$7.25
Total Annual Cost (Federal and State shares, millions)	$1.6	$0.8

While these changes are estimated to increase burden for State agencies and individuals, these changes are expected to provide important protections to individuals subject to the ABAWD time limit. The notice requirement will help ensure that these individuals are adequately informed of their responsibilities with respect to work requirements and of what steps they should take in order to comply with those requirements or if they believe they should be exempt from those requirements. The Department also notes that, in response to the COVID–19 pandemic, States currently have flexibilities regarding certification periods that may reduce the frequency of certification actions. In addition, as noted previously, the ABAWD time limit is temporarily and partially suspended. Therefore, actual burden on households may be lower than these estimates for the duration of the public health emergency.

Changes to Reporting Requirements

The final rule modifies the required reporting elements in the quarterly E&T Program Activity Report provided by State agencies to add four additional reporting elements to form FNS–583, which State agencies must submit annually with the further quarter report. These new reporting elements include (1) the number of SNAP participants who are required to participate in E&T (mandatory participants); (2) of those in (1), the number who begin participation in an E&T program; (3) of those in (1), the number who begin participation in an E&T component; and (4) the number of participants who are determined ineligible for non-compliance. Reporting on these additional elements is expected to increase reporting burden on 17 State agencies that currently operate mandatory E&T programs. The Department will add four reporting elements to form FNS–583, which State agencies must submit annually with the fourth quarter report. This additional burden is expected to be of minimal cost to State agencies.

TABLE 6—COST OF STATE AGENCY BURDEN, NEW REPORTING REQUIREMENTS

	State Agency burden
State agencies	17
Reports per year (4 additional elements)	1
Hours per response	51
Hourly wage rate [16]	$18.41
Total Annual Cost (Federal and State shares)	(*)

* Minimal—less than $1 million.

Overall Impact on E&T Spending

In addition to the 100 percent grant funding provided by the Federal government, most States spend their own funds on SNAP E&T services. This additional State E&T spending is matched by the Federal government and referred to as 50–50 spending. While the rule provisions are expected to result in some additional cost to State agencies (primarily related to case management and administrative burden), it is the Department's belief that States will use the following strategies as they modify their E&T programs in accordance with the statutory and regulatory changes:

- In the first five years after implementation, the Department expects that most States will use 100 percent grant funding, including the increased funding provided through the 2018 Farm Bill, to pay for the required case management services.
- The Department anticipates that changes to allowable components and activities, which may result in a higher cost per E&T participant, will initially be managed by adjusting the number of participants served through various components/activities rather than through investment of additional 50–50 matching funds by State Agencies. State Agencies' budgets are often less flexible (for example, prohibitions on running a deficit or budgets that cover multiple years) and may not permit immediate increases in State E&T spending. This is especially true currently due to the COVID–19 pandemic and the resulting need for States to redirect resources to public health activities.
- Over the five year period covered by these estimates, the Department expects that some but not all States will increase their investment in 50–50 matching funds to cover both the costs of case management services and to permit greater participation in new allowable activities and components that may show more success in moving individuals toward greater self-sufficiency.

In total, we estimate that these provisions of the rule will increase spending on E&T by $0 million in Fiscal Year (FY) 2020, and by $21 million over the five FYs 2020–2024. Costs would be

[14] Estimates of occurrences per year are based on the expected number of SNAP ABAWD participants and work registrants in FY 2021. For more information on these estimates, please see the Paperwork Reduction Act section of this rule.

[15] Based on the Bureau of Labor Statistics May 2019 Occupational and Wage Statistics for ''eligibility interviewers, government programs,'' available at *https://www.bls.gov/oes/tables.htm.*

[16] Based on the Bureau of Labor Statistics May 2019 Occupational and Wage Statistics for ''Office and Administrative Support Workers, All other,'' available at *https://www.bls.gov/oes/tables.htm.*

shared equally between the Federal government and State agencies.

The estimates were derived as follows:

• Between FY 2016 and FY 2018, the Federal share of 50–50 spending increased by about $17 million, from $171 million to $188 million. Therefore, we assume that the Federal share of State 50–50 spending would have increased by about $8 million per year.

• In response to the changes in allowable components and activities as well as the case management requirement, we assume that each year beginning in FY 2022 a small number of States increase their 50–50 spending beyond current projected spending. In FY 2020 and FY 2021, we assume no States increase their 50–50 spending due to the ongoing pandemic. In FY 2022, 4 States spend about 10 percent more, and by FY 2024 8 States have increased their spending by about 10 percent overall.

• The per-State increase in 50–50 spending is approximately $0.5 million per State. The per-State increase is estimated as follows: A 10 percent increase in 50–50 spending equals $20.5 million in FY 2020. There are 53 State agencies (including the District of Columbia, Guam, and the U.S. Virgin Islands), 43 of which currently spend 50–50 funding on E&T services, therefore $20.5 million is divided by 43 to calculate the average ($20.5 million/43 = $0.49 million).

TABLE 7—EXPECTED INCREASE IN STATE 50-50 SPENDING OVER TIME

(Dollars in millions)	FY 2020	FY 2021	FY 2022	FY 2023	FY 2024	Total
Pre-Farm Bill projected 50-50 spending	205	213	221	229	237	.....
10% increase (amount per State)	.49	.49	.49	.49	.49	.....
Number of States increasing spending	0	0	4	6	8	.....
State agency Cost	0	0	2	2	5	10
Total, Federal + State	0	0	4	7	10	21

*Totals may not sum due to rounding.

Benefits of Final Rule

The Department believes the statutory changes made by Section 4005 of the 2018 Farm Bill are intended to strengthen E&T programs and improve SNAP participants' ability to gain and retain employment, thus reducing participant reliance on the social safety net. The changes contained in the final rule allow for more evidence-based activities, requiring more accountability on the part of both State agencies and E&T participants, while also retaining State flexibility. The requirement to inform ABAWDs of their work requirement will help ensure that these individuals are adequately informed of their responsibilities with respect to work requirements and of what steps they should take in order to comply with those requirements, or if they believe they should be exempt from those requirements.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Agencies to analyze the impact of rulemaking on small entities and consider alternatives that would minimize any significant impacts on a substantial number of small entities. Pursuant to that review, the Secretary certifies that this rule would not have a significant impact on a substantial number of small entities. This final rule would not have a measurable impact on small entities because the changes required by the regulations are primarily directed toward State agencies operating SNAP programs and SNAP E&T programs. Some E&T providers may be considered small entities. This rule requires that E&T providers inform the State agency within 10 days when they have made a determination that an individual who was referred for E&T services is not a good fit for the component.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

Executive Order 13771

Executive Order 13771 directs agencies to reduce regulation and control regulatory costs and provides that the cost of planned regulations be prudently managed and controlled through a budgeting process. This final rule is considered an E.O. 13771 regulatory action. We estimate that it will impose $20.30 million in annualized costs at a 7% discount rate, discounted to a 2016 equivalent, over a perpetual time horizon.''

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local and tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures by State, local or tribal governments, in the aggregate, or the private sector, of $100 million or more in any one year. When such a statement is needed for a rule, Section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the most cost effective or least burdensome alternative that achieves the objectives of the rule.

This final rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of $100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

This Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.551 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.) FNS Regional offices are in contact with State agencies, who provide feedback on policies and procedures for the E&T program and overall SNAP policy.

Federalism Summary Impact Statement

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under Section

(6)(b)(2)(B) of Executive Order 13132. The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is intended to have preemptive effect with respect to any State or local laws, regulations or policies which conflict with its provisions or which would otherwise impede its full and timely implementation. This rule is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. Prior to any judicial challenge to the provisions of the final rule, all applicable administrative procedures must be exhausted.

Civil Rights Impact Analysis

FNS has reviewed the final rule, in accordance with Departmental Regulation 4300–004, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the rule might have on participants on the basis of race, color, national origin, sex, age, or disability. A comprehensive Civil Rights Impact Analysis (CRIA) was conducted on the final rule, including an analysis of participant data and provisions contained in the final rule. While the CRIA did not find any major civil rights implications, the CRIA outlines outreach and mitigation strategies that would lessen any possible civil rights impacts. This final rule will impact all State agencies in their administration of the E&T programs. Additionally, the final rule will impact applicants and recipients of SNAP who are E&T participants. However, the Department finds that the CRIA and the mitigation and outreach strategies outlined within the CRIA provide ample consideration to applicants' and participants' ability to participate in SNAP. For instance, FNS will provide implementation guidance and technical assistance to support State agencies implementation of the new regulations consistent with the final rule. FNS, through review and approval of E&T State plans, performance of management evaluations, and collection and analysis of required data elements, will monitor the implementation of the new rule to mitigate potential civil rights violations. Among the outreach strategies included in the CRIA, FNS National Office will communicate regulatory changes to Regional Offices who directly interact and provide technical assistance to State agencies. Regional Offices will also communicate with the National Office regarding implementation challenges so that FNS can take appropriate action.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments, or proposed legislation. Additionally, other policy statements or actions that have substantial direct effects on one or more Indian Tribes, the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes also require consultation.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian tribes and determined that this rule has tribal implications that require consultation under E.O. 13175. FNS discussed the proposed rule in Washington, DC on May 1, 2019, at the United States Department of Agriculture Farm Bill Tribal Consultation. FNS also discussed the final rule in a virtual Tribal SNAP Learning Session on October 30, 2020. FNS received no comments.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chap. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information by a Federal agency before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current valid OMB control number.

In accordance with the Paperwork Reduction Act of 1995, this final rule contains information collections that are subject to review and approval by the Office of Management and Budget; therefore, FNS is submitting for public comment the changes in the information collection burden that would result from adoption of the proposals in the rule. Once the information collection request is approved by OMB, the agency will publish a separate notice in the **Federal Register** announcing OMB approval.

Title: Employment and Training Opportunities in the Supplemental Nutrition Assistance Program.

OMB Number: 0584–NEW.

Form Number: FNS 583.

Expiration Date: N/A.

Type of Request: New request.

Abstract: This final rule would implement changes made by section 4005 of the Act to the E&T program to strengthen State and Federal accountability to move SNAP participants toward self-sufficiency. FNS is requesting a new OMB Control Number for the requirements in this final rule. Some of the final changes will modify current regulations resulting in an increase in the reporting burden for State agencies. Other requirements are new and will result in new mandatory reporting burden requirements for State agencies, as well as individuals participating in E&T. First, the Act requires that State agencies provide individuals participating in E&T with case management services. Many State agencies already provide case management activities to SNAP E&T participants; however, State agencies are not currently reporting this activity to the Department and the Department is not currently collecting case management activities from these State agencies. This regulatory change to require that State agencies provide these services as part of their E&T programs and include them in their E&T State plans will help ensure that E&T participants receive the guidance and support needed to move toward self-sufficiency. Second, the Act establishes that individuals participating in an E&T component who receive a provider determination (*i.e.,* are determined ill-suited) by the E&T provider for that component, must be engaged by the State agency to assess their mental or physical fitness or to identify another type of training or assistance. The Department requires at 7 CFR 273.7(c)(18)(i) that individuals who have received a provider determination be notified of this determination, and if the individual is an ABAWD, be notified that they will begin to accrue countable months. This process to notify individuals with a provider determination will constitute a new burden for State agencies and for SNAP participants who must exchange the information. Third, to increase State accountability for moving SNAP participants toward self-sufficiency, the Department has added at 7 CFR 273.7(c)(11) four additional data elements to the final quarterly E&T Program Activity Report (FNS 583 reports) (SNAP Employment and Training Program activity Report; OMB Control Number: 0584–0594; Expiration Date: 7/31/2023 currently under renewal) to collect information on the

number of SNAP applicants and participants who are required by the State agency to participate in an E&T program, of those the number who begin to participate in an E&T program and an E&T component, and the number of mandatory participants who are determined ineligible for failure to comply. Fourth, the Department requires in new paragraph 7 CFR 273.24(a)(5) to add a State agency requirement to inform every ABAWD in writing about the ABAWD work requirement and time limit, thus creating a new burden to develop and provide this written notice, and to participants to read this notice. This requirement to inform ABAWDs of their work requirement is added to a consolidated written notice that consolidates the requirements to inform ABAWDs, work registrants, and mandatory E&T participants of their work requirements, as applicable. The requirements to inform work registrants and mandatory E&T participants of their work requirements are already covered by an existing burden (OMB Control number: 0584–0064; Expiration Date 12/31/2020, currently under review with OMB). And fifth, the Department requires in new paragraph 7 CFR 273.14(b)(5) that, at a minimum, the State agency provide households with no earned income and with no elderly or disabled members a list of available employment and training services for household members subject to the general work requirements either electronically (*e.g.,* on a website or in an email) or in printed form. This requirement creates a new burden on State agencies to develop the list of opportunities and for participants to read the list. The Department notes that the final rule create a new requirement for State agencies to consult with their workforce development boards, and to explain in their E&T State plans the extent to which they coordinate with title 1 of WIOA. Based on the existing regulatory requirement to work with their State workforce development systems, this information is already collected by the Department through the E&T State plans and is included in an existing burden (OMB Control Number: 0584–0083; Expiration Date: 8/31/2023 currently under OMB review), as a result the new requirement in the Act is not expected to increase the existing burden.

The existing burden for the FNS–583 is currently covered under the information collection for the Food Programs Reporting System, OMB Control Number 0584–0594, expiration date 7/31/2023. The recordkeeping burden for the FNS 583 is already sufficient as documented in OMB Control Number: 0584–0339; Expiration Date: 1/31/2021. The basic recordkeeping requirement for household case file documentation is part of OMB Control Number: 0584–0064; Expiration Date 10/31/2020. FNS will add additional burden to this collection to accommodate the increased burden resulting from providing case management to E&T participants. FNS intends to merge the new reporting burden 0584–0594 and 0584–0064, once the final rulemaking information collection request is approved. At that time, FNS will publish a separate notice in the **Federal Register** announcing OMB's approval.

The Department received some comments directly on the cost and hour burden, as well as comments related to the underlying policy. As a result, the Department has made changes to the rule's burden. Regarding the requirement that all E&T participants receive case management, the Department received a comment from a State agency agreeing that the State agency will experience increased costs as a result of the requirement, but the State agency did not dispute the values provided in the burden. The Department did receive one comment that State agency staff will need time to prepare for the case management sessions, thus the Department added 10 minutes per case management meeting to account for this preparation time. Regarding the requirement in the proposed rule to send a Notice of E&T Participation Change (NETPC) when an individual receives an ill-suited determination, the Department received a comment from a State agency that the notice was unnecessary and more costly to implement than provided for in the burden. The Department, as described in the final rule preamble, has decided not to require the NETPC, and instead will only require that State agencies notify the participant with State discretion regarding the mode for providing the information. The burden has also been updated to account for the act of notifying the individual, rather than sending a formal notice. Regarding the new data elements for the FNS–583, the Department received several comments requesting the Department add a third and fourth data element capturing the number of individuals who begin an E&T component and the number of mandatory E&T participants who are sanctioned for failure to comply. The Department agreed with these commenters and has added a third and fourth data element to the FNS–583 fourth quarter report. The burden for the FNS–583 new data elements has been updated to include this third and fourth element and to correct errors in estimation during the proposed rule, resulting in a decrease in burden hours for this element. Regarding the requirement to inform ABAWDs of the ABAWD work requirement, the Department received one comment from a State agency that the impact of the proposal would add burden to the State agency, but on balance, the State agency believed that it may be time well spent if ABAWDs better understand the work requirement, thus reducing churn. The Department has modified the burden for informing ABAWDs of the work requirement by increasing the time to orally inform the ABAWD from two minutes to five minutes to account for the additional information commenters believed should be communicated during the interaction (*e.g.,* good cause and exemption). The Department also increased the amount of time it will take State agencies to develop the written notice from 24 to 40 hours to account for the greater amount of information required to be in the notice in the final rule. Regarding the requirement that State agencies advise certain households with zero earned income, the Department received no comments regarding the burden and has made no changes to the burden from what was proposed.

Respondents: State Agencies.

Estimated Number of Respondents: 53 State Agencies.

Estimated Number of Responses per Respondent: 108,575.64.

Estimated Total Annual Responses: 5,754,509.

Estimated Time per Response: 0.1899868.

Estimated Total Annual Burden on Respondents: 1,093,281.

Respondents: (Individuals) SNAP E&T participants.

Estimated Number of Respondents: 8,702,000.

Estimated Number of Responses per Respondent: 1.1199954034.

Estimated Total Annual Responses: 9,746,200.

Estimated Time per Response: 0.100411135.

Estimated Total Annual Burden on Respondents: 978,627.

The total burden for this rulemaking is 2,069,983 burden hours and 15,500,709 total annual responses.

Reg. section	Affected public	Respondent type	Description of activity	Estimated number of respondents	Estimated frequency of response	Total annual responses	Number of burden hours per response	Estimated total burden hours	Previous burden hours used	Differences due to program changes	Difference due to adjustment	Hourly wage rate *	Fully loaded hourly wage rate (x.33)	Estimated cost to respondents
7 CFR 273.7(c)(1)	State Agencies	State Agency E&T Case Manager *.	Provide Case Management Services.	53	28,381	1,504,193	0.493	741,567.15	0	0	0	$29.69	$39.4877	$29,282,781
7 CFR 273.7(c)(1)		State Agency E&T Case Manager *.	Document Case Management Services.	53	28,381	1,504,193	0.08	120,335.44	0	0	0	29.69	39.4877	4,751,770
7 CFR 273.7(c)(18)(i)		State Eligibility worker *.	Notify E&T Participants of Provider Determination.	53	868	46,000	0.083	3,818.00	0	0	0	22.65	30.1245	115,015
7 CFR 273.7(c)(11)		*State Agency Administrative Staff *.*	*Reporting FNS 583 data lements ** (OMB Control Number 0584–0594).*	*53*	*4*	*212*	*98*	*20,776.00*	*21,889*	*0*	*1,113*	*18.41*	24.4853	508,707
7 CFR 273.7(c)(11)		State Agency Administrative Staff *.	Reporting additional FNS 583 data elements.	17	1	17	4	68.00	0	51	0	18.41	24.4853	1,665
7 CFR 273.7(a)(5)		State Agency Administrative Staff *.	Develop ABAWD written statement of work requirements.	53	1	53	40	2,120.00	0	0	0	18.41	24.4853	51,909
7 CFR 273.7(a)(5)		State Eligibility worker *.	Inform ABAWDs of the ABAWD work requirement.	53	50,943	2,700,000	0.083	224,100.00	0	0	0	22.65	30.1245	6,750,900
7 CFR 273.14(b)(5)		State Agency Administrative Staff *.	Develop list of Employment and Training Services.	53	1	53	24	1,272.00	0	0	0	18.41	24.4853	31,145
Sub-Total State Agencies				53	108,575.642	5,754,509	0.1899868	1,093,281						40,985,186
7 CFR 273.7(c)(1)	Individual & Household.	E&T Participants.	Participate in Case Management.	460,000	3.27	1,504,200	0.426	640,789.00	0	0	0	7.25	n/a	4,645,720
7 CFR 273.7(c)(18)(i)		E&T Participants.	Review Information on Provider Determination.	46,000	1	46,000	0.083	3,818.00	0	0	0	7.25	n/a	27,681
7 CFR 273.7(a)(5)		E&T Participants.	Read ABAWD written statement of work requirements.	2,700,000	1	2,700,000	0.083	224,100.00	0	0	0	7.25	n/a	1,624,725
7 CFR 273.14(b)(5)		E&T Participants.	Read list of Employment and Training Services.	5,496,000	1	5,496,000	0.02	109,920.00	0	0	0	7.25	n/a	796,920
Sub-Total Individual/ Households.				8,702,000	1.119995403	9,746,200	0.1004111	978,627						7,095,046
Grand Total Reporting Burden with both affected public and States.				8,702,053	108,576.76	15,500,709	0.1336653	2,071,908	21,889	8,788	1,113			48,080,231

*Note: Each State Eligibility worker is counted once as all State Agency employees.

**Note: *FNS has not included the burden already approved for the current 583 reporting elements w/additional funds in the grand total. The current FNS 583 reporting elements are undergoing a separate revision with OMB control number: 0584–0594; Expiration Date: 7/31/2023; FNS is not seeking approval for these burden estimates in the request. All burden hours associated with the FNS 583 will be merged into 0584–0594 when OMB approves the information collection request (ICR) associated with the Final Rule.*

***Numbers may not add due to rounding.

E-Government Act Compliance

The Department is committed to complying with the E-Government Act, 2002 to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

List of Subjects

7 CFR Part 271

Administrative practice and procedures, Food stamps, Grant programs-social programs.

7 CFR Part 273

Administrative practice and procedures, Food stamps, Grant programs-social programs, Penalties, Reporting and recordkeeping.

Accordingly, 7 CFR parts 271 and 273 are amended to read as follows:

■ 1. The authority citation for parts 271 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

■ 2. In § 271.2:

■ a. Revise the definitions of ''Employment and training (E&T) component'' and ''Employment and training (E&T) mandatory participant'';

■ b. Add in alphabetical order a definition for ''Employment and Training (E&T) participant'';

■ c. Revise the definition of ''Employment and training (E&T) program'';

■ d. Add in alphabetical order a definition for ''Employment and Training (E&T) voluntary participant''; and

■ e. Remove the definition of ''Placed in an employment and training (E&T) program''.

The revisions and additions read as follows:

§ 271.2 Definitions.

* * * * *

Employment and Training (E&T) component a work experience, work training, supervised job search or other program described in section 6(d)(4)(B)(i) of the Food and Nutrition Act of 2008 (7 U.S.C. 2015(d)(4)(B)(i)) designed to help SNAP participants move promptly into unsubsidized employment.

Employment and Training (E&T) mandatory participant a supplemental nutrition assistance program applicant or participant who is required to work register under 7 U.S.C. 2015(d)(1) or (2) and who the State determines should not be exempted from participation in an employment and training program and is required to participate in E&T.

Employment and Training (E&T) participant means an individual who meets the definition of a mandatory or voluntary E&T participant.

Employment and Training (E&T) program means a program operated by each State agency consisting of case management and one or more E&T components.

Employment and Training (E&T) voluntary participant means a supplemental nutrition assistance program applicant or participant who volunteers to participate in an employment and training (E&T) program.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

■ 3. In § 273.7, revise paragraphs (c) through (f) and (i) and add paragraph (n) to read as follows:

§ 273.7 Work provisions.

* * * * *

(c) *State agency responsibilities.* (1)(i) The State agency must register for work each household member not exempted by the provisions of paragraph (b)(1) of this section. The State agency must permit the applicant to complete a record or form for each household member required to register for employment in accordance with paragraph (a)(1)(i) of this section. Household members are considered to have registered when an identifiable work registration form is submitted to the State agency or when the registration is otherwise annotated or recorded by the State agency.

(ii) During the certification process, the State agency must provide a written notice and oral explanation to the household of all applicable work requirements for all members of the household, and identify which household member is subject to which work requirement. These work requirements include the general work requirement in paragraph (a) of this section, mandatory E&T in paragraph (a)(1)(ii) of this section, and the ABAWD work requirement at § 273.24. The written notice and oral explanation must be provided in accordance with (c)(1)(iii) of this section. This written notice and oral explanation must also be provided to the household when a previously exempt household member or new household member becomes subject to these work requirements, and at recertification.

(iii) The consolidated written notice must include all pertinent information related to each of the applicable work requirements, including: An explanation of each applicable work requirement; which individuals are subject to which work requirement; exemptions from each applicable work requirement; an explanation of the process to request an exemption (including contact information to request an exemption); the rights and responsibilities of each applicable work requirement; what is required to maintain eligibility under each applicable work requirement; pertinent dates by which an individual must take any actions to remain in compliance with each applicable work requirement; the consequences for failure to comply with each applicable work requirement; an explanation of the process for requesting good cause (including examples of good cause circumstances and contact information to initiate a good cause request); and any other information the State agency believes would assist the household members with compliance. If an individual is subject to mandatory E&T, the written notice must also explain the individual's right to receive participant reimbursements for allowable expenses related to participation in E&T, up to any applicable State cap, and the responsibility of the State agency to exempt the individual from the requirement to participate in E&T if the individual's allowable expenses exceed what the State agency will reimburse, as provided in paragraph (d)(4) of this section. In addition, as stated in paragraph (c)(2) of this section and § 273.24(b)(8), the State agency must provide a comprehensive oral explanation to the household of each applicable work requirement pertaining to individuals in the household.

(2) The State agency is responsible for screening each work registrant to determine whether or not it is appropriate, based on the State agency's criteria, to refer the individual to an E&T program. If the State agency determines the individual is required to participate in an E&T program, as defined in paragraph (e) of this section and § 271.2, the State agency must provide the participant with the written notice and the comprehensive oral explanation described in paragraph (c)(1)(iii) of this section. The State agency must refer participants to E&T, this referral may vary from participant to participant, but in all cases E&T participants must receive both case management services and at least one E&T component while participating in

E&T. The State agency must determine the order in which the participant will receive the elements of an E&T program (*e.g.,* case management followed by a component, case management embedded within a component, etc.). The State agency must explain to the participant next steps for accessing the E&T program. If there is not an appropriate and available opening in an E&T program, the State agency must determine the participant has good cause for failure to comply with the mandatory E&T requirement in accordance with paragraph (i)(4) of this section. The State agency may, with FNS approval, use intake and sanction systems that are compatible with its title IV–A work program. Such systems must be proposed and explained in the State agency's E&T State Plan.

(3) After learning of an individual's non-compliance with SNAP work requirements, the State agency must issue a notice of adverse action to the individual, or to the household if appropriate, within 10 days of establishing that the noncompliance was without good cause. The notice of adverse action must meet the timeliness and adequacy requirements of § 273.13. If the individual complies before the end of the advance notice period, the State agency will cancel the adverse action. If the State agency offers a conciliation process as part of its E&T program, it must issue the notice of adverse action no later than the end of the conciliation period. Mandatory E&T participants who have received a provider determination in accordance with paragraph (c)(18)(i) of this section shall not be subject to disqualification for refusal without good cause to participate in a mandatory E&T program until after the State has taken one of the four actions in paragraph (c)(18)(i)(B) of this section, and the individual subsequently refuses to participate without good cause.

(4) The State agency must design and operate an E&T program that consists of case management services in accordance with paragraph (e)(1) of this section and at least one or more, or a combination of, employment and/or training components as described in paragraph (e)(2) of this section. The State agency must ensure that it is notified by the agency or agencies operating its E&T components within 10 days if an E&T mandatory participant fails to comply with E&T requirements.

(5) The State agency must design its E&T program in consultation with the State workforce development board, or with private employers or employer organizations if the State agency determines the latter approach is more effective and efficient. Each component of the State agency's E&T program must be delivered through its statewide workforce development system, unless the component is not available locally through such a system.

(6) In accordance with § 272.2(d) and (e) of this chapter, the State agency must prepare and submit an E&T Plan to its appropriate FNS Regional Office. The E&T Plan must be available for public inspection at the State agency headquarters. In its E&T Plan, the State agency will detail the following:

(i) The nature of the E&T components the State agency plans to offer and the reasons for such components, including cost information. The methodology for State agency reimbursement for education components must be specifically addressed. If a State agency plans to offer supervised job search in accordance with paragraph (e)(2)(i) of this section, the State agency must also include in the E&T plan a summary of the State guidelines implementing supervised job search. This summary of the State guidelines, at a minimum, must describe: The criteria used by the State agency to approve locations for supervised job search, an explanation of why those criteria were chosen, and how the supervised job search component meets the requirements to directly supervise the activities of participants and track the timing and activities of participants;

(ii) A description of the case management services and models, how participants will be referred to case management, how the participant's case will be managed, who will provide case management services, and how the service providers will coordinate with E&T providers, the State agency, and other community resources, as appropriate. The State plan should also discuss how the State agency will ensure E&T participants are provided with targeted case management services through an efficient administrative process;

(iii) An operating budget for the Federal fiscal year with an estimate of the cost of operation for one full year. Any State agency that requests 50 percent Federal reimbursement for State agency E&T administrative costs, other than for participant reimbursements, must include in its plan, or amendments to its plan, an itemized list of all activities and costs for which those Federal funds will be claimed, including the costs for case management and casework to facilitate the transition from economic dependency to self-sufficiency through work. Costs in excess of the Federal grant will be allowed only with the prior approval of FNS and must be adequately documented to assure that they are necessary, reasonable and properly allocated;

(iv) The categories and types of individuals the State agency intends to exempt from E&T participation, the estimated percentage of work registrants the State agency plans to exempt, and the frequency with which the State agency plans to reevaluate the validity of its exemptions;

(v) The characteristics of the population the State agency intends to place in E&T;

(vi) The estimated number of volunteers the State agency expects to place in E&T;

(vii) The geographic areas covered and not covered by the E&T Plan and why, and the type and location of services to be offered;

(viii) The method the State agency uses to count all work registrants as of the first day of the new fiscal year;

(ix) The method the State agency uses to report work registrant information on the quarterly Form FNS–583;

(x) The method the State agency uses to prevent work registrants from being counted twice within a Federal fiscal year. If the State agency universally work registers all SNAP applicants, this method must specify how the State agency excludes those exempt from work registration under paragraph (b)(1) of this section. If the State agency work registers nonexempt participants whenever a new application is submitted, this method must also specify how the State agency excludes those participants who may have already been registered within the past 12 months as specified under paragraph (a)(1)(i) of this section;

(xi) The organizational relationship between the units responsible for certification and the units operating the E&T program, including units of the statewide workforce development system, if available. FNS is specifically concerned that the lines of communication be efficient and that noncompliance be reported to the certification unit within 10 working days after the noncompliance occurs;

(xii) The relationship between the State agency and other organizations it plans to coordinate with for the provision of services, including organizations in the statewide workforce development system, if available. Copies of contracts must be available for inspection. The State agency must document how it consulted with the State workforce development board. If the State agency consulted with private employers or employer organizations in lieu of the State workforce development

board, it must document this consultation and explain the determination that doing so was more effective or efficient. The State agency must include in its E&T State plan a description of any outcomes from the consultation with the State workforce development board or private employers or employer organizations. The State agency must also address in the E&T State plan the extent to which E&T activities will be carried out in coordination with the activities under title I of WIOA;

(xiii) The availability, if appropriate, of E&T programs for Indians living on reservations;

(xiv) If a conciliation process is planned, the procedures that will be used when an individual fails to comply with an E&T program requirement. Include the length of the conciliation period;

(xv) The payment rates for child care established in accordance with the Child Care and Development Block Grant provisions of 45 CFR 98.43, and based on local market rate surveys;

(xvi) The combined (Federal/State) State agency reimbursement rate for transportation costs and other expenses reasonably necessary and directly related to participation incurred by E&T participants. If the State agency proposes to provide different reimbursement amounts to account for varying levels of expenses, for instance for greater or lesser costs of transportation in different areas of the State, it must include them here;

(xvii) Information about expenses the State agency proposes to reimburse. FNS must be afforded the opportunity to review and comment on the proposed reimbursements before they are implemented;

(xviii) For each component that is expected to include 100 or more participants, reporting measures that the State will collect and include in the annual report in paragraph (c)(17) of this section. Such measures may include:

(A) The percentage and number of program participants who received E&T services and are in unsubsidized employment subsequent to the receipt of those services;

(B) The percentage and number of participants who obtain a recognized credential, a registered apprenticeship, or a regular secondary school diploma (or its recognized equivalent), while participating in, or within 1 year after receiving E&T services;

(C) The percentage and number of participants who are in an education or training program that is intended to lead to a recognized credential, a registered apprenticeship an on-the-job training program, a regular secondary school diploma (or its recognized equivalent), or unsubsidized employment;

(D) Measures developed to assess the skills acquisition of E&T program participants that reflect the goals of the specific components including the percentage and number of participants who are meeting program requirements or are gaining skills likely to lead to employment; and

(E) Other indicators approved by FNS in the E&T State plan; and

(xix) Any State agency that will be requesting Federal funds that may become available for reallocation in accordance with paragraph (d)(1)(iii)(A), (B), or (D) of this section should include this request in the E&T State plan for the year the State agency would plan to use the reallocated funds. The request must include a separate budget and narrative explaining how the State agency intends to use the reallocated funds. FNS will review all State agency requests for reallocated funds and notify State agencies of the approval of any reallocated funds in accordance with regulations at (d)(1)(iii)(E) of this section. FNS' approval or denial of requests for reallocated funds will occur separately from the approval or denial of the rest of the E&T State plan.

(7) A State agency interested in receiving additional funding for serving able-bodied adults without dependents (ABAWDs) subject to the 3-month time limit, in accordance with paragraph (d)(3) of this section, must include in its annual E&T plan:

(i) Its pledge to offer a qualifying activity to all at-risk ABAWD applicants and recipients;

(ii) Estimated costs of fulfilling its pledge;

(iii) A description of management controls in place to meet pledge requirements;

(iv) A discussion of its capacity and ability to serve at-risk ABAWDs;

(v) Information about the size and special needs of its ABAWD population; and

(vi) Information about the education, training, and workfare components it will offer to meet the ABAWD work requirement.

(8) The State agency will submit its E&T Plan annually, at least 45 days before the start of the Federal fiscal year. The State agency must submit plan revisions to the appropriate FNS regional office for approval if it plans to alter the nature or location of its components or the number or characteristics of persons served. The proposed changes must be submitted for approval at least 30 days prior to planned implementation.

(9) The State agency will submit an E&T Program Activity Report to FNS no later than 45 days after the end of each Federal fiscal quarter. The report will contain monthly figures for:

(i) Participants newly work registered;

(ii) Number of ABAWD applicants and recipients participating in qualifying components;

(iii) Number of all other applicants and recipients (including ABAWDs involved in non-qualifying activities) participating in components; and

(iv) ABAWDs subject to the 3-month time limit imposed in accordance with § 273.24(b) who are exempt under the State agency's discretionary exemptions under § 273.24(g).

(10) The State agency will submit annually, on its first quarterly report, the number of work registrants in the State on October 1 of the new fiscal year.

(11) The State agency will submit annually, on its final quarterly report:

(i) A list of E&T components it offered during the fiscal year and the number of ABAWDs and non-ABAWDs who participated in each;

(ii) The number of ABAWDs and non-ABAWDs who participated in the E&T Program during the fiscal year. Each individual must be counted only once;

(iii) Number of SNAP applicants and participants required to participate in E&T by the State agency and of those the number who begin participation in an E&T program and the number who begin participation in an E&T component. An E&T participant begins to participate in an E&T program when the participant commences at least one part of an E&T program including an orientation, assessment, case management, or a component. An E&T participant begins to participate in an E&T component when the participant commences the first activity in the E&T component; and

(iv) Number of mandatory E&T participants who were determined ineligible for failure to comply with E&T requirements.

(12) Additional information may be required of the State agency, on an as needed basis, regarding the type of components offered and the characteristics of persons served, depending on the contents of its E&T Plan.

(13) The State agency must ensure, to the maximum extent practicable, that E&T programs are provided for Indians living on reservations.

(14) If a benefit overissuance is discovered for a month or months in which a mandatory E&T participant has already fulfilled a work component

requirement, the State agency must follow the procedure specified in paragraph (m)(6)(v) of this section for a workfare overissuance.

(15) If a State agency fails to efficiently and effectively administer its E&T program, the provisions of § 276.1(a)(4) of this chapter will apply.

(16) FNS may require a State agency to make modifications to its SNAP E&T plan to improve outcomes if FNS determines that the E&T outcomes are inadequate.

(17) The State agency shall submit an annual E&T report by January 1 each year that contains the following information for the Federal fiscal year ending the preceding September 30.

(i) The number and percentage of E&T participants and former participants who are in unsubsidized employment during the second quarter after completion of participation in E&T.

(ii) The number and percentage of E&T participants and former participants who are in unsubsidized employment during the fourth quarter after completion of participation in E&T.

(iii) Median average quarterly earnings of the E&T participants and former participants who are in unsubsidized employment during the second quarter after completion of participation in E&T.

(iv) The total number and percentage of participants that completed an educational, training work experience or an on-the-job training component.

(v) The number and percentage of E&T participants who:

(A) Are voluntary vs. mandatory participants;

(B) Have received a high school degree (or GED) prior to being provided with E&T services;

(C) Are ABAWDs;

(D) Speak English as a second language;

(E) Are male vs. female; and

(F) Are within each of the following age ranges: 16–17, 18–35, 36–49, 50–59, 60 or older.

(vi) Of the number and percentage of E&T participants reported in paragraphs (c)(17)(i) through (iv) of this section, a disaggregation of the number and percentage of those participants and former participants by the characteristics listed in paragraphs (c)(17)(v)(A), (B), and (C) of this section.

(vii) Reports for the measures identified in a State's E&T plan related to components that are designed to serve at least 100 participants a year; and

(viii) States that have committed to offering all at-risk ABAWDs participation in a qualifying activity and have received an additional allocation of funds as specified in paragraph (d)(3) of this section shall include:

(A) The monthly average number of individuals in the State who meet the conditions in paragraph (d)(3)(i) of this section;

(B) The monthly average number of individuals to whom the State offers a position in a program described in § 273.24(a)(3) and (4);

(C) The monthly average number of individuals who participate in such programs; and

(D) A description of the types of employment and training programs the State agency offered to at risk ABAWDs and the availability of those programs throughout the State.

(ix) States may be required to submit the annual report in a standardized format based upon guidance issued by FNS.

(x) State agencies certifying workforce partnerships for operation in their State in accordance with paragraph (n) of this section may report relevant data to demonstrate the number of program participants served by the workforce partnership, and of those how many were mandatory E&T participants.

(18)(i) The State agency must ensure E&T providers are informed of their authority and responsibility to determine if an individual is ill-suited for a particular E&T component. Such determinations shall be referred to as provider determinations. For purposes of this paragraph, an E&T provider is the provider of an E&T component. The E&T provider must notify the State agency of a provider determination within 10 days of the date the determination is made and inform the State agency of the reason for the provider determination. The E&T provider may also provide input on the most appropriate next step, as outlined in paragraph (c)(18)(i)(B) of this section, for the individual with a provider determination. If the State agency is unable to obtain the reason for the provider determination from the E&T provider, the State agency must continue to act on the provider determination in accordance with this section. If an E&T provider finds an individual is ill-suited for one component, but the E&T provider determines the individual may be suitable for another component offered by the E&T provider, at State agency option, the E&T provider may switch the individual to the other component and inform the State agency of the new component without the need for the State agency to act further on the provider determination. The E&T provider has the authority to determine if an individual is ill-suited for the E&T component from the time an individual is referred to an E&T component until completion of the component. When a State agency receives notification that an individual has received a provider determination, and the individual is not exempt from the work requirement as specified in paragraph (b) of this section, the State agency must:

(A) Notify the mandatory or voluntary E&T participant, within 10 days of receiving notification from the E&T provider, of the provider determination including the following information, as applicable. The State agency must explain what a provider determination is, the next steps the State agency will take as a result of the provider determination, and contact information for the State agency. In the case of either a mandatory or voluntary E&T participant with a provider determination, the State agency must also notify the individual that they are not being sanctioned as a result of the provider determination. In the case of an ABAWD who has received a provider determination, the State agency must also notify the ABAWD that the ABAWD will accrue countable months toward their three-month participation time limit the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination, unless the ABAWD fulfills the work requirements in accordance with § 273.24, or the ABAWD has good cause, lives in a waived area, or is otherwise exempt. The State agency may make such notification either verbally or in writing, but must, at a minimum, document when the notification occurs in the participant's case file; and

(B) Take the most suitable action from among the following options no later than the date of the individual's recertification. If an individual with a provider determination requests that the State agency take one of the following actions sooner than the next recertification, the State agency must take the most suitable action as soon as possible:

(*1*) Refer the individual to an appropriate E&T program component in accordance with paragraph (e)(2) of this section. Before making this referral, the State agency must screen the individual for participation in the E&T program in accordance with paragraph (c)(2) of this section, and determine that it is appropriate to refer the individual to an E&T component, considering the suitability of the individual for any available E&T components. In accordance with paragraph (e)(1) of this section, all E&T participants must

receive case management services along with at least one E&T component;

(*2*) Refer the individual to an appropriate workforce partnership as defined in paragraph (n) of this section, if available. Before making this referral, the State agency must provide information about workforce partnerships to assist the individual in making an informed decision about whether to voluntarily participate in the workforce partnership, in accordance with paragraph (n)(10) of this section;

(*3*) Reassess the physical and mental fitness of the individual. If the individual is not found to be physically or mentally fit, the individual is exempt from the work requirement in accordance with paragraph (b)(1)(ii) of this section. If the individual is found to be physically or mentally fit, and the State agency determines the individual is not otherwise exempt from the general work requirements the State agency must consider if one of the other available actions in paragraph (c)(18)(i)(B) of this section would be appropriate for the individual. If the State agency determines the individual should not be required to participate in E&T, the State agency must exempt the individual from mandatory E&T; or

(*4*) Coordinate, to the maximum extent practicable, with other Federal, State, or local workforce or assistance programs to identify work opportunities or assistance for the individual. If the State agency chooses this option, the State agency must not require the individual to participate in E&T.

(ii) From the time an E&T provider determines an individual is ill-suited for an E&T component until after the State agency takes one of the actions in paragraph (c)(18)(i)(B) of this section, the individual shall not be found to have refused without good cause to participate in mandatory E&T. In the case of an ABAWD who has received a provider determination, the ABAWD will accrue countable months toward their three-month participation time limit the next full benefit month after the month during which the State agency notifies the ABAWD of the provider determination, unless the ABAWD fulfills the work requirements in accordance with § 273.24, or the ABAWD has good cause, lives in a waived area, or is otherwise exempt.

(d) *Federal financial participation*—(1) *Employment and training grants*—(i) *Allocation of grants.* Each State agency will receive a 100 percent Federal grant each fiscal year to operate an E&T program in accordance with paragraph (e) of this section. The grant requires no State matching.

(A) In determining each State agency's 100 percent Federal E&T grant, FNS will apply the percentage determined in accordance with paragraph (d)(1)(i)(B) of this section to the total amount of 100 percent Federal funds authorized under section 16(h)(1)(A) of the Act for each fiscal year.

(B) FNS will allocate the funding available each fiscal year for E&T grants using a formula designed to ensure that each State agency receives its appropriate share.

(*1*) Ninety percent of the annual 100 percent Federal E&T grant will be allocated based on the number of work registrants in each State as a percentage of work registrants nationwide. FNS will use work registrant data reported by each State agency on the FNS–583, Employment and Training Program Activity Report, from the most recent Federal fiscal year.

(*2*) Ten percent of the annual 100 percent Federal E&T grant will be allocated based on the number of ABAWDs in each State, as determined by SNAP QC data for the most recently available completed fiscal year, which provide a breakdown of each State's population of adults age 18 through 49 who are not disabled and who do not live with children.

(C) No State agency will receive less than $100,000 in Federal E&T funds. To ensure this, FNS will, if necessary, reduce the grant of each State agency allocated more than $100,000. In order to guarantee an equitable reduction, FNS will calculate grants as follows. First, disregarding those State agencies scheduled to receive less than $100,000, FNS will calculate each remaining State agency's percentage share of the fiscal year's E&T grant. Next, FNS will multiply the grant—less $100,000 for every State agency under the minimum—by each remaining State agency's same percentage share to arrive at the revised amount. The difference between the original and the revised amounts will represent each State agency's contribution. FNS will distribute the funds from the reduction to State agencies initially allocated less than $100,000.

(ii) *Use of funds.* (A) A State agency must use E&T program grants to fund the administrative costs of planning, implementing and operating its SNAP E&T program in accordance with its approved State E&T plan. E&T grants must not be used for the process of determining whether an individual must be work registered, the work registration process, or any further screening performed during the certification process, nor for sanction activity that takes place after the operator of an E&T program reports noncompliance without good cause. For purposes of this paragraph (d), the certification process is considered ended when an individual is referred to an E&T program for assessment or participation. E&T grants may be used to subsidize wages in accordance with paragraph (e)(2)(iv)(2) of this section, and may not be used to reimburse participants under paragraph (d)(4) of this section.

(B) A State agency's receipt of its 100 percent Federal E&T grant is contingent on FNS's approval of the State agency's E&T plan. If an adequate plan is not submitted, FNS may reallocate a State agency's grant among other State agencies with approved plans. Non-receipt of an E&T grant does not release a State agency from its responsibility under paragraph (c)(4) of this section to operate an E&T program.

(C) Federal funds made available to a State agency to operate an educational component under paragraph (e)(2)(vi) of this section must not be used to supplant nonfederal funds for existing educational services and activities that promote the purposes of this component. Education expenses are approvable to the extent that E&T component costs exceed the normal cost of services provided to persons not participating in an E&T program.

(D) In accordance with section 6(d)(4)(K) of the Food and Nutrition Act of 2008, and notwithstanding any other provision of this paragraph (d), the amount of Federal E&T funds, including participant and dependent care reimbursements, a State agency uses to serve participants who are receiving cash assistance under a State program funded under title IV–A of the Social Security Act must not exceed the amount of Federal E&T funds the State agency used in FY 1995 to serve participants who were receiving cash assistance under a State program funded under title IV–A of the Social Security Act.

(*1*) Based on information provided by each State agency, FNS established claimed Federal E&T expenditures on this category of recipients in fiscal year 1995 for the State agencies of Colorado ($318,613), Utah ($10,200), Vermont ($1,484,913), and Wisconsin ($10,999,773). These State agencies may spend up to a like amount each fiscal year to serve SNAP recipients who also receive title IV assistance.

(*2*) All other State agencies are prohibited from expending any Federal E&T funds on title IV cash assistance recipients.

(iii) If a State agency will not obligate or expend all of the funds allocated to

it for a fiscal year under paragraph (d)(1)(i) of this section, FNS will reallocate the unobligated, unexpended funds to other State agencies during the fiscal year or subsequent fiscal year. FNS will allocate carryover funding to meet some or all of the State agencies' requests, as it considers appropriate and equitable in accordance with the following process:

(A) Not less than 50 percent shall be reallocated to State agencies requesting funding to conduct employment and training programs and activities for which the State agency had previously received funding under the pilots authorized by the Agricultural Act of 2014 (Pub. L. 113–79) that FNS determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance.

(B) Not less than 30 percent shall be reallocated to State agencies requesting funding for E&T programs and activities under paragraph (e)(1) or (2) of this section that FNS determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance, including activities targeted to:

(*1*) Individuals 50 years of age or older;

(*2*) Formerly incarcerated individuals;

(*3*) Individuals participating in a substance abuse treatment program;

(*4*) Homeless individuals;

(*5*) People with disabilities seeking to enter the workforce;

(*6*) Other individuals with substantial barriers to employment, including disabled veterans; or

(*7*) Households facing multi-generational poverty, to support employment and workforce participation through an integrated and family-focused approach in providing supportive services.

(C) State agencies who receive reallocated funds under paragraph (d)(1)(iii)(A) of this section may also be considered to receive reallocated funds under paragraph (d)(1)(iii)(B) of this section.

(D) Any remaining funds not accounted for with the reallocations specified in paragraphs (d)(1)(iii)(A) or (B) of this section shall be reallocated to State agencies requesting such funds for E&T programs and activities under paragraph (e)(1) or (2) of this section that FNS determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance.

(E) State agencies requesting the reallocated funds specified in paragraph (d)(1)(iii)(A), (B), or (D) of this section, shall make their request for those funds in their E&T State plans submitted for the upcoming fiscal year. FNS will determine the amount of reallocated funds each requesting State agency shall receive and provide the reallocated funds to those State agencies within a timeframe that allows each State agency to which funds are reallocated at least 270 days to expend the reallocated funds. When making the reallocations, FNS will also consider the size of the request relative to the level of the State agency's E&T spending in prior years, the specificity of the State agency's plan for spending carryover funds, and the quality of program and scope of impact for the State's E&T program.

(F) Unobligated, unexpended funds not reallocated in the process specified in paragraph (E) of this section, shall be reallocated to State agencies upon request for E&T programs and activities under paragraph (e)(1) or (2) of this section that FNS determines have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance. In making these reallocations FNS will also consider the size of the request relative to the level of the State agency's E&T spending in prior years, the specificity of the State agency's plan for spending carryover funds, and the quality of program and scope of impact for the State's E&T program.

(2) *Additional administrative costs.* Fifty percent of all other administrative costs incurred by State agencies in operating E&T programs, above the costs referenced in paragraph (d)(1) of this section, will be funded by the Federal Government.

(3) *Additional allocations.* In addition to the E&T program grants discussed in paragraph (d)(1) of this section, FNS will allocate $20 million in Federal funds each fiscal year to State agencies that ensure availability of education, training, or workfare opportunities that permit ABAWDs to remain eligible beyond the 3-month time limit.

(i) To be eligible, a State agency must make and comply with a commitment, or ''pledge,'' to use these additional funds to defray the cost of offering a position in an education, training, or workfare component that fulfills the ABAWD work requirement, as defined in § 273.24(a), to each applicant and recipient who is:

(A) In the last month of the 3-month time limit described in § 273.24(b);

(B) Not eligible for an exception to the 3-month time limit under § 273.24(c);

(C) Not a resident of an area of the State granted a waiver of the 3-month time limit under § 273.24(f); and

(D) Not included in each State agency's 15 percent ABAWD exemption allotment under § 273.24(g).

(ii) While a participating pledge State may use a portion of the additional funding to provide E&T services to ABAWDs who do not meet the criteria discussed in paragraph (d)(3)(i) of this section, it must guarantee that the ABAWDs who do meet the criteria are provided the opportunity to remain eligible.

(iii) State agencies will have one opportunity each fiscal year to take the pledge described in paragraph (d)(3)(i) of this section. An interested State agency, in its E&T Plan for the upcoming fiscal year, must include the following:

(A) A request to be considered as a pledge State, along with its commitment to comply with the requirements of paragraph (d)(3)(i) of this section;

(B) The estimated costs of complying with its pledge;

(C) A description of management controls it has established to meet the requirements of the pledge;

(D) A discussion of its capacity and ability to serve vulnerable ABAWDs;

(E) Information about the size and special needs of the State's ABAWD population; and

(F) Information about the education, training, and workfare components that it will offer to allow ABAWDs to remain eligible.

(iv) If the information provided in accordance with paragraph (d)(3)(iii) of this section clearly indicates that the State agency will be unable to fulfill its commitment, FNS may require the State agency to address its deficiencies before it is allowed to participate as a pledge State.

(v) If the State agency does not address its deficiencies by the beginning of the new fiscal year on October 1, it will not be allowed to participate as a pledge State.

(vi) No pledges will be accepted after the beginning of the fiscal year.

(vii)(A) Once FNS determines how many State agencies will participate as pledge States in the upcoming fiscal year, it will, as early in the fiscal year as possible, allocate among them the $20 million based on the number of ABAWDs in each participating State, as a percentage of ABAWDs in all the participating States. FNS will determine the number of ABAWDs in each

participating State using SNAP QC data for the most recently available completed fiscal year, which provide a breakdown of each State's population of adults age 18 through 49 who are not disabled and who do not live with children.

(B) Each participating State agency's share of the $20 million will be disbursed in accordance with paragraph (d)(6) of this section.

(C) Each participating State agency must meet the fiscal recordkeeping and reporting requirements of paragraph (d)(7) of this section.

(viii) If a participating State agency notifies FNS that it will not obligate or expend its entire share of the additional funding allocated to it for a fiscal year, FNS will reallocate the unobligated, unexpended funds to other participating State agencies during the fiscal year, as it considers appropriate and equitable, on a first come-first served basis. FNS will notify other pledge States of the availability of additional funding. To qualify, a pledge State must have already obligated its entire annual 100 percent Federal E&T grant, excluding an amount that is proportionate to the number of months remaining in the fiscal year, and it must guarantee in writing that it intends to obligate its entire grant by the end of the fiscal year. A State's annual 100 percent Federal E&T grant is its share of the regular 100 percent Federal E&T allocation plus its share of the additional $20 million (if applicable). Interested pledge States must submit their requests for additional funding to FNS. FNS will review the requests and, if they are determined reasonable and necessary, will reallocate some or all of the unobligated, unspent ABAWD funds.

(ix) Unlike the funds allocated in accordance with paragraph (d)(1) of this section, the additional pledge funding will not remain available until obligated or expended. Unobligated funds from this grant must be returned to the U.S. Treasury at the end of each fiscal year.

(x) The cost of serving at-risk ABAWDs is not an acceptable reason to fail to live up to the pledge. A slot must be made available and the ABAWD must be served even if the State agency exhausts all of its 100 percent Federal E&T funds and must use State funds to guarantee an opportunity for all at-risk ABAWDs to remain eligible beyond the 3-month time limit. State funds expended in accordance with the approved State E&T Plan are eligible for 50 percent Federal match. If a participating State agency fails, without good cause, to meet its commitment, it may be disqualified from participating in the subsequent fiscal year or years.

(4) *Participant reimbursements.* The State agency must provide payments to participants in its E&T program, including applicants and volunteers, for expenses that are reasonably necessary and directly related to participation in the E&T program. The Federal Government will fund 50 percent of State agency payments for allowable expenses, except that Federal matching for dependent care expenses is limited to the maximum amount specified in paragraph (d)(4)(i) of this section. These payments may be provided as a reimbursement for expenses incurred or in advance as payment for anticipated expenses in the coming month. The State agency must inform each E&T participant that allowable expenses up to the amounts specified in paragraphs (d)(4)(i) and (ii) of this section will be reimbursed by the State agency upon presentation of appropriate documentation. Reimbursable costs may include, but are not limited to, dependent care costs, transportation, and other work, training or education related expenses such as uniforms, personal safety items or other necessary equipment, and books or training manuals. These costs must not include the cost of meals away from home. If applicable, any allowable costs incurred by a noncompliant E&T participant after the expiration of the noncompliant participant's minimum mandatory disqualification period, as established by the State agency, that are reasonably necessary and directly related to reestablishing eligibility, as defined by the State agency, are reimbursable under paragraphs (d)(4)(i) and (ii) of this section. The State agency may reimburse participants for expenses beyond the amounts specified in paragraph (d)(4)(i) of this section; however, only costs that are up to but not in excess of those amounts are subject to Federal cost sharing. Reimbursement must not be provided from E&T grants allocated under paragraph (d)(1)(i) of this section. Any expense covered by a reimbursement under this section is not deductible under § 273.10(d)(1)(i).

(i) The State agency will reimburse the cost of dependent care it determines to be necessary for the participation of a household member in the E&T program up to the actual cost of dependent care, or the applicable payment rate for child care, whichever is lowest. The payment rates for child care are established in accordance with the Child Care and Development Block Grant provisions of 45 CFR 98.43, and are based on local market rate surveys. The State agency will provide a dependent care reimbursement to an E&T participant for all dependents requiring care unless otherwise prohibited by this section. The State agency will not provide a reimbursement for a dependent age 13 or older unless the dependent is physically and/or mentally incapable of caring for himself or herself or is under court supervision. The State agency must provide a reimbursement for all dependents who are physically and/or mentally incapable of caring for themselves or who are under court supervision, regardless of age, if dependent care is necessary for the participation of a household member in the E&T program. The State agency will obtain verification of the physical and/or mental incapacity for dependents age 13 or older if the physical and/or mental incapacity is questionable. Also, the State agency will verify a court-imposed requirement for the supervision of a dependent age 13 or older if the need for dependent care is questionable. If more than one household member is required to participate in an E&T program, the State agency will reimburse the actual cost of dependent care or the applicable payment rate for child care, whichever is lowest, for each dependent in the household, regardless of the number of household members participating in the E&T program. An individual who is the caretaker relative of a dependent in a family receiving cash assistance under title IV–A of the Social Security Act in a local area where an employment, training, or education program under title IV–A is in operation is not eligible for such reimbursement. An E&T participant is not entitled to the dependent care reimbursement if a member of the E&T participant's SNAP household provides the dependent care services. The State agency must verify the participant's need for dependent care and the cost of the dependent care prior to the issuance of the reimbursement. The verification must include the name and address of the dependent care provider, the cost and the hours of service (*e.g.,* five hours per day, five days per week for two weeks). A participant may not be reimbursed for dependent care services beyond that which is required for participation in the E&T program. In lieu of providing reimbursements for dependent care expenses, a State agency may arrange for dependent care through providers by the use of purchase of service contracts, by providing vouchers to the household or by other means. A State agency may require that dependent care provided or arranged by the State agency meet all applicable standards of State and local

law, including requirements designed to ensure basic health and safety protections (*e.g.,* fire safety). An E&T participant may refuse available appropriate dependent care as provided or arranged by the State agency, if the participant can arrange other dependent care or can show that such refusal will not prevent or interfere with participation in the E&T program as required by the State agency.

(ii) The State agency will reimburse the actual costs of transportation and other costs (excluding dependent care costs) it determines to be necessary and directly related to participation in the E&T program up the maximum level of reimbursement established by the State agency. Such costs are the actual costs of participation unless the State agency has a method approved in its E&T Plan for providing allowances to participants to reflect approximate costs of participation. If a State agency has an approved method to provide allowances rather than reimbursements, it must provide participants an opportunity to claim actual expenses up to the maximum level of reimbursements established by the State agency.

(iii) No participant cost that has been reimbursed under a workfare program under paragraph (m)(7)(i) of this section, title IV of the Social Security Act or other work program will be reimbursed under this section.

(iv) Any portion of dependent care costs that are reimbursed under this section may not be claimed as an expense and used in calculating the dependent care deduction under § 273.9(d)(4) for determining benefits.

(v) The State agency must inform all mandatory E&T participants that they may be exempted from E&T participation if their monthly expenses that are reasonably necessary and directly related to participation in the E&T program, including participation in case management services and E&T components, exceed the allowable reimbursement amount. Persons for whom allowable monthly expenses in an E&T component exceed the amounts specified under paragraphs (d)(4)(i) and (ii) of this section are not required to participate in that component. These individuals will be placed, if possible, in another suitable component in which the individual's monthly E&T expenses would not exceed the allowable reimbursable amount paid by the State agency. If a suitable component is not available, these individuals will be exempt from E&T participation until a suitable component is available or the individual's circumstances change and his/her monthly expenses do not exceed the allowable reimbursable amount paid by the State agency. Dependent care expenses incurred that are otherwise allowable but not reimbursed because they exceed the reimbursable amount specified under paragraph (d)(4)(i) of this section will be considered in determining a dependent care deduction under § 273.9(d)(4).

(5) *Workfare cost sharing.* Enhanced cost-sharing due to placement of workfare participants in paid employment is available only for workfare programs funded under paragraph (m)(7)(iv) of this section at the 50 percent reimbursement level and reported as such.

(6) *Funding mechanism.* E&T program funding will be disbursed through States' Letters of Credit in accordance with § 277.5 of this chapter. The State agency must ensure that records are maintained that support the financial claims being made to FNS.

(7) *Fiscal recordkeeping and reporting requirements.* Total E&T expenditures are reported on the Financial Status Report (SF–425 using FNS–778/FNS–778A worksheet) in the column containing ''other'' expenses. E&T expenditures are also separately identified in an attachment to the SF–425 using FNS–778/FNS–778A worksheet to show, as provided in instructions, total State and Federal E&T expenditures; expenditures funded with the unmatched Federal grants; State and Federal expenditures for participant reimbursements; State and Federal expenditures for E&T costs at the 50 percent reimbursement level; and State and Federal expenditures for optional workfare program costs, operated under section 20 of the Food and Nutrition Act of 2008 and paragraph (m)(7) of this section. Claims for enhanced funding for placements of participants in employment after their initial participation in the optional workfare program will be submitted in accordance with paragraph (m)(7)(iv) of this section.

(e) *Employment and training programs.* Work registrants not otherwise exempted by the State agency are subject to the E&T program participation requirements imposed by the State agency. Such individuals are referred to in this section as E&T mandatory participants or mandatory E&T participants. Requirements may vary among participants. Failure to comply without good cause with the requirements imposed by the State agency will result in disqualification as specified in paragraph (f)(2) of this section. Mandatory E&T participants who receive an E&T provider determination in accordance with paragraph (c)(18)(i) of this section shall not be subject to disqualification for refusal without good cause to participate in mandatory E&T during the time specified in (c)(18)(ii) of this section.

(1) *Case management.* The State E&T program must provide case management services such as comprehensive intake assessments, individualized service plans, progress monitoring, or coordination with service providers which are provided to all E&T participants. The purpose of case management services shall be to guide the participant towards appropriate E&T components and activities based on the participant's needs and interests, support the participant in the E&T program, and to provide activities and resources that help the participant achieve program goals. Case management services and activities must directly support an individual's participation in the E&T program. Case management may include referrals to activities and supports outside of the E&T program, but State agencies can only use E&T funds for allowable components, activities, and participant reimbursements. The provision of case management services must not be an impediment to the participant's successful participation in E&T. In addition, if the case manager determines a mandatory E&T participant may meet an exemption from the requirement to participate in an E&T program, may have good cause for non-compliance with a work requirement, or both, the case manager must inform the appropriate State agency staff. Also, if the case manager is unable to identify an appropriate and available opening in an E&T component for a mandatory E&T participant, the case manager must inform the appropriate State agency staff.

(2) *Components.* To be considered acceptable by FNS, any component offered by a State agency must entail a certain level of effort by the participants. The level of effort should be comparable to spending approximately 12 hours a month for two months making job contacts (less in workfare or work experience components if the household's benefit divided by the minimum wage is less than this amount). However, FNS may approve components that do not meet this guideline if it determines that such components will advance program goals. An initial screening by an eligibility worker to determine whom to place in an E&T program does not constitute a component. The State agency may require SNAP applicants to participate in any component it offers in its E&T program at the time of

application. The State agency must screen applicants to determine if it is appropriate to participate in E&T in accordance with paragraph (c)(2) of this section, provide the applicant with participant reimbursements in accordance with (d)(4) of this section, and inform the applicant of E&T participation requirements including how to access the component and consequences for failing to participate. The State agency must not impose requirements that would delay the determination of an individual's eligibility for benefits or in issuing benefits to any household that is otherwise eligible. In accordance with section 6(o)(1)(C) of the Food and Nutrition Act of 2008 and § 273.24, supervised job search and job search training, when offered as components of an E&T program, are not qualifying activities relating to the participation requirements necessary to fulfill the ABAWD work requirement under § 273.24. However, job search, including supervised job search, or job search training activities, when offered as part of other E&T program components, are acceptable as long as those activities comprise less than half the total required time spent in the components. An E&T program offered by a State agency must include one or more of the following components:

(i) A supervised job search program. Supervised job search programs are those that occur at State-approved locations at which the activities of participants shall be directly supervised and the timing and activities of participants tracked in accordance with guidelines issued by the State agency and summarized in their E&T State plan in accordance with paragraph (c)(6)(i) of this section. State-approved locations include any location deemed suitable by the State agency where the participant has access to the tools and materials they need to perform supervised job search. Tools used in the supervised job search program may include virtual tools, including, but not limited to, websites, portals, or web applications to access supervised job search services. State agencies are encouraged to offer a variety of locations and formats to best meet participant needs, and to the extent practicable, allow participants to choose their preferred location. Supervision can occur asynchronously with respect to the participant's job search activities, but must be provided by skilled staff, either remotely or in-person, who provide meaningful guidance and support with at least monthly check-ins, and must be provided in such a way so as to best support the participant. State agencies have discretion to develop tracking methods that best meet the needs of the participant. Supervised job search activities must have a direct link to increasing the employment opportunities of individuals engaged in the activity. Job search that does not meet the definition of supervised job search is allowed as a subsidiary activity of another E&T component, so long as the job search activity comprises less than half of the total time spent in the component. The State agency may require an individual to participate in supervised job search from the time an application is filed for an initial period established by the State agency, so long as the criteria for serving applicants in this paragraph (e)(2) are satisfied. Following this initial period (which may extend beyond the date when eligibility is determined) the State agency may require an additional supervised job search period in any period of 12 consecutive months. The first such period of 12 consecutive months will begin at any time following the close of the initial period. The State agency may establish a supervised job search period that, in its estimation, will provide participants a reasonable opportunity to find suitable employment. The State agency should not, however, establish a continuous, year-round supervised job search requirement. If a reasonable period of supervised job search does not result in employment, placing the individual in a training or education component to improve job skills will likely be more productive. In accordance with section 6(o)(1)(C) of the Food and Nutrition Act of 2008 and § 273.24, a supervised job search program is not a qualifying E&T activity relating to the participation requirements necessary to maintain SNAP eligibility for ABAWDs. However, a job search program, supervised or otherwise, when operated under title I of the Workforce Innovation and Opportunity Act (WIOA), under section 236 of the Trade Act, or a program of employment and training for veterans operated by the Department of Labor or the Department of Veterans Affairs, is considered a qualifying activity relating to the participation requirements necessary to maintain SNAP eligibility for ABAWDs.

(ii) A job search training program that includes reasonable job search training and support activities. Such a program may consist of employability assessments, training in techniques to increase employability, job placement services, or other direct training or support activities, including educational programs determined by the State agency to expand the job search abilities or employability of those subject to the program. Job search training activities are approvable if they directly enhance the employability of the participants. A direct link between the job search training activities and job-readiness must be established for a component to be approved. In accordance with section 6(o)(1)(C) of the Food and Nutrition Act of 2008 and § 273.24, a job search training program is not a qualifying activity relating to the participation requirements necessary to maintain SNAP eligibility for ABAWDs. However, such a program, when operated under title I of WIOA, under section 236 of the Trade Act, or a program of employment and training for veterans operated by the Department of Labor or the Department of Veterans Affairs, is considered a qualifying activity relating to the participation requirements necessary to maintain SNAP eligibility for ABAWDs.

(iii) A workfare program as described in paragraph (m) of this section.

(A) The participation requirements of section 20(b) of the Food and Nutrition Act of 2008 and paragraphs (m)(5)(i)(A) and (B) of this section for individuals exempt from SNAP work requirements under paragraphs (b)(1)(iii) and (v) of this section, are not applicable to E&T workfare components.

(B) In accordance with section 20(e) of the Food and Nutrition Act of 2008 and paragraph (m)(6)(ii) of this section, the State agency may establish a job search period of up to 30 days following certification prior to making a workfare assignment. This job search activity is part of the workfare assignment, and not a job search ''program.'' Participants are considered to be participating in and complying with the requirements of workfare, thereby meeting the participation requirement for ABAWDs.

(C) The sharing of workfare savings authorized under section 20(g) of the Food and Nutrition Act of 2008 and paragraph (m)(7)(iv) of this section are not available for E&T workfare components.

(iv) A work experience program designed to improve the employability of household members through actual work experience or training, or both, and to enable individuals employed or trained under such programs to move promptly into regular public or private employment. Work experience is a planned, structured learning experience that takes place in a workplace for a limited period of time. Work experience may be paid or unpaid, as appropriate, and consistent with other laws such as the Fair Labor Standards Act. Work experience may be arranged within the

private for-profit sector, the non-profit sector, or the public sector. Labor standards apply in any work experience setting where an employee/employer relationship, as defined by the Fair Labor Standards Act, exists.

(A) A work experience program may include:

(*1*) A work activity performed in exchange for SNAP benefits that provides an individual with an opportunity to acquire the general skills, knowledge, and work habits necessary to obtain employment. The purpose of work activity is to improve the employability of those who cannot find unsubsidized full-time employment.

(*2*) A work-based learning program, which, for the purposes of SNAP E&T, are sustained interactions with industry or community professionals in real world settings to the extent practicable, or simulated environments at an educational institution that foster in-depth, firsthand engagement with the tasks required in a given career field, that are aligned to curriculum and instruction. Work-based learning emphasizes employer engagement, includes specific training objectives, and leads to regular employment. Work-based learning can include internships, pre-apprenticeships, apprenticeships, customized training, transitional jobs, incumbent worker training, and on-the-job training as defined under WIOA. Work-based learning can include both subsidized and unsubsidized employment models.

(B) A work experience program must:

(*1*) Not provide any work that has the effect of replacing the employment of an individual not participating in the employment or training experience program; and

(*2*) Provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours.

(v) A project, program or experiment such as a supported work program aimed at accomplishing the purpose of the E&T program.

(vi) Educational programs or activities to improve basic skills, build work readiness, or otherwise improve employability including educational programs determined by the State agency to expand the job search abilities or employability of those subject to the program.

(A) Allowable educational programs or activities may include, but are not limited to, courses or programs of study that are part of a program of career and technical education (as defined in section 3 of the Carl D. Perkins Act of 2006), high school or equivalent educational programs, remedial education programs to achieve a basic literacy level, and instructional programs in English as a second language.

(B) Only educational components that directly enhance the employability of the participants are allowable. A direct link between the education and job-readiness must be established for a component to be approved.

(vii) A program designed to improve the self-sufficiency of recipients through self-employment. Included are programs that provide instruction for self-employment ventures.

(viii) Job retention services that are designed to help achieve satisfactory performance, retain employment and to increase earnings over time. The State agency may offer job retention services, such as case management, job coaching, dependent care assistance and transportation assistance, for up to 90 days to an individual who has secured employment. State agencies must make a good faith effort to provide job retention services for at least 30 days. The State agency may determine the start date for job retention services provided that the individual is participating in SNAP in the month of or the month prior to beginning job retention services. The State agency may provide job retention services to households leaving SNAP up to the 90-day limit unless the individual is leaving SNAP due to a disqualification in accordance with § 273.7(f) or § 273.16. The participant must have secured employment after or while receiving other employment/training services under the E&T program offered by the State agency. There is no limit to the number of times an individual may receive job retention services as long as the individual has re-engaged with E&T prior to obtaining new employment. An otherwise eligible individual who refuses or fails to accept or comply with job retention services offered by the State agency may not be disqualified as specified in paragraph (f)(2) of this section.

(ix) Programs and activities conducted under the pilots authorized by the Agricultural Act of 2014 (Pub. L. 113–79) that the Secretary determines, based on the results from the independent evaluations conducted for those pilots, have the most demonstrable impact on the ability of participants to find and retain employment that leads to increased household income and reduced reliance on public assistance.

(3) *Exemptions.* Each State agency may, at its discretion, exempt individual work registrants and categories of work registrants from E&T participation. Each State agency must periodically reevaluate its individual and categorical exemptions to determine whether they remain valid. Each State agency will establish the frequency of its periodic evaluation.

(4) *Time spent in an employment and training program.* (i) Each State agency will determine the length of time a participant spends in case management or any E&T component it offers. The State agency may also determine the number of successive components in which a participant may be placed.

(ii) The time spent by the members of a household collectively each month in an E&T work program (including, but not limited to, those carried out under paragraphs (e)(2)(iii) and (iv) of this section) combined with any hours worked that month in a workfare program under paragraph (m) of this section must not exceed the number of hours equal to the household's allotment for that month divided by the higher of the applicable Federal or State minimum wage. The total hours of participation in an E&T program for any household member individually in any month, together with any hours worked in a workfare program under paragraph (m) of this section and any hours worked for compensation (in cash or in kind), must not exceed 120.

(5) *Voluntary participation.* (i) A State agency may operate an E&T program in which individuals elect to participate.

(ii) A State agency must not disqualify voluntary participants in an E&T program for failure to comply with E&T requirements.

(iii) Voluntary participants are not subject to the restrictions in paragraph (e)(4)(ii) of this section, as long as the voluntary participants are paid a wage at least equal to the higher of the applicable Federal or State minimum wage for all hours spent in an E&T work program or workfare.

(f) *Failure to comply*—(1) *Ineligibility for failure to comply.* A nonexempt individual who refuses or fails without good cause, as defined in paragraphs (i)(2), (3), and (4) of this section, to comply with SNAP work requirements listed under paragraph (a)(1) of this section is ineligible to participate in SNAP, and will be considered an ineligible household member, pursuant to § 273.1(b)(7).

(i) As soon as the State agency learns of the individual's noncompliance it must determine whether good cause for the noncompliance exists, as discussed in paragraph (i) of this section. Within 10 days of establishing that the noncompliance was without good cause, the State agency must provide the individual with a notice of adverse action, as specified in § 273.13. If the

State agency offers a conciliation process as part of its E&T program, it must issue the notice of adverse action no later than the end of the conciliation period.

(ii) The notice of adverse action must contain the particular act of noncompliance committed and the proposed period of disqualification. The notice must also specify that the individual may, if appropriate, reapply at the end of the disqualification period. Information must be included on or with the notice describing the action that can be taken to avoid the disqualification before the disqualification period begins. The disqualification period must begin with the first month following the expiration of the 10-day adverse notice period, unless a fair hearing is requested.

(iii) An E&T disqualification may be imposed after the end of a certification period. Thus, a notice of adverse action must be sent whenever the State agency becomes aware of an individual's noncompliance with SNAP work requirements, even if the disqualification begins after the certification period expires and the household has not been recertified.

(2) *Disqualification periods.* The following disqualification periods will be imposed:

(i) For the first occurrence of noncompliance, the individual will be disqualified until the later of:

(A) The date the individual complies, as determined by the State agency;

(B) One month; or

(C) Up to three months, at State agency option.

(ii) For the second occurrence, until the later of:

(A) The date the individual complies, as determined by the State agency;

(B) Three months; or

(C) Up to six months, at State agency option.

(iii) For the third or subsequent occurrence, until the later of:

(A) The date the individual complies, as determined by the State agency;

(B) Six months;

(C) A date determined by the State agency; or

(D) At the option of the State agency, permanently.

(3) *Record retention.* In accordance with § 272.1(f) of this chapter, State agencies are required to retain records concerning the frequency of noncompliance with FSP work requirements and the resulting disqualification actions imposed. These records must be available for inspection and audit at any reasonable time to ensure conformance with the minimum mandatory disqualification periods instituted.

(4) *Disqualification plan.* In accordance with § 272.2(d)(1)(xiii) of this chapter, each State agency must prepare and submit a plan detailing its disqualification policies. The plan must include the length of disqualification to be enforced for each occurrence of noncompliance, how compliance is determined by the State agency, and the State agency's household disqualification policy.

(5) *Household ineligibility.* (i) If the individual who becomes ineligible to participate under paragraph (f)(1) of this section is the head of a household, the State agency, at its option, may disqualify the entire household from SNAP participation.

(ii) The State agency may disqualify the household for a period that does not exceed the lesser of:

(A) The duration of the ineligibility of the noncompliant individual under paragraph (f)(2) of this section; or

(B) 180 days.

(iii) A household disqualified under this provision may reestablish eligibility if:

(A) The head of the household leaves the household;

(B) A new and eligible person joins the household as the head of the household, as defined in § 273.1(d)(2); or

(C) The head of the household becomes exempt from work requirements during the disqualification period.

(iv) If the head of the household joins another household as its head, that household will be disqualified from participating in SNAP for the remaining period of ineligibility.

(6) *Fair hearings.* Each individual or household has the right to request a fair hearing, in accordance with § 273.15, to appeal a denial, reduction, or termination of benefits due to a determination of nonexempt status, or a State agency determination of failure to comply with SNAP work requirements. Individuals or households may appeal State agency actions such as exemption status, the type of requirement imposed, or State agency refusal to make a finding of good cause if the individual or household believes that a finding of failure to comply has resulted from improper decisions on these matters. The State agency or its designee operating the relevant component or service of the E&T program must receive sufficient advance notice to either permit the attendance of a representative or ensure that a representative will be available for questioning over the phone during the hearing. A representative of the appropriate agency must be available through one of these means. A household must be allowed to examine its E&T program casefile at a reasonable time before the date of the fair hearing, except for confidential information (that may include test results) that the agency determines should be protected from release. Confidential information not released to a household may not be used by either party at the hearing. The results of the fair hearing are binding on the State agency.

(7) *Failure to comply with a work requirement under title IV of the Social Security Act, or an unemployment compensation work requirement.* An individual exempt from SNAP work requirements by paragraph (b)(1)(iii) or (v) of this section because he or she is subject to work requirements under title IV–A or unemployment compensation who fails to comply with a title IV–A or unemployment compensation work requirement will be treated as though he or she failed to comply with SNAP work requirement.

(i) When a SNAP household reports the loss or denial of title IV–A or unemployment compensation benefits, or if the State agency otherwise learns of a loss or denial, the State agency must determine whether the loss or denial resulted when a household member refused or failed without good cause to comply with a title IV–A or unemployment compensation work requirement.

(ii) If the State agency determines that the loss or denial of benefits resulted from an individual's refusal or failure without good cause to comply with a title IV or unemployment compensation requirement, the individual (or household if applicable under paragraph (f)(5) of this section) must be disqualified in accordance with the applicable provisions of this paragraph (f). However, if the noncomplying individual meets one of the work registration exemptions provided in paragraph (b)(1) of this section (other than the exemptions provided in paragraph (b)(1)(iii) or (v) of this section) the individual (or household if applicable under paragraph (f)(5) of this section) will not be disqualified.

(iii) If the State agency determination of noncompliance with a title IV–A or unemployment compensation work requirement leads to a denial or termination of the individual's or household's SNAP benefits, the individual or household has a right to appeal the decision in accordance with the provisions of paragraph (f)(6) of this section.

(iv) In cases where the individual is disqualified from the title IV–A program for refusal or failure to comply with a

title IV–A work requirement, but the individual meets one of the work registration exemptions provided in paragraph (b)(1) of this section, other than the exemption in paragraphs (b)(1)(iii) of this section, the State agency may, at its option, apply the identical title IV–A disqualification on the individual under SNAP. The State agency must impose such optional disqualifications in accordance with section 6(i) of the Food and Nutrition Act of 2008 and with the provisions of § 273.11(1).

* * * * *

(i) *Good cause.* (1) The State agency is responsible for determining good cause when a SNAP recipient fails or refuses to comply with SNAP work requirements. Since it is not possible for the Department to enumerate each individual situation that should or should not be considered good cause, the State agency must take into account the facts and circumstances, including information submitted by the employer and by the household member involved, in determining whether or not good cause exists.

(2) Good cause includes circumstances beyond the member's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, the unavailability of transportation, or the lack of adequate child care for children who have reached age six but are under age 12.

(3) Good cause for leaving employment includes the good cause provisions found in paragraph (i)(2) of this section, and resigning from a job that is unsuitable, as specified in paragraphs (h)(1) and (2) of this section. Good cause for leaving employment also includes:

(i) Discrimination by an employer based on age, race, sex, color, handicap, religious beliefs, national origin or political beliefs;

(ii) Work demands or conditions that render continued employment unreasonable, such as working without being paid on schedule;

(iii) Acceptance of employment by the individual, or enrollment by the individual in any recognized school, training program or institution of higher education on at least a half time basis, that requires the individual to leave employment;

(iv) Acceptance by any other household member of employment or enrollment at least half-time in any recognized school, training program or institution of higher education in another county or similar political subdivision that requires the household to move and thereby requires the individual to leave employment;

(v) Resignations by persons under the age of 60 which are recognized by the employer as retirement;

(vi) Employment that becomes unsuitable, as specified in paragraphs (h)(1) and (2) of this section, after the acceptance of such employment;

(vii) Acceptance of a bona fide offer of employment of more than 30 hours a week or in which the weekly earnings are equivalent to the Federal minimum wage multiplied by 30 hours that, because of circumstances beyond the individual's control, subsequently either does not materialize or results in employment of less than 30 hours a week or weekly earnings of less than the Federal minimum wage multiplied by 30 hours; and

(viii) Leaving a job in connection with patterns of employment in which workers frequently move from one employer to another such as migrant farm labor or construction work. There may be some circumstances where households will apply for SNAP benefits between jobs particularly in cases where work may not yet be available at the new job site. Even though employment at the new site has not actually begun, the quitting of the previous employment must be considered as with good cause if it is part of the pattern of that type of employment.

(4) Good cause includes circumstances where the State agency determines that there is not an appropriate and available opening within the E&T program to accommodate the mandatory participant. Good cause for circumstances where there is not an appropriate or available opening within the E&T program shall extend until the State agency identifies an appropriate and available E&T opening, and the State agency informs the SNAP participant. In addition, good cause for circumstances where there is not an appropriate and available opening within the E&T program shall only apply to the requirement to participate in E&T and shall not provide good cause to ABAWDs who fail to fulfill the ABAWD work requirement in accordance with § 273.24.

(5) *Verification.* To the extent that the information given by the household is questionable, as defined in § 273.2(f)(2), State agencies must request verification of the household's statements. The primary responsibility for providing verification, as provided in § 273.2(f)(5), rests with the household.

(n) *Workforce partnerships.* Workforce partnerships must meet the following requirements.

(1) Workforce partnerships are programs operated by:

(i) A private employer, an organization representing private employers, or a nonprofit organization providing services relating to workforce development; or

(ii) An entity identified as an eligible provider of training services under section 122(d) of WIOA (29 U.S.C. 3152(d)).

(2) Workforce partnerships may include multi-State programs.

(3) Workforce partnerships must be in compliance with the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq), as applicable.

(4) *Certification of workforce partnerships.* All workforce partnerships must be certified by the Secretary or by the State agency to the Secretary to indicate all of the following. The workforce partnership must:

(i) Assist SNAP households in gaining high-quality, work-relevant skills, training, work, or experience that will increase the ability of the participants to obtain regular employment;

(ii) Provide participants with not less than 20 hours per week, averaged monthly of training, work, or experience; for the purposes of this provision, 20 hours a week averaged monthly means 80 hours a month;

(iii) Not use any funds authorized to be appropriated under the Food and Nutrition Act of 2008;

(iv) Provide sufficient information to the State agency, on request, to determine whether members of SNAP households who are subject to the work requirement in 7 CFR 273.7(a), the ABAWD work requirements in 7 CFR 273.24, or both are fulfilling the work requirement through the workforce partnership;

(v) Be willing to serve as a reference for participants who are members of SNAP households for future employment or work-related programs.

(5) In certifying that a workforce partnership meets the criteria in paragraphs (n)(4)(i) and (ii) of this section to be certified as a workforce partnership, the Secretary or the State agency shall require that the program submit to the Secretary or the State agency sufficient information that describes both:

(i) The services and activities of the program that would provide participants with not less than 20 hours per week of training, work, or experience; and

(ii) How the workforce partnership would provide services and activities described in paragraph (n)(5)(i) of this section that would directly enhance the employability or job readiness of the participant.

(6) *Application to employment and training.* (i) Workforce partnerships may not use any funds authorized to be appropriated by the Food and Nutrition Act of 2008.

(ii) If a member of a SNAP household is required to participate in an employment and training program in accordance with paragraph (a)(1)(ii) of this section, the State shall consider an individual participating in a workforce partnership certified in accordance with paragraph (n)(4) of this section to be in compliance with the employment and training requirements. The State agency cannot disqualify an individual for no longer participating in a workforce partnership. When a State agency learns that an individual is no longer participating in a workforce partnership, and the individual had been subject to mandatory E&T in accordance with paragraph (a)(1)(ii) of this section, the State agency must re-screen the individual to determine if the individual qualifies for an exemption from the work requirements in accordance with paragraph (b) of this section, and re-screen the individual to determine if the individual meets State criteria for referral to an E&T program or component in accordance with paragraph (c)(2) of this section. After this re-screening, if it is appropriate to require the individual to participate in an E&T program, the State agency may refer the individual to an E&T program or workforce partnership, as applicable.

(7) *Supplement, Not Supplant.* A state agency may use a workforce partnership to supplement, not to supplant, the employment and training program of the State agency.

(8) *Application to work programs.* Workforce partnerships certified in accordance with paragraph (n)(4) of this section are included in the definition of a work program under 7 CFR 273.24(a)(3) for the purposes of fulfilling the ABAWD work requirement.

(9) The State agency shall not require any member of a household participating in SNAP to participate in a workforce partnership.

(10) *List of workforce partnerships.* A State agency shall maintain a list of workforce partnerships certified in accordance with paragraph (n)(4) of this section. A State agency must also inform any SNAP participant whom the State agency has determined is likely to benefit from participation in a workforce partnership of the availability of the workforce partnership, and provide the participant with all available pertinent information regarding the workforce partnership to enable the participant to make an informed choice about participation. The information must include, if available: contact information for the workforce partnership; the types of activities the participant would be engaged in through the workforce partnership, screening criteria used by the workforce partnership to select individuals, the location of the workforce partnership, the work schedule or schedules, any special skills required to participate, and wage and benefit information, if applicable.

(11) Participation in a workforce partnership shall not replace the employment or training of an individual not participating in a workforce partnership.

(12) A workforce partnership may select individuals for participation in the workforce partnership who may or may not meet the criteria for the general work requirement at 7 CFR 273.7(a), including participation in E&T, or the ABAWD work requirement at 7 CFR 273.24(a)(1).

(13) *Reporting.* Workforce partnership reporting requirements to the State agency are limited to the following:

(i) On notification that an individual participating in the workforce partnership is receiving SNAP benefits, notifying the State agency that the individual is participating in a workforce partnership;

(ii) Identifying participants who have completed or are no longer participating in the workforce partnership;

(iii) Identifying changes to the workforce partnership that result in the workforce partnership no longer meeting the certification requirements in accordance with paragraph (n)(4) of this section; and

(iv) Providing sufficient information, on request by the State agency, for the State agency to verify that a participant is fulfilling the applicable work requirements in paragraph (a) of this section or 7 CFR 273.24.

■ 4. In § 273.14, add paragraph (b)(5) to read as follows:

§ 273.14 Recertification.

* * * * *

(b) * * *

(5) *Advise of available employment and training services.* (i) At the time of recertification, the State agency shall advise household members subject to the work requirements of § 273.7(a) who reside in households meeting the criteria in paragraph (b)(5)(ii) of this section of available employment and training services. This shall include, at a minimum, providing a list of available employment and training services electronically or in printed form to the household.

(ii) The State agency requirement in paragraph (b)(5)(i) of this section only applies to households that meet all of the following criteria, as most recently reported by the household:

(A) Contain a household member subject to the work requirements of § 273.7(a);

(B) Contain at least one adult;

(C) Contain no elderly or disabled individuals; and

(D) Have no earned income.

* * * * *

■ 5. In section § 273.24:

■ a. Revise paragraph (a)(3);

■ b. Amend paragraph (b)(1)(iii) by removing the word ''or'' at the end of the paragraph;

■ c. Revise paragraph (b)(1)(iv);

■ d. Add paragraph (b)(1)(v);

■ e. Revise paragraph (b)(2);

■ f. Add paragraph (b)(8);

■ g. Amend the paragraph (g) subject heading by removing the words ''15 percent'' and adding in its place the word ''Discretionary'';

■ h. Amend paragraph (g)(1) introductory text by removing the words ''15 percent exemption'' and adding in their place the words ''discretionary exemptions''; and

■ i. Amend paragraph (g)(3) introductory text by removing the number ''15'' and adding in its place the number ''12''.

The revisions and additions read as follows:

§ 273.24 Time limit for able-bodied adults.

* * * * *

(a) * * *

(3) *Work Program* means:

(i) A program under title 1 of the Workforce Innovation and Opportunity Act (WIOA) (Pub. L.113–128);

(ii) A program under section 236 of the Trade Act of 1974 (19 U.S.C. 2296);

(iii) An employment and training program operated or supervised by a State or political subdivision of a State agency that meets standards approved by the Chief Executive Office, including a SNAP E&T program under § 2 73.7(e) excluding any job search, supervised job search, or job search training program. However, a program under this clause may contain job search, supervised job search, or job search training as subsidiary activities as long as such activity is less than half the requirement. Participation in job search, supervised job search, or job search training as subsidiary activities that

make up less than half the requirement counts for purposes of fulfilling the work requirement under paragraph (a)(1)(ii) of this section.

(iv) A program of employment and training for veterans operated by the Department of Labor or the Department of Veterans Affairs. For the purpose of this paragraph, any employment and training program of the Department of Labor or Veterans Affairs that serves veterans shall be an approved work program; or

(v) A workforce partnership under § 273.7(n)

* * * * *

(b) * * *

(1) * * *

(iv) Receiving benefits that are prorated in accordance with § 273.10; or

(v) In the month of notification from the State agency of a provider determination in accordance with § 273.7(c)(18)(i).

(2) *Good cause.* As determined by the State agency, if an individual would have fulfilled the work requirement as defined in paragraph (a)(1) of this section, but missed some hours for good cause, the individual shall be considered to have fulfilled the work requirement if the absence from work, the work program, or the workfare program is temporary. Good cause shall include circumstances beyond the individual's control, such as, but not limited to, illness, illness of another household member requiring the presence of the member, a household emergency, or the unavailability of transportation. In addition, if the State agency grants an individual good cause under § 273.7(i) for failure or refusal to meet the mandatory E&T requirement, that good cause determination confers good cause under this paragraph, except in the case of § 273.7(i)(4), without the need for a separate good cause determination under this paragraph. Good cause granted under § 273.7(i)(4) only provides good cause to ABAWDs for failure or refusal to participate in a mandatory SNAP E&T program, and does not confer good cause for failure to fulfill the work requirement in paragraph (a)(1) of this section.

* * * * *

(8) The State agency shall inform all ABAWDs of the ABAWD work requirement and time limit both in writing and orally in accordance with § 273.7(c)(1)(ii) and (iii).

* * * * *

Dated: December 21, 2020.

Sonny Perdue,

Secretary, United States Department of Agriculture.

Appendix

Note: This appendix will not be published in the Code of Regulations.

Regulatory Impact Analysis

7 CFR part 271 and 273: Employment and Training Opportunities in the Supplemental Nutrition Assistance Program.

[FR Doc. 2020–28610 Filed 1–4–21; 8:45 am]

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